

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 26 of 1983

Between:

MITHLA SHARAN

Appellant

- and -

BIR MATI

Respondent

Dr. Sahu Khan for the Appellant
Mr. G.P. Shankar for the Respondent

Date of Hearing: 8th November, 1983

Date of Judgment:

JUDGMENT OF THE COURT

Henry, J.A.

Appellant was at all material times the owner of a leasehold interest in a piece of native land called Vitogo C/N 129, Lovu, containing 13 acres 2 roods. The interest was held under lease from the Native Land Trust Board for a term of 20 years from January 1, 1981, at an annual rental of \$355.00. In October, 1982 he sold his interest to respondent for \$10,000. Appellant issued an Originating Summons in the Supreme Court seeking to have the transfer of the said interest declared null and void by alleging that the transfer was in breach of Section 12 of the Native Land Trust Act. In short appellant is settint up his own illegal act as a basis for having the transfer set aside no doubt in the hope of ultimately regaining the interest he had sold and for which he

had received the sum of \$10,000. Appellant's adviser, realising the difficulties in the way of recovering property handed over in pursuance of an alleged illegal transaction, is attempting to do indirectly that which cannot be done by direct action. The procedure has no merit, lacks morality, and, is probably within the well-known principle that a party to an illegal act, as he is on his claim, cannot base an action on such an act. The Supreme Court dismissed the summons and from that dismissal the present appeal has been brought.

Section 12(1) of the Native Land Trust Act provides :

"12. - (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sub-lease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void. "

A transfer of a leasehold interest is expressly mentioned. The contention is that consent was not first had and obtained so the transfer was null and void. We are not concerned with any transaction under Section 12 except that which comes within the word "transfer".

Appellant denied that he had signed any of the documents put forward and alleged fraud and forgery which necessarily would involve the Solicitor who carried out the transaction. It could not have been so done without his connivance. Affidavits in reply were filed. It became clear that the allegations could not be sustained,

3.

and, not surprisingly, no claim was put forward on this head. However, two documents were exhibited. One was a printed form of transfer of land under the Land Transfer Act. It was properly completed and was signed by appellant and respondent and duly witnessed by a Solicitor. The consideration was expressed as \$10,000 "to be paid to the transferor" which indicated that no money passed at this point.

The appellant and respondent at the same time, and as part of the transaction, signed a printed form of application for consent of the N.L.T.B. which expressly referred to the "Native Land Trust Act (Cap. 115) (Section 12)". Both documents were completed on October 16, 1982. Read together it is an inescapable conclusion that the parties intended to obtain the consent of the N.L.T.B. and that payment of the consideration would take place on some future date which was not fixed in the written terms. The law in such a case is that, when a good title has been made out, the vendor is entitled to call for the purchase price in return for the handing over of valid documents transferring the interest which has been purchased. To make a good title a vendor (appellant) has the obligation to obtain any necessary consent.

We turn now to set out what happened. This appears from the affidavit of the Solicitor. He said that in October 16, 1982 (which was a Saturday) respondent and her husband introduced him to appellant who instructed the Solicitor that he (appellant) wanted to sell and transfer the said interest in the lease for \$10,000. The Solicitor prepared a transfer and application for consent and obtained execution by both parties. Presumably the Solicitor retained the documents until the following Monday when he, appellant, and the husband of respondent, all went to the N.L.T.B. office at Lautoka

to obtain the necessary consent. Consent was applied for and it was forthwith granted on the same day whereupon the transfer was immediately stamped and registered with the Registrar of Deeds.

The inference is inescapable that the Solicitor was acting for both parties and that he retained the transfer on behalf of appellant until the consent was obtained thus completing appellant's title which he was bound to do. Appellant was not entitled to the purchase price until he produced a valid title which depended upon the prior consent of the N.L.T.B. to the executed transfer.

Although the Solicitor was acting for both parties he had separate duties and functions to perform for each. For appellant the Solicitor had a duty to produce a valid title which would entitle appellant to be paid the stated consideration. For respondent the Solicitor was bound to see that she got a valid and registrable transfer for the money she was required to pay. It is absurd to suggest that the Solicitor was deliberately and knowingly pursuing a course which would expose one client to penalties and the other to a null and void transfer. It will be shown that the course pursued was otherwise. The necessity for appellant, as a lessee transferring his interest, to comply with Section 12 was clearly the whole object of the Solicitor retaining the documents and later proceeding with appellant (and respondent's husband) to obtain the necessary consent. Until that consent was obtained the Solicitor had, on behalf of appellant, no valid instrument of title to effect the intended transfer. It is not an offence to intend to transfer the interest.

Once the necessary consent had been given the only duty remaining on the Solicitor, as Solicitor for the vendor (appellant), was to retain the transfer until either the consideration had been paid or acceptable arrangements for payment had been agreed on. The purchase price was not paid until November 4, 1982. What took place next shows it was the intention of the parties that the transfer should not, after consent had been granted, remain inoperative in the hands of the Solicitor pending payment. The Solicitor immediately commenced to carry out his duties as Solicitor for the purchaser (respondent). He stamped the transfer and then presented it to the Registrar of Deeds for registration. All this took place on October 18, 1982 during the visit to Lautoka. The clear result of this course of conduct is that the duty of the Solicitor to retain the transfer on behalf of appellant had been discharged immediately after the consent had been obtained and that thereafter the document had become a perfected legal document of transfer held by the Solicitor, on behalf of respondent, to complete the steps necessary to transfer the interest in the lease. Accordingly, no transfer to respondent had taken place before the necessary consent had been "first had and obtained" in compliance with Section 12. It is nothing to the point that the same Solicitor acted for both parties.


Moreover, in our opinion, in the circumstances of this case, it is absurd to suggest that the document was intended to operate as a transfer without the necessary consent first having been obtained. Consent could have been refused. The document would then never have reached the stage of becoming an operative transfer. No consideration would have passed and possession would never have been given as it was at some time after the visit to Lautoka.

Confusion of thought has arisen because the same Solicitor acted for both parties. Had separate Solicitors acted the situation would have been so clear that not even a specious argument could arise. The fact that one Solicitor was involved for both parties does not alter the principles in respect of his separate duties and functions. An intended transaction, in a document still in the possession of the vendor's Solicitor, is not hit by Section 12 as a transfer of the lessee's interest.

The cases cited are not in point. They differ in their facts and have no resemblance to the facts of this case. We do not propose to discuss them. It should be noted that in the present case, not only was no part of the consideration paid before consent but also possession was not taken until some time later. Nothing was done except the formalities of completing the legal steps earlier set out.

The answer to the question posed in the declaration sought is that the said document was a valid transfer of appellant's interest in the lease of the said land and it was not a transfer in breach of that term as it appears in Section 12. The Supreme Court reached a correct conclusion in dismissing the summons with costs. That decision is affirmed. The appeal is dismissed with costs to be fixed by the Registrar.

.....
Vice President


.....
Judge of Appeal

.....
Judge of Appeal