233 29

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No.47 of 1982

Between:

RAMESH s/o Samji Jadavji — Appellant

and

1. MANJI JADAVJI s/o Jadavji
2. DAYALJI JADAVJI s/o Jadavji
3. PRAKASH MANJI s/o Manji
4. JAWERILAL MANJI alias JAWERILAL MANJI RANIGA s/o Manji

Respondents

S.M. Koya for the Appellant
J.R. Reddy for the Respondents

Date of Hearing: 3rd & 4th March, 1983
Delivery of Judgment: 23rd March, 1983

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from a judgment of the Supreme Court of Fiji (Western Division) in an action concerning commercial property in the main street of Nadi township. In his judgment, dated the 26th August, 1982, Williams J. dismissed with costs the appellant's claim for possession and allowed with costs a counter-claim by the present respondents.

As the learned Judge observed, there was really no dispute as to the facts, by which we understand him to mean the primary facts, as matters of inference have been

234.79

the subject of argument. We will endeavour to summarize the relevant facts taking them in the main from the judgment under appeal.

The appellant became the registered lessee of the land with which the action is concerned, comprised in Native Lease 7190, by a transfer of that lease registered on the 30th November, 1965. The transferor was the appellant's father Samji Jadavji to whom the lease was granted by the Native Land Trust Board. Though the Seal of the Board was affixed to the lease on the 6th May, 1943, it contains a recital that the Board (to which we will refer hereafter as the NLTB) approved the lease on the 5th July, 1941. The term was for 75 years from the 1st July, 1941.

It will be seen that Samji Jadavji (to whom we will refer as "Samji") was the lessee from July 1941 until he transferred to the appellant some twenty-four years later, but his connection with the particular property commenced much earlier than 1941. One M.N. Naidu held a Native Lease of a larger area for a term of 21 years as from the 11th September, 1918; there was then a sublease of the land now in dispute from Naidu to A.K. Pillay registered No. 39/9A for 17 years from 11th September, 1922. This sublease was transferred to Samji on 3rd March, 1933. Both the lease to Naidu and the sublease to Samji would be due to expire on the same date in September 1939.

It is common ground that the firm of Samji Jadavji & Company came into existence in 1932. We will refer to it as "the firm" and, though there have been changes of partners, no point has been taken on this, and the firm has in effect been the defendant throughout the proceedings. Samji was a partner and Mr. Reddy called our attention to the partnership agreement of the 20th March, 1962, Clause 17 of which preserved Samji's entitlement to agreed rent for the use of the building in which the business was carried on. It was common ground that the firm was a subtenant of Samji from about 1932.

As to what happened from the expiry in September 1939 of the lease and sublease to Naidu and Samji respectively until the commencement of the new lease No. 7190 from the NLTB to Samji on the 1st July, 1941 the learned Judge found that Samji remained in possession and the firm continued to use the shop. We will return to this period at a later stage in this judgment.

There is no doubt that the original subtenancy from Samji to the firm was an annual one. There is no doubt that when Samji obtained Native Lease 7190 in 1941 the firm continued as his annual tenant. He retired from the firm on the 10th March, 1964, not long before the transfer of Native Lease 7190 to his son the appellant. Nevertheless the firm continued in occupation of the premises at a yearly rent as subtenants of the appellant for a substantial period before any change was made.

That change was made on the 15th December, 1976, when the firm entered into a fresh agreement with the appellant for a ten year lease. The rental for the shop then agreed upon continued to be paid annually and that for the office and residence on the first floor became $200 per month. This agreement (reduced to writing and referred to as Ex. P.7) was signed on the appellant's behalf as his attorney by the partner and respondent Manji Jadavji, but his authority to do so has not been challenged in the proceedings.

We can now set out the summary of the pleadings contained in the judgment under appeal. It reads :

> " The plaintiff, Ramesh Samji, the registered proprietor of lots 23 and 24 Vodawa, being N.L. 7190 claims that he acquired the registered title on 30/11/65 following which he leased the premises to the defendants, without the consent of the NLTB and he alleges that the lease is accordingly unlawful under section 12 of the NLTA and in consequence the defendants are trespassers.
>
> Notice to quit was served upon the defendants on 21/4/81 but they are still in occupation.

236 31

The statement of defence claims that the tenancy began in 1932 and has continued to date and that N.L. 7190 was issued subject to the tenancy; accordingly the sub-tenancy is not affected by section 12 of the NLT Act.

On 15/12/76 the plaintiff and the firm Jadavji & Company (which I will refer to as "the firm") entered into a written tenancy agreement of N.L. 7190 for 10 years from 1/1/77. To date no consent of the NLTB has been obtained to that lease.

The defence allege that the written tenancy agreement which is Ex. P.7 is valid and that they occupy under it as sub-tenants.

By way of counterclaim they state that the plaintiff in breach of the written lease has not only failed to obtain consent of the NLTB to the lease but has requested the NLTB not to give consent. They ask that the plaintiff be directed to obtain consent of the NLTB and alternatively damages for breach of the agreement.

By way of reply to the defence and counter-claim the plaintiff states that N.L. 7190 was registered in May 1946 and that the firm's sub-tenancy ceased to exist on 30th June 1941 when N.L. 7190 came into effect, (it should read 5th July), 1941 or on 12th May, 1946 when the said Native Lease 7190 was registered. It states that the firm's sub-lease had expired on 11th September, 1939 when the native sub-lease 39/9A, from which the firm's sub-lease was granted, expired. Following the expiry of the sub-lease 39/9A on 11.9.39 it was necessary, so the reply alleges, to obtain the consent of the NLTB to any sub-lease held by the firm.

At the hearing the statement of defence was amended in paragraphs 3 and 8 to plead alternatively that the defendant firm still occupies as a yearly tenant. "

In order to convey the purport of the issues raised in that passage we will set out section 12 of the Native Land Trust Act (Cap. 134) with the preliminary comment that section 4(1) of the Act vests in the NLTB the control of all native land. It is not disputed that the land with which the proceedings are concerned is native land.

"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 sublease 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.

(2) For the purposes of this section 'lease' includes a sublease and 'lessee' includes a sub-lessee. "

The Act first appeared as the Native Land Trust Ordinance No.12 of 1940 which came into effect on the 7th June, 1940. That Ordinance, which originated the NLTB, contained (as section 13) the present section 12 in a form not materially different from the present.

Prior to the creation of the NLTB leases of native land made under the then existing legislation appear to have been signed on behalf of the native owners by the Commissioner of Lands. This was done in the case of the earliest lease to which we have been referred (P 1) which was acquired by M.N. Naidu and was for 21 years from the 11th September, 1918. We make this digression because Mr. Koya, for the appellant, referred us to section 35 of the Ordinance No.12 of 1940 which repeals earlier legislation on the subject but provides that any lease (inter alia) given under an Ordinance so repealed shall continue in force as if it had been granted under Ordinance No.12 of 1940. Mr. Koya was at pains to point out that section 35 could not operate to save either the earlier lease of M.N. Naidu or the sublease No. 39/[illegible] of part thereof which Samji acquired, as both of these had expired in September 1939, some nine months before Ordinance No.12 of 1940 brought the NLTB into being.

Before coming to the findings of the Supreme Court it will be convenient to refer to additional facts relevant to the approval of the NLTB. After Ex. P.7 was executed an application was made for the consent by the legal representatives of the appellant B.K. Pillay & Company who had, we were informed, acted for both parties. That was by letter of the 19th October, 1978. On the 8th November, 1978, the NLTB replied to the effect that they were re-organizing, and could not attend to the matter at that time. There was a request not to re-submit the matter until the Western Divisional Office had been re-opened. On the 5th June, 1979, Mr. Koya's firm which (we were again informed) were by way of being successors to B.K. Pillay & Company, again applied. There is a letter in evidence dated the 14th August, 1979, from the appellant to Manji Jadavji notifying him that Powers of Attorney No. 5530 were revoked. Lastly there is a letter from the NLTB to Messrs Koya & Company dated the 18th April, 1980, stating they were unable to approve the "submitted tenancy agreement" - they added that the Board had been advised that Manji Samji was no longer acting on instructions from Ramesh Samji. Evidence given at the hearing in the Supreme Court by Charis Turtle, an officer of the NLTB (called by the respondents) included the statement, in answer to the Court, "as between the parties the NLTB would give consent".

On these facts the problem before the learned Judge was whether the respondents were occupying the premises in question illegally by reason of the lack of the consent of the NLTB and the operation of section 12 (as we shall hereinafter refer to this section) of the Native Land Trust Act. As Williams J. commented in his judgment, section 12 has been the subject of ceaseless litigation in Fiji. Without pursuing this matter further at the moment we will endeavour to summarize the findings of the learned Judge.

First he held that there was no reason to assume or hold that Samji's possession from the 11th September, 1939, when sublease 39/9A expired until the commencement of N.L. 7190 was unlawful. He held it without let or hindrance from the native owners or the NLTB (when it came into being) presumably while negotiating the new lease with the NLTB. It was on the appellant to plead and prove facts which showed the illegality upon which he relied.

He held further that on the face of the evidence the annual subtenancy to the firm continued throughout this period. It would be no less lawful than that of Samji. He rejected Mr. Koya's argument that when the Act No.12 of 1940 came into effect the subtenancy would have become illegal by virtue of section 12, relying on the decision of this Court in Subramani v. Prices & Incomes Board (F.C.A. Cr. App. 70/81). We pause to say that, though that case is a criminal appeal it does bear some resemblance to the present case. It involves section 35 (supra) (therein numbered s.36) and section 12. In the course of the judgment it is stated :

> "The law is clear that a retrospective effect should not be given to statutory provisions unless such a construction appears very clearly or by necessary and distinct implication: Ingle v. Farrand /1927/ A.C. 417, 428. Thus, taken by itself, section 12 does not apply to lessees and sublessees in leases and subleases granted before the commencement of the Ordinance because, of necessity, they must have had their origin under some other ordinance or provision earlier in point of time. "

Later there is this passage :

> "The provisions of section 36 are clear and unambiguous when defining the nature of pre-existing transactions which are brought within the ambit. The pre-existing sub-lease of appellant is not a transaction which is included and, accordingly, it is not subject to the provisions of section 12. There is no ground upon which it could be successfully argued that

there is a necessary and distinct implication that section 12 has retrospective effect so as to include pre-existing subleases. Dealings with the sublease are not within section 12 so the tenancy of complainant is therefore not rendered null and void by section 12. "

If it had been clear that Samji had come to the Board as an existing tenant of native land under some part of the legislation mentioned in the Schedule to section 35, and in respect of which he had granted a sublease, Subramani's case would have been in point. Section 12 would not have applied to a sublease granted by him earlier. But whatever the nature of the tenancy he actually held in the few months before he received N.L. 7190 it was obviously of such an informal nature as to exclude it from any of the categories of legislation mentioned in the Schedule to section 35.

Mr. Koya's point is well taken that section 35 does not apply, though the general finding is valid that the Native Land Trust Act had no retrospective effect. Whether this alone is sufficient in an ordinary case to render lawful a subtenancy existing at the moment a new native lease is granted may be open to doubt. Williams J. held that it did in the present case, and it is implicit in his findings that the NLTB knew all about the matter. To the extent that he put this on an evidential onus we agree that he was justified. These were matters which happened about forty years ago and no allegation of illegality has been made until the present. In his judgment he said "they (i.e. the NLTB) must have discussed the project with those occupiers and allowed them to remain in possession of the plots they had developed and promised to grant fresh leases". The firm's business was a family matter and included Samji. The fact that the NLTB did grant the new lease in the circumstances raises the strongest of inferences that they were approving the status quo and the onus was upon the appellant to show they were not. This there was no attempt to do.

The finding of the learned Judge therefore that there was no illegality attaching to the firm's subtenancy at the time of the granting of N.L. 7190, is to be sustained.

We proceed now to the learned Judge's findings on the events that happened after Native Lease 7190 came into being. The crucial matter is the grant to and acceptance by the firm of the 10 year sublease Ex. P.7. The argument is the same: that it is illegal, null and void by virtue of section 12. As to its terms in that regard it contains no provision that the appellant should apply to the NLTB for its consent but that was clearly implied as can be seen from the fact that the appellant did apply for the consent, and repeated the application after it had been temporarily shelved.

The learned Judge held that if his finding that the firm's annual tenancy was legal (and we have confirmed his decision in this respect) Ex. 7, the ten year agreement, not having received approval under section 12, was itself not effective to terminate the annual tenancy. To appreciate the next finding fully it will be necessary to take into consideration the judgments of the courts in Fiji in which section 12 has been considered. The most convenient way to do this is to quote passages from the judgment of Henry J.A. (with which the other members of the Court agreed) in Phalad v. Sukhlal (1978) F.C.A. No.43 of 1978, in which earlier decisions are considered. These are :

(1) " Section 12 places restrictions on the right of the lessee to deal with the land comprised in the lease. Any transaction which comes within the ambit of section 12, is declared unlawful unless the consent of the Board as lessor or head lessor is first had and obtained. The granting or withholding of consent is within the absolute discretion of the Board, and, in the absence of such consent, the transaction is declared to be null and void. There is thus no right in a lessee to require the Board to grant its consent and the consent must be one first had and obtained. "

242 27

(2) " In the case of Chalmers v. Pardoe (1963) 3 All E.R. 552 upon an appeal to the Privy Council from this Court there had been full performance on one side and this was held to come within the transactions prohibited by section 12. The case is important for the statement that there must necessarily be some prior agreement so that the mere fact of the existence of a prior agreement is not of itself a breach of section 12. In Jai Kissun Singh v. Sumintra No. 18 of 1970 Fiji C.A. it was said that a signed agreement, held inoperative and inchoate while consent is being sought, is not caught by section 12. "

(3) "It will suffice to refer to two other cases where it was held that on their special facts there was no breach of section 12. In the case of Imam Hussein v. Shiu Narayan Civil Appeal No. 16 of 1978 it was said at p.14 :

> 'These authorities demonstrate that the inquiry is into the question whether or not the agreement was performed in a manner in which it could be said that there was a 'dealing with' the land. This will involve a question of fact in each case upon a consideration of the true meaning of that term in section 12(1). Where the transaction is subject to a condition precedent with no act of performance no difficulty arises.'

It was earlier said at p.12 :

> 'If the condition as to obtaining consent was a condition precedent then the contract did not come into force until the condition was fulfilled. On the other hand if it were a condition subsequent the contract came into force when it was signed by both parties. A condition subsequent would discharge the contract if it were not fulfilled. Whether or not the condition was a condition precedent or a condition subsequent depends, not on technical words, but on the plain intention of the parties to be determined from the whole instrument: Porter v. Shepherd (1796) 6 Term. Rep. 665, 101 E.R. 761; Roberts v. Brett (1865) 11 H.L. Cas. 337; 11 E.R. 1363. '

243 38

In Kulamma v. Manadan /1968/ 2 W.L.R. 1074 it was said by their Lordships in the Privy Council when dealing with three earlier cases, at p. 1079 :

> 'But each of these inevitably fell to be decided upon the terms of a particular agreement, which in no case - in so far as the terms of it appear from the report - is identical with the agreement of May 23, 1957, and the decision in the present appeal must be based upon an analysis of that agreement alone. '

I would add with respect that acts done in performance of the agreement may, in cases such as the present, be also a relevant topic although not a necessary factor in determining whether or not section 12 has been breached. "

Henry J.A. went on to say that on the facts of the particular case before him there was no doubt and indeed it was pleaded that the appellant had obtained exclusive possession of the land pursuant to the agreement. We continue with further extracts from the judgment of Henry J.A. :

(4) " The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12. The question then is whether, upon the true construction of the said agreement the subsequent acts of appellant, done in pursuance of the agreement, 'alienate or deal with the land, whether by sale, transfer or sublease or in any other manner whatsoever' without the prior consent of the Board had or obtained. "

(5) " The words 'alienate' and 'deal with' as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not

cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof. "

(6) " The making of the agreement conditional upon consent being granted does not assist appellant because section 12 does not permit the conditional doing of the acts prohibited by section 12. The time factor is plain and mandatory. The acts proved come clearly within the prohibited acts. In Chalmers v. Pardoe (supra) Sir Terence Donovan said at p. 557 :

> 'In the present case, however, there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s. 12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr. Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr. Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful. '

In the present case the Board would find respondent completely dispossessed and appellant in full possession and control of the land without having an opportunity of considering whether he was a desirable tenant in the exercise of its statutory duty to administer for the benefit of the Fijian owners. "

(7) " The appellant was in possession for some 18 months before the consent was granted. The fact that it was then granted does not make lawful that which the Ordinance declared to be unlawful: vide Chalmers v. Pardoe p.557. It is nothing to the point that the Board might, or does, later grant its consent. The lessee would have committed an offence against section 26 and the transaction is declared to be null and void. The Board may waive its remedies against the lessee under his contract but it cannot waive the statutory consequences of a

breach of the Statute. In my opinion, a consent given after a breach of section 12 is not a consent under that section. The question is, whether the later consent was a consent 'first had and obtained'. In my opinion it was not. "

No doubt with these considerations in mind the learned Judge in the present case, having first referred to the long duration of the subtenancy and the onus upon the appellant, said :

" The present position as I find it is that the firm was a lawful sub-tenant of the plaintiff's predecessor from 1932 to 1965 and of the plaintiff from 1965 until the creation of the lease agreement Ex. P.7 in 1976. The agreement Ex. P.7 is not unlawful in itself and would only become unlawful under section 12 of the current NLTA if the plaintiff acted under it so as to confer tenant's rights upon the defendant e.g. letting the defendant into possession. However, the defendant was not let into possession under Ex. P.7; he was already in possession and there is no evidence of any other act arising under the agreement Ex. P.7 which comes within the transactions prohibited under section 12. Payment of a different rent for the premises is not a prohibited dealing; rent was paid for 32 years and a change in the rent is not a fresh dealing in the land. Substitution of a fixed term of 10 years instead of an annual tenancy did not change possession. The NLTB only had to approve a change in the term meanwhile the status quo continued until such consent was given - Imman Hussein v. Shiu Narayan Civil App. 16 of 1978 F.C.A.

I think the firm's annual sub-tenancy is extant until the lease Ex. P.7 is presented to the NLTB for approval. If it is disapproved the sub-tenancy continues from year to year as it has done for over 32 years. If it is approved then the 10 year lease supercedes the current annual tenancy. "

The judgment of this Court referred to by the learned Judge in that passage is one in which there was an agreement in 1974 which was partly performed without the consent under section 12 having been first obtained, and thereby became illegal, null and void. Possession had

been given. In 1975 another agreement was made and consent applied for - it was granted, but illegality was again alleged. The Court held that there was no "dealing with" the land in pursuance of the 1975 agreement; possession was always by virtue of the 1974 agreement, illegal though it was. The Court (Henry and Spring JJ.A.) said :

> " In our judgment the proper finding of fact is that the appellant's continued possession of the land was solely referable to the 1974 agreement and that the 1975 agreement did not constitute either an alienation of or a dealing with the land before the consent of the Board was granted. "

This illustrates the point that the learned Judge was making in the passage from his judgment last above quoted. He has accepted, on the authorities we have mentioned above, that an agreement such as one for sale of a native lease is not necessarily illegal of itself by virtue of section 12, but will become so if it is implemented prior to the consent having been obtained. Everything hinges upon this question of implementation or carrying into effect. Even if, as we have seen, there is provision for the agreement to be ineffective pending the application to the Board it will not avail if the agreement is in fact carried into effect meanwhile. The same would apply to any right of a party to proceed to enforce through the Court a right, express or implied, to have the other party apply for the consent. That was clearly the position in the case of D.B. Waite (Overseas) Ltd. v. Wallath (1972) 18 F.L.R. 141, in which this question was discussed. Possession had not been given or taken in that case.

The question is whether the learned Judge's view in the present case, that the respondents were not let into possession under the agreement P.7, should be upheld.

Mr. Koya's argument to the contrary is that it is not a preliminary agreement, but confers a grant. It makes no reference to previous occupancy and contains a right of renewal. It varied the basis of payment of rent. He relied upon the evidence of the respondent Manji Jadavji, particularly one answer in cross-examination - "under Ex. P.7 the firm has occupied the property". The question had obviously been, of course quite legitimately, a leading one.

There does not appear to us to be a great deal in Manji's evidence which is unequivocally in favour of Mr. Koya's argument. On the rental question he said in examination in chief: "Yearly rent was being paid to Samji Jadavji by S. Jadavji and Company until 1981. Then we paid at intervals of 3 or 4 months." In cross-examination he said the yearly rent to Ramesh was increased between 1965 and 1976 - it is to be noted that Ex. P.7 ran from 1st January, 1977. For January - March 1980 the rent was paid quarterly. The whole tone of the evidence emphasizes the family nature of the business in such matters and clearly there had been previous rises in rent.

As to the wording of P.7, it was intended in due course to take effect as a binding agreement and naturally contained appropriate clauses for this purpose. Manji said it was done because some of them were getting old. The question is rather of the mental approach of all the signatories to the agreement from the time of signing. In all probability it was never present to their minds that the NLTB might refuse its consent, but they knew the consent was essential. There was some delay because the NLTB was disorganized. Would not the natural attitude of all parties to the agreement be that they had a good and valid tenancy already and if the new arrangement could not be brought into force they would continue to reply on the existing one? In Imman Hussein v. Shiu Narayan (supra) the possession which might have defeated the

24a 43

purchaser's claim was ascribed to a former void transaction. The present case is stronger, in that the possession of the firm at the time of entering into Ex. P.7 was quite lawful. Would the parties abdicate from that position until they were made secure by the granting of the consent? We would need unequivocal evidence that the parties had in fact acted upon the terms of the new agreement to the exclusion of the annual tenancy before we would find ourselves justified in holding, that illegality under section 12 had supervened upon lawful legal relations. We do not find that the evidence reached such a point, though we acknowledge that in so finding we have given weight to the family nature of the business in question.

Though we have not referred to the grounds of appeal by number we believe we have covered them all except Ground 4. This puts forward a claim of indefeasibility of title in the appellant by reason of the registration of his transfer of Native Lease No. 7190. After acquiring the lease the appellant observed the annual tenancy and accepted the rent for a period of years. He then signed, albeit by attorney, a ten year subtenancy in favour of the same subtenants. There can be no merit whatever in the circumstances in such a ground of appeal.

For these reasons we uphold the judgment of the Supreme Court. We have not been asked to vary the form of the orders there made.

The appeal is dismissed with costs.

.....
Vice President

.....
Judge of Appeal

.....
Judge of Appeal