IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 48 of 1983

Between:

JAI CHAND s/o Ram Kissun — Appellant

and

SHEILA MAHARAJ d/o Ram Nath — Respondent

J.R. Reddy for the Appellant
A. Singh for the Respondent

Date of Hearing: 27th March, 1984
Delivery of Judgment: 30th March, 1984

JUDGMENT OF THE COURT

O'Regan J.A.,

The parties to these proceedings lived together as man and wife for the twelve years between 1968 and 1980 and they had one child who was born on 29th April, 1970. The learned trial Judge found that the relationship between them during that period was stable and had the appearance of permanence.

On 29th October, 1973 the appellant submitted a tender to the Housing Authority for various allotments of Native land under the control of the Authority and available for allocation among married couples. In his tenders the appellant represented himself to be a married man and thus qualified to participate in the scheme. He stated in his

papers that the respondent was his wife and supported that statement with the following declaration:

> " I hereby declare that I am married and that I or my wife own no other house or land or share an interest in a house in the Dominion of Fiji. "

In due time when one of his tenders was accepted he was required to complete and submit a formal application for the allotment. In so doing he named the respondent as a co-applicant and described the two of them as married with two children, one of which was the respondent's child from her previous marriage. The document bore signatures "Jai Chand" and "Sheila Wati". The respondent deposed that she signed one document having to do with the application to acquire land but was unable to say what the document was.

During the time the parties cohabited as man and wife the respondent was engaged in employment, but there is confusion in the evidence as to the length of time she was so engaged. It suffices for present purposes to record that the learned Judge found that she made no payments directly towards the purchase of the land or the cost of building the house but that she did contribute to the household expenses from her earnings.

In due time a house was erected on the leased land. The parties and their children vacated a Housing Authority flat previously rented and moved into the new house in June 1979. It was not long afterwards that unhappy differences arose and the appellant left home and family in October 1980. He went to live with his parents. He has since married.

In evidence, the appellant said :

> " When I got the property - I got it for myself and the defendant. We talked on that line. When I obtained the lease I did not

leave a part for the defendant. If she wanted she could have stayed. She was there with my consent ....."

And later :

" In 1979 I told the defendant to stay there. No time limit was made by me. "

And, of course, the respondent did stay there. The appellant, however, had a change of heart. On 20th March, 1980, he served notice upon her requiring her to vacate.

The learned Judge summarised the situation as follows :

" I have no doubt that when the plaintiff obtained the land and later set about constructing a house he told the defendant that he was building it for what in fact was his family at that time. It was possible that he was entirely sincere in this purpose. I have no reason to disbelieve the defendant when she said that she was under the impression the plaintiff was providing a home for her and her children. As she is uneducated, she took no steps to protect her interest. Whether or not the Housing Authority would have granted the sublease if they had known of the true relationship between the parties, I do not know. The fact remains that the plaintiff obtained the sublease with the support of the defendant and on the premise that they and two of the defendant's children were a family unit eligible to receive an allocation of land. "

And, in the end, he held that the plaintiff would not have obtained the land at all were it not for his association with the defendant and his representation that she was his wife. And he went :

" By his conduct the plaintiff gave the defendant reason to believe that she and the children had a licence to remain in the house as long as they wished and it is not possible to say on the evidence that in so remaining she did not act to her detriment. Her present

> situation, in which she stands in peril of being put out on the street might never have come about if the plaintiff had made it clear to her at the relevant time that she could never have any expectation of a permanent home with him. "

And, on the authority, Greasley and Ors. v. Cooke (1980) 1 W.L.R. 1306 he held that respondent had acted on the faith of assurances given her by the respondent and that, on the facts, an equity was raised in her favour. As the respondent had not claimed or counterclaimed for relief, the necessity for the Court to decide in what way the equity should be satisfied did not arise. But, because of the equity, he declined to make an order for possession in the plaintiff's favour.

Before making such order, the learned Judge considered the effect of section 12 of the Native Land Trust Act (Cap. 134) which applies to the subject properly. It provides :

> " Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance 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. "

Such a consideration arose from a submission that the respondent, because of the provisions of the subsection, could not lawfully acquire any interest in the property without the prior consent of the Board. It is common ground that such had not been obtained.

The learned Judge considered the decision of the Privy Council in Chalmers v. Pardoe (1963) 1 W.L.R.

677; (1963) 3 All E.R. 552 but in the end reached the conclusion the licence which the appellant granted the respondent on his leaving the property was not proscribed by the subsection. He said :

> " ..... A mere licence does not create an estate or interest in the property to which it relates; it only makes lawful which without it would be unlawful. (See, for instance, Wells v. Kingston-Upon-Hull (1875) L.R. 10 C.P. 402 at 409). I take the view that such a licence does not constitute an alienation of the house and is not prohibited by the statute. I am also of the opinion that it cannot be said that the arrangements, if they can be so described, between the parties constituted a dealing in land. No agreement was entered into between them. "

We find ourselves unable to accept the proposition enunciated in the crucial penultimate sentence of this passage. The subsection is concerned with lessees of native land and it prescribes that "it shall not be lawful for any lessee ..... to deal with the land comprised in his lease ..... in any ..... manner whatsoever without the consent of the Board ..." We think that when the appellant quitted the property and told the respondent she could remain in possession he conferred upon her a licence to occupy - a licence which was revoked by the notice of 20th March, 1981. And, in our view, such a licence is caught by the section. We think that Chalmers v. Pardoe (supra) concludes the point. In that case, the Court of Appeal had held that the "friendly arrangement" between the parties was that of a licence to occupy coupled with possession. In the event their Lordships of the Privy Council thought that the matter ought to have been put higher but they said :

> " Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr. Chalmers and Mr. Pardoe well knew, of erecting a dwelling house and accessory buildings, it seems to their

> Lordships that, when this purpose was carried into effect, a 'dealing' with the land took place. "

In the present case we think that the same can be said. When the house was occupied by the respondent in the absence of the appellant in pursuance of the licence coupled with possession there was a "dealing" with the land. Being of that opinion, we find that we must allow the appeal.

We are accordingly absolved from the necessity to discuss and to express opinions upon the interesting arguments advanced by both learned counsel as to the juristic bases upon which parties to de facto relationships acquire interests in property the legal estate to which is vested in their partner. In the present case the learned Judge was able to hold that the matrix of facts threw up an equity in favour of respondent and that, if she had been a claimant, the Court would have had to determine the relief appropriate to satisfy it. The result came from an estoppel. In other common law jurisdictions there have been other approaches. In Canada a majority of the Supreme Court in Pettkus v. Becker 117 D.L.R. 3d 257 resorted to the imposition of a constructive trust. In doing so it prayed in aid the principle of unjust enrichment which had its genesis in the case of Moses v. MacFerlan (1760) 2 Burr 1005 at p.1012, 97 E.R. 676 in which Lord Mansfield formulated it in this way :

> " .... the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which unjust enrichment might arise ..... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to

> accommodate the changing needs and mores of society in order to achieve justice. "

We interpolate that today perhaps more so than in the days of Lord Mansfield the changing needs and mores of society require judges of today to make generous use of the constructive trust in the field of the social relationships which concern us in this case.

In Rathwell 83 D.L.R. (3d) 289, Dickson J. suggested that there were three requirements to be satisfied before an unjust enrichment in this type of case, can be said to exist :

> " ..... an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment."

And he said that such an approach is supported by general principles of equity that have been fashioned by the Courts for centuries.

And in New Zealand, in this field, the constructive trust approach has been scouted but not given an imprimatur by the Court of Appeal. But recently Richardson J. in Hayward v. Giordani (unreported judgment of 27th June, 1983) said :

> " There is considerable force in the argument that give the realities of contemporary family life the property interests of persons who have been cohabiting together outside of marriage should not turn on an elusive and often vain search for indications of common intention in relation to the property; and that there should be room in the evolution of equitable principles for the imposition of a constructive trust to reflect the direct and indirect contributions of the parties to the property which they have when they cease to live together."

And we also draw attention to the opinion of Mahoney J.A. in Allan v. Snyder (1977) 2 N.S.W.L.R. 685.

So the malleable principles of which Lord Mansfield spoke are being shaped to accommodate the needs of the day and to reflect the dictates of the social facts. In Fiji, advances in the law in this field are hampered, as in [illegible] case, by statutory provision for local social needs. Be that as it may, there will be scope for them in some cases. They are inapplicable in the present case but we thought it well to discuss them here. The arguments of learned counsel on related topics do not require response but they have evoked this short reference to what perhaps is in prospect.

The appeal is allowed. The respondent must pay appellant's costs here and below.

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Judge of Appeal

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