IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 6 of 1984

Between:

TAJIM ALI
s/o Dean Mohammed — Appellant

and

THE NATIONAL INSURANCE COMPANY OF FIJI LIMITED — Respondent

Mr. H. Patel for the Appellant
Mr. A. Ali for the Respondent

Date of Hearing: 17th July, 1984

Delivery of Judgment: 25.7.84

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from the decision of the Supreme Court, Lautoka, on 13th January, 1984, dismissing the appellant's claim against the respondent insurance company under a fire insurance policy.

The appellant, at the relevant time held two policies of insurance issued by the respondent, one in respect of a house and the other covering furniture in it. In one proposal form he, among other particulars, stated that the house was on leasehold land belonging to his father and, in the other, that it was a native lease. The respondent accepted his proposals and insured the house for $15,000 and furniture for $5,000.

On 6th November, 1979, the house and furniture were destroyed by fire and on 27th November, 1979, the respondent advised the appellant's bankers that his claim under the two policies would be settled by 3rd December, 1979 for $19,000. In the meantime, however, the respondent received advice from a solicitor acting on behalf of the appellant's father claiming that the house belonged to his cleint and not to the appellant. The respondent thereupon declined to settle.

There had been some litigation over the land in question between the appellant and his father which was settled out of court on 11th February, 1981. A charge of arson preferred by the police against the father in respect of the fire that destroyed the house was also dropped.

The appellant brought an action against the respondent company claiming $20,000 under the two policies. The latter, in its amended defence, made reference to the litigation between the appellant and his father, then pending before the Supreme Court, and stated that "the plaintiff had made a false statement in his proposal thus rendering his policies null and void". No particulars of falsity or fraud were provided. We note in this regard that fraud and kindred allegations of falsity must always be pleaded with great particularity. The respondent's pleadings in this case failed to disclose the true basis of its defence.

When, after numerous adjournments, the trial started in January 1983, the only effective defence would appear to have been falsity allegedly contained in the proposal form. An amendment to the statement was granted after the appellant's evidence had concluded. The learned Judge remarked that the amendment made very little difference to the existing statement of defence. At no stage did the statement of defence allege either

(a) lack of insurable intereest;or

(b) breach of section 12 of the Native Land Trust Act.

Nothing relating to any falsity was put to the appellant when he gave evidence. The major thrust of the cross-examination of the appellant was directed towards the ownership of the native lease which the proposal form had correctly described as belonging to the appellant's father. The following appears in the appellant's evidence :-

"Cross-examined (Defendant):

Father has N.L.T.B. lease.

Plans were approved for the house.

Q. What was it?

A. From N.L.T.B. and father. Have not the NLTB consent - it was burned in the house.

NLTB consent was in writing - signed by the Manager.

I made the application on my father's behalf - it was in his name. I am much better educated. "

The defence for some reason, called the appellant's father as their witness.

He said on oath -

" I had given a place to my son. He built a house. It was burnt. I will not tell a lie. I am an old man. "

And again -

" I had given that area to my son. He built the house. I do not know how much it cost him. "

The learned Judge in his judgment said :-

" There is no evidence that the N.L.T.B. were approached for their consent to the arrangement between Din Mohammed and Tajim Ali. Under section 12 of the N.L.T.

Ordinance such dealings between the lessee of native land and third parties are illegal unless consent of the N.L.T.B. is first obtained. I am satisfied that the dealing between Din Mohammed and Tajim Ali was illegal under section 12 and no interest could pass to Tajim Ali. He has no right to the house he built. "

The Judge dismissed the appellant's claim in respect of the house; he allowed it in respect of the furniture.

The grounds of appeal are :-

"(1) That the learned trial Judge erred in law and in fact in holding that the Appellant/Plaintiff did not have an insurable interest to his house which was insured for $15,000-00 (FIFTEEN THOUSAND DOLLARS).

(2) That the learned trial Judge erred in law by applying Section 12 of the Native Land Trust Act Cap. 134 when the same was never pleaded by the Respondent/Defendant.

(3) That the learned trial Judge erred in law in shifting the burden of proof on to the Appellant/Plaintiff on the question of obtaining of consent from the Native Land Trust Board.

(4) That in the circumstances of this case the Respondent/Defendant is stopped from raising the issue of "insurable interest" and "lack of consent" of Native Land Trust Board and the learned Judge failed to direct his mind accordingly. "

As for ground 2 we are satisfied that the learned Judge was entitled to consider the effect of section 12 of the Native Land Trust Act on the alleged dealing, if a dealing there was, even though it had

not been specifically pleaded by the Insurance Company. As was said in Alexander v. Rayson (1936 1 K.B. 169 at 190) :-

> "The moment that the attention of the Court is drawn to the illegality attending the execution of the lease, it is bound to take notice of it, whether the illegality be pleaded or not. "

Grounds 1 and 3 have a direct bearing on the issue of illegality and may conveniently be dealt with together.

The position, as we see it, was quite simple. The appellant was claiming under a valid contract of insurance until proved otherwise. It was the respondent who, without pleading it, alleged lack of insurable interest at the hearing relying on the further allegation of illegality under section 12 of the Native Land Trust Act. It was a positive averment and the onus was on the respondent to establish it if it was to challenge the validity or enforceability of the contract of insurance. It tried unsuccessfully to extract an admission from the appellant that no consent from the Native Land Trust Board had been obtained to permit the construction of the house on native land.

The only other witness who could have assisted the respondent in this regard was the appellant's father, Dean Mohammed, whom the respondent itself had called but who was not even asked if the consent of the Native Land Trust Board had been obtained or even applied for.

At the end, the only evidence before the court was the appellant's own that a written consent had been obtained from the Native Land Trust Board which had been destroyed by the fire. It was for the respondent not the

appellant, to have called someone from the Native Land Trust Board if illegality was to be established. This it failed to do. The Judge stated that the appellant was untruthful in his statement about the Native Land Trust Board consent. We find it difficult to uphold this finding in the absence of an evidence which pointed to the statement being untruthful. For all the appellant had known the respondent might have had it in mind to have called an official from the Native Land Trust Board to contradict any untruthful statement. The abortive litigation between father and son had little relevance in our view.

Having reached this conclusion we consider it unnecessary to deal with ground 4.

The appeal is allowed and judgment entered in the appellant's favour for the sum of $15,000 in respect of the house together with interest calculated at the rate of 8% per annum until the date of judgment. The judgment of the Supreme Court given in favour of the appellant for $5,400 in respect of the furniture remains unaffected by this appeal.

The order made by the Supreme Court as to costs is also set aside and the appellant will have costs both here and in the court below to be taxed in default of agreement.

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