

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 46 of 1985

Between:

RAM DEVI

Appellant

and

1. SATYA NAND SHARMA

2. MAYA WATI

Respondents

Mr. S.D. Sahukhan for the Appellant
Mr. H.M. Patel for the 1st Respondent
Mr. V.K. Kalyan for 2nd Respondent

Date of Hearing: 13 November, 1985

Delivery of Judgment: 14th November, 1985

JUDGMENT OF THE COURT

Speight, V.P.

This appeal is against a refusal by Dyke J. to make a summary order for possession of land pursuant to section 169 of the Land Transfer Act. (Cap 131).

The appellant is administratrix of the estate of Shyam Lal and as such is the registered proprietor of a block of land containing approximately 25 acres being all the land in Certificate of Title 13868. In support of the Summons, claiming possession pursuant to Section 169, she swore an affidavit covering the following points:

That she was the proprietor as aforesaid.

That each of the Respondents was occupying one acre of the land.

That her Solicitor's had made written demand upon each for vacant possession.

That the first respondent had claimed that he was occupying by virtue of a lease of one acre.

That she denied that the first respondent was her lessee and asserted that neither respondent had any right to occupy.

The Respondents each filed their first affidavits setting out claims of right.

Each deposed that the Appellant had entered into a tenancy agreement with one Jai Ram leasing to him an area of 2 acres (part of the land in the title) for a term of 999 years. Further that Jai Ram had in turn subsequently subleased the same in one acre parcels to the first respondent and to second respondent's deceased husband for terms of 995 years. Photocopies of what on their face appeared to be bona fide leases and subleases to this effect were annexed, together with a photocopy of Second Respondent's Letters of Administration in the estate of her late husband.

Appellant then filed a further affidavit. She raised two matters. First she said that the purported lease to Jai Ram had been obtained by fraud, and that any occupancy by him was as a bare licensee and that his right, if any, had been cancelled. Secondly she claimed that the transaction, such as it was, between Jai Ram and the First Respondent (and inferentially with Second Respondent's husband) had amounted to a subdivision of land, made without the consent of the Director of Town and Country Planning, pursuant to Section 4 of the Subdivision of Land Act (Cap 140) and hence was illegal and incapable of creating any rights of occupancy.

Second Respondent filed a further affidavit. She deposed that her late husband had instructed surveyors to prepare a subdivision plan for the two one acre lots,

and she annexed a copy of such a plan. She said that her husband had intended to apply to the Director of Town and Country Planning for consent, but that application had been held up for lack of funds.

When the matter came before Dyke J. Counsel made submissions. There was no real difference between them as to the legal principles which have been enunciated as appropriate in such cases. In Shyam Lal v. Eric Martin Schultz 18 F.L.R. 152 @ 154 Gould VP said:

" Complicated questions of fact (particularly where there are allegations of fraud) cannot be adequately investigated and dealt with on a summary proceeding in Chambers. The present case, however, included virtually no contested relevant fact, and the learned judge in my opinion rightly entertained and dealt with it."

In delivering his judgment Dyke J. said that despite the matters set out by the appellant in her affidavits there was "nothing to show that the agreement between Jai Ram and herself was null and void".

He then continued.

" It may be that no consent of the Director of Town and Country Planning was first obtained. But there is no provision in the Subdivision of Land Act, similar to section 13 of the Crown Land Act or section 12 of the Native Land Trust Act, that any dealing in or subdivision of land without the prior consent of the Director shall be null and void and of no effect. A person who subdivides land to which the Act applies without prior consent risks prosecution, but there seems to be no reason why subsequent consent cannot validate the subdivision. There was provision in the agreement between the plaintiff and Jai Ram for validating the subdivision if he has not already done so, and presumably Jai Ram could do the same for the defendants.

So far as it appears to the Court at this stage Jai Ram has a valid agreement with the plaintiff entitling him to take steps to properly subdivide the two acres and

to deal with the land as he wishes."

Consequently he dismissed the summons.

It will be seen that Dyke J. saw a difference between the effect of Section 4 and the provisions of the Crown Lands Act and the Native Land Trust Act - indeed the later expressly spells out that a dealing without consent shall be of no effect.

We do not think that it can be doubted that Section 4 of the Subdivision Act also makes a subdivision without consent unlawful.

It reads:

" Notwithstanding the provisions of any other law for the time being in force no land to which this Act applies shall be subdivided without the prior approval of the Director to be obtained in the manner hereinafter prescribed:

Provided that it shall be lawful to subdivide such land without such approval if -

- a) no part of the land is situated in any town or within three miles of the boundaries of a town; and
- b) the land is subdivided in such a manner that no lot is less than five acres in area."

It will be noted that the proviso saves certain exceptions from being "unlawful". The use of that word, together with the provisions of penalties in Section 15 in our view make it an irresistible inference that a subdivision, to which prior consent has not been given, is illegal and accordingly of no effect.

Two previous judgments of this court make the position clear:-

Subsequent approval is of no avail in Native Land Trust cases - Phalad v. Sukh Raj FCA 43/1978 per Henry J.A. and of greater relevance - Devi Dayal v. Jagdish Kumar F.C.A. 38/1980. In that case the owner had parted with possession of and all his interest in part of his land, leaving it to the purchaser to obtain the necessary subdivisional consent

for the portion sold.

The same learned judge said

" The consent required is the prior approval of the Director. The Court will not lend aid to perfecting.. a scheme" (of subdivision) "already carried out in fact".

In the present case it is conceded that the provisions of the Act applied to the land in question, and there had been no consent.

The question was whether the claim of right to occupy advanced by the Respondents depended entirely upon a purported lease which was illegal. If it did then Section 169 provided a remedy. It is true that orders under that section will not be made on disputed facts or in complicated law situations - but that must mean bona fide fact disputes arising from the evidence, or legal points which cannot be simply identified.

Of primary relevance, in ascertaining whether or not this was a subdivision, were the lease to Jai Ram of a 2 acre area and the two subleases to the Respondents.

In one of his submissions Mr. Sahu Khan endeavoured to persuade us that the mere entering into agreement relating to a portion of land which is not the subject of an existing subdivision is contrary to the Act. He cited in support the case of Adelaide Development Company Proprietary Ltd. v. Pohler (1933) 49 C.L.R. 25 - a decision of the High Court of Australia. There various approvals had been given but no final subdivision plan deposited or Letter Form A issued at the time the contract for sale was entered into. But the South Australian Act (Section 23) provided that it was not lawful to offer for sale or sell any land except in accordance with the Act. There is no such provision in the Fiji statute - the prohibition is against "subdividing" without consent - and subdivide means:-

"dividing a parcel of land for sale, conveyance, transfer, lease, sublease, mortgage, agreement, partition or other dealing or by procuring the issue of a certificate of title under the Land Transfer Act in respect of any portion of land, or by parting with the possession of any part thereof or by depositing a plan or subdivision with the Registrar of Titles under the last mentioned Act;"

The Adelaide Development case, and George v. Greater Adelaide Development Compnay 43 C L R 91 both turn on the statutory prohibition of agreements, even conditional agreements to sell. That is not the position in Fiji.

Whether a contract of sale amounts to a "dividing" will be a question of the construction of the document. We are not prepared to say, on the very limited discussion there has been on this part of the case, that there could never be a legal agreement to lease, made subject to a condition that it was only to have effect if and when the Director's approval was obtained. Indeed, in Chalmers v. Pardoe itself, the Privy Council recognised that agreements to deal with land might exist without breaching Section 12 of the Native Land Trust Act - (1963) 3 All E.R. 552 @ 557.

That question may require attention on another occasion if there is what can properly be described as an executory contract, with no step taken which could be construed as a "dividing".

In this case Counsel for both Respondents submitted that the land had not been occupied by their clients and hence no steps had been taken which amount to a subdividing. They contended that the true situation had not emerged and that a full hearing was required to ascertain what had occurred between the parties.

We have already discussed the pleadings, but a closer study of the documents and the sequence in which they were filed is revealing. The original affidavit of the appellant

alleged that the Respondents were in occupation and that demand had been made for them to vacate. Correspondence between solicitors was annexed., The First Respondent's solicitor had written that his client's "occupation of the land is legal" and that he was " a lessee of one acre"; "our client has fenced the area" and "you (appellant) are requested not to enter our client's land".

First Respondent filed an affidavit exhibiting the lease to Jai Ram, and the sublease from Jai Ram and admitted fencing his one acre. In each document dated 23.3.1976 and 20.6.1978 respectively "possession of the said 2 acres (one acre) will be given upon the execution hereof" together with rights to assign or sublet.

Second Respondent filed a imilar affidavit exhibiting the other sublease and claimed to be the lawful occupier as successor to her deceased husband. She deposed that she had full lawful right to the possession of the land and the appellant had interfered with her quiet enjoyment of the same.

The appellant then filed an affidavit dealing with these assertions of right. She set out particulars relating to the property to show that the Subdivision of Land Act applied to it and claimed that there had been no consent of the Director prior to the purported lease and subleases. She also made allegations of fraud against Jai Ram in an endeavour to destroy the validity of the leases by that means. We do not intend to deal with that issue but assume, against her, that such allegations could not be made out.

It was by now clear that illegality was in issue. Then for the first time, and contrary to everything which had been said before, the Second Respondent claimed in a further affidavit, that she was not occupying the land. She said that she had instructed surveyors to prepare plan and would be applying to the Director for consent.

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Her counsel joined with First Respondent's Counsel in submitting that the subleases "had not yet been performed" although we have allowed that there might be room for an argument in cases of executory contracts made expressly subject to obtaining consent, that situation quite clearly does not arise here.

There was no reservation expressed concerning consent. The documents provide for possession to be "given and taken on execution : The solicitors original letters, and the Respondent's initial affidavits claimed existing rights of possession based on fully operative subleases. The suggestion the Respondents subsequently made to the contrary were nothing but transparent after-thoughts.

Nor is this a case where, to establish her right, the appellant has to rely on illegality. True, some suggestions of fraud and consequent invalidity were raised as against Jai Ram - but that is irrelevant to the issue and can be put to one side. The ground of registered proprietorship is one upon which the appellant can stand independently of her challenge to the Jai Ram transaction.

It is in our view a case where the observations of Gould VP quoted initially are of application. True there is now a contest as to fact - but it is obviously specious - this is a clear case.

The Appeal is allowed, the judgment in the Supreme Court is set aside and there is an order for possession in favour of Appellant.

Appellant is to have costs in both Courts to be taxed if necessary.



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VICE-PRESIDENT



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JUDGE OF APPEAL



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JUDGE OF APPEAL