IN THE FIJI COURT OF APPEAL

Civil Appeal No. 56 of 1985

Between:

JAI NARAYAN s/o Sukh Deo	Appellant
and	
MOHAMMED SHAMSHU DEAN & JAMILA NISHA DEAN	1st Respondents
and	
KHAIRUL NISHA, MOHAMMED AQIB KHAN & MOHAMMED ALIM KHAN	2nd Respondents

Civil Appeal No. 59 of 1985

Between:

KHAIRUL NISHA, MOHAMMED AQIB KHAN & MOHAMMED ALIM KHAN	Appellants
and	
JAI NARAYAN s/o Sukh Deo	Respondent

Mr. S.M. Koya & Mrs. F. Adam for the Appellant
Dr. M.S. Sahu Khan for the 1st Respondents
Mr. B.C. Patel for the 2nd Respondents.

Date of Hearing: 31st October, 1st November 1985; 4th and 5th March, 1986.

Delivery of Judgment: 21st March, 1986

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from the judgment of the Supreme Court, Suva, in a case in which Mohammed and Jamila Dean were plaintiffs, Jai Narayan defendant, and Khairul Nisha and Aqib and Alim Khan (as executors and trustees of Mohammed Ramzan Khan) the Third Party. The defendant's appeal is against the decision allowing the plaintiffs' claim for damages arising out

of a mortgagee's sale of their land at a public auction. The Third Party, who had been the highest bidder for the same land at an earlier public auction but had refused to complete the purchase, appeals against the decision upholding the defendant's claim for damages against him. The two appeals were heard together and it will be convenient to call the parties plaintiffs, defendant and the Third Party as in the Supreme Court judgment.

The plaintiffs, lessees of 5,540 acres of native land at Tagi Tagi about 17 miles from Sigatoka, had borrowed £900 from the defendant, a registered money-lender. They were unable to pay any part of this debt and the defendant notified them of his intention to exercise his power of sale under a mortgage he had taken over this property to secure the advances. Correspondence followed between solicitors giving the plaintiffs 9 months' respite. The defendant would wait no longer and advised the plaintiffs' solicitor of his decision to sell the land by public auction on 18th May, 1968. The auction was advertised in the Fiji Times and broadcast over Radio Fiji. The bid of £2,500 from Ba Meat Co. was accepted at this auction conducted at Sigatoka by an auctioneer, Abu Bakar Koya. It was later discovered that the place of auction inserted in the advertisements was Tagi Tagi, not Sigatoka, and the sale was consequently cancelled.

The next auction advertised for 18th June, 1968 at Sigatoka failed to eventuate because of an interim injunction granted by the Supreme Court. The plaintiffs failed to pay into court the sum ordered and the injunction lapsed.

The advertisement of the next auction appeared in the Fiji Times of 24th, 25th and 26th July, 1968 and was in following terms :-

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" Public Auction

Under instructions received from the mortgagee under mortgage No. 84422 Abu Bakar Koya, of Ba, auctioneer, will sell by Public Auction, on Saturday, July 27th at 12 noon Native Lease No. 3500, Tagi Tagi (Tuvu East part of) Tuvu, containing 5540 acres. The sale shall be subject to the consent of the Native Land Trust Board. For further particulars please contact the auctioneer. "

The auction was conducted at the appointed time and place attracting a fair number of bidders. They were told that each bidder would have to deposit £10 in advance and that the successful bidder would, in addition, be required to pay a deposit of £300 in cash. Bidding would appear to have been brisk for some time but, towards the end, only two bidders remained in the field Yanktesh and Mohammed Ramzan Khan, the Third Party. Yanktesh stopped at £11,000 and the auctioneer accepted the Third Party's bid of £11,100. He also accepted his cheque for £300. The defendant and the Third Party both signed an application to the Native Land Trust Board for its consent to this sale. Apart from this no sale note or other documents was prepared or signed.

On 7th August, 1968 the Third Party wrote to Messrs Koya & Co. the defendant's solicitors :-

"Sir,

I wish to bring to your notice that I have stopped the payment for cheque EI33516, which was deposit for the auctioned land N/L 3500.

I have done so to clarify certain conditions, under which the said land was auctioned."

On 11th October, 1968 the Native Land Trust Board granted its consent to the transfer of the lease to the Third Party.

On 13th November, 1968 Messrs Koya & Co. wrote to the Third Party :-

> "Transfer of Native Lease Jai Narayan as mortgagee to you - Native Lease No. 3500 belonging to Mr. Mrs. Shamsudean.
>
> We are instructed by Mr. Jai Narayan to notify you that inasmuch as you have refused to complete the purchase of the above-mentioned property, our client will now proceed to sell the same by public auction on Saturday the 16th November, 1968.
>
> Our client would look to you for all damages already suffered by him as result of your failure to complete the purchase of the said property."

The auction of 16th November, 1968 was advertised in the Fiji Times of 12th, 13th and 15th November, 1968 and broadcast over Radio Fiji in Hindustani on 14th, 15th and 16th November, 1968, in the following terms :-

> " Under instructions received from the mortgagee under Mortgage Number 84422, Abu Bakar Koya of Ba, auctioneer, will sell by Public Auction at Sigatoka, near the market, on Saturday November 16, at 10 a.m. Native Lease No. 3500, Tagi Tagi (Tuvu East part of) Tuvu, containing 5540 acres. The sale shall be subject to the consent of the Native Land Trust Board. Reserved price of £3000 payable in cash. For further particulars please contact the auctioneer. "

On 14th November, 1968 Messrs Munro, Warren, Leys and Kermode, on behalf of the plaintiffs, wrote to Messrs Koya & Co. enquiring about the sale of the property to the

Third Party and requesting cancellation or postponement, in the meantime, of the auction scheduled for 16th November, 1968. They received no reply.

On 16th November, 1968 the auction was conducted as advertised and the land was sold to one Imamu Dean for £3,400, that being the highest bid.

Plaintiffs commenced proceedings for damages on 2nd September, 1971. Before the hearing started on 21st April, 1982, the Third Party, the auctioneer and Yanktesh, whose evidence might have been of considerable assistance to the Court, had all died.

In his judgment the learned Judge held the sale to the Third Party on 27th July, 1968 to be a binding contract and his bid of £11,100 as representing the proper value of the land. He also held that in exercising his power of sale at the auction of 16th November, 1968 the defendant failed to exercise reasonable care to obtain a proper price. He, therefore, gave judgment in favour of the plaintiffs against the defendant in the sum of $15,400, it being the difference between £11,100 ($22,200) and £3,400 ($6,800) obtained from Imamu Dean. He also gave judgment for the same sum in favour of the defendant against the Third Party.

In addition the learned Judge reduced the auctioneer's commission to 2½% from 10% which the defendant had charged and also allowed the plaintiff 5% interest on $15,400 from 7th March, 1969 to the date of judgment.

Costs were awarded in favour of the plaintiff against the defendant and in favour of the defendant against the Third Party.

The defendant's grounds of appeal are :-

"1. THAT the Learned Trial Judge erred in law and in fact in holding that the Appellant as Mortgagee was negligent in effecting the sale of the Native Leasehold property comprised in Native Lease No. 3500 (of which the First Respondents were the Registered Proprietors) under Mortgage No. 84422.

2. THAT the Learned Trial Judge erred in law and in fact in holding that the Appellant was not entitled to debit the First Respondents' account with the full commission paid to the Auctioneer in selling the said Native Leasehold property under the Auction Sale held on the 27th July, 1968 and the full commission paid to the Auctioneer in respect of the sale effected by him at the Auction Sale held on the 16th November, 1968.

3. THAT the Learned Trial Judge erred in law and in fact in holding that the proper value of the said Native Leasehold property at the time the last Public Auction took place (16th November, 1968) was £11,100.0.0 having regard to all the circumstances.

4. THAT the Learned Trial Judge erred in law and in fact in holding that the land was sold at a gross undervalue.

5. THAT the Learned Trial Judge erred in not acting on the evidence of the independent and material witness Mr. J. Nakaitoga who testified that at all material times the said Native Leasehold land in question was declared or included as part of a FROZEN AREA by the Government as a matter of Government's Development Policy and could not be dealt with or developed without its prior approval.

6. THAT the Learned Trial Judge ought to have held that having regard to all the circumstances and on balance of probabilities the said Mohammed Ramzan Khan and or Yenktesh were acting

collectively or separately as agents for the First Respondents when they were bidding at the Public Auction on the 27th July, 1968

7. THAT the Learned Trial Judge erred in holding that the First Respondents were entitled to any interest on any amount awarded to them as damages.

8. THAT the Learned Trial Judge erred in not holding:-

(a) that having regard to all the circumstances Mohammed Shamshudean (one of the Respondents herein) was an unreliable witness;

(b) that the Respondents at no time during the proceedings herein could explain away as to why the First Respondents as Plaintiffs in Civil Action No. 119 of 1968 were challenging the validity of the said Mortgage when at the same time in these proceedings (Civil Action No. 245 of 1971), they were proceeding on the basis that the said Mortgage was valid but with the allegation that the Appellant exercised his powers of the sale negligently when the said Native Leasehold property was sold under a Public Auction by the Auctioneer to the said Imamudean on the 16th November, 1968.

9. THAT the Learned Trial Judge erred in not awarding adequate damages against the Second Respondents or to indemnify the Appellant in full against the First Respondents claim for damages interest and costs."

The Third Party's grounds are :-

"1. In having held that the Respondent did not exercise reasonable care to obtain a proper price for the said Lease and was thereby negligent in exercising his power of sale at the final auction on 16th November, 1968, the learned trial Judge erred in law and in fact in entering judgment for the Respondent against the Appellant because:

(a) The Respondent was not entitled to indemnity against the Appellant for his own negligence.

2. In view of the pleadings and the evidence the Respondent was not entitled to any indemnity from the Appellant and the learned trial Judge erred in law and in fact in entering judgment for the Respondent against the Appellant.

3. By holding that the Appellant had not "repudiated" the agreement before the grant of consent by the Native Land Trust Board the learned trial Judge erred in law and in fact:

(a) In failing to appreciate the true effect of the Appellant's action in stopping payment of the deposit cheque.

(b) In failing to consider the Appellant's refusal to carry on with or complete the transaction between the date payment was stopped and the date of grant of consent by the Native Land Trust Board.

(c) In failing to consider the pleadings.

4. The learned trial Judge erred in law and in fact in treating the Third Party's (Appellant's) bid as representing the true value of the Plaintiff's land without considering:

(i) the reasons and purpose for the making of such a bid.

(ii) the other evidence pertaining to the value of the land.

(iii) why the Third Party (Appellant) had failed to complete the sale and purchase if he was bidding for himself and the value was a fair one.

5. The learned trial Judge erred in law and in fact in holding that the bid of £11,100-0-0 by Yenktesh was a genuine bid and that Yenktesh was not put up by the Plaintiff.

6. The learned trial Judge erred in law and in fact in not holding that the Appellant was at all material times acting as the agent of and for the benefit of the Plaintiff.

7. The learned trial Judge erred in law and in fact in believing the evidence of the Plaintiff when such evidence was contradictory in material particulars and unreliable. "

Defendant's Ground 1.

The advertisement for the 16th November auction gave the acreage comprising the native lease but no other particulars. For these the prospective buyers were invited to contact the auctioneer without any proper address or telephone number where he might be contacted.

The learned Judge mentioned these omissions and went on to say -

" The advertisements did not specify what purposes the land could be used for. There is absolutely no indication as to what this land containing 5540 acres is suitable for or had been used for. Whether it was all hilly or forest land or whether any part of the land was suitable for agricultural purposes such as cane or vegetables or other cash crops or for grazing purposes or goat farming. The defendant knew the land was suitable for subdivision. He had signed for the plaintiff a rough plan of subdivision of the land (Ex.E). The evidence shows that the lease was a grazing lease with areas of land suitable for agricultural purposes and that Clause 20 of the lease permitted the lessee to convert it as of right into an agricultural lease subject to payment of appropriate rental. The effect of Clause 20 was not explained even at the auction itself and the successful bidder. Imamu Dean, says he was not aware of it until it was explained to him in Court while giving evidence.

There had been several bidders at the previous sale on 27th July, 1968. One of them bid up to £11,000 and others to at least £6,000. No attempt was made either to inform these bidders that the land was being auctioned

> again or to make a private sale with them. "

There was, in addition, an item of information in the advertisement not generally furnished to prospective buyers. It said :-

> "Reserved price of £3,000 payable in cash."

This figure did not have any relation to the value of the land which had never been valued for purposes of sale. Nor did it bear any relation to bids received at the 27th July auction. Counsel concedes that the main purpose of inserting the reserve price was the realisation of the defendant's debt, the auctioneer's fees and other expenses.

Imamu Dean who purchased the property at the auction said :-

> "But the reserve price of £3,000 shows it does not apply to agricultural lease. By seeing that advertisement with reserve price of £3,000 for 5,000 acres it shows it is not very valuable land."

Apart from Imamu Dean thre were only two other bids, both of about £3,200.

The learned Judge held the insertion of the reserve price in the advertisement to have had a depreciatory effect on the value of the property. He also found the three days' notice completely inadequate for a property of this size particularly if the interested buyers also had to arrange finance for payment in cash.

Learned Counsel for the defendant referred to section 63(1) of the Land Transfer and Registration Ordinance 1955, applicable at the time of the sale,

which gives a mortgagee or encumbrancer power in case of default of payment, to sell "either together or in lots by public auction or by private contract, and either at one or several times, subject to such terms or conditions as the mortgagee or encumbrancer thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale or resell without being answerable for any loss occasioned thereby" and submits that this statutory power given to a mortgagee for the protection of his intersts should not be watered down by imposition upon him a duty akin to that of a trustee.

The learned Judge dealt at considerable length with the law relating to this aspect of a mortgagee's power referring to passages from McHugh v. Union Bank of Canada (1913 A.C. 299) Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd (1971 2 W.L.R. 1207), Pendlebury v. Colonial Mutual Life Assurance Society Ltd (13 C.L.R. 676), and Alexander v. New Zealand Breweries (1974 1 N.Z.L.R. 497) and said :-

> " Having regard to these duties of a mortgagee and the evidence before me I am satisfied that the defendant as mortgagee and his auctioneer who was his duly authorised agent, and for whose negligence the defendant is liable, in exercising the power of sale on the 16th November, 1968, did not exercise reasonable care to obtain a proper price for the said lease. He did not in conducting such sale behave as a reasonable man would behave in realizing his own property so that the mortgagor may receive credit for the fair value of the property sold for the following reasons."

Learned Counsel for the defendant submits that the second sentence of this passage places too heavy a burden upon his client and is erroneous in law. From the judgment, however, it is clear that the learned Judge was merely

reiterating what was said in McHugh v. Union Bank of Canada (1913 A.C. 299 at 311) :-

> " It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold. "

The decision in Tse Kwong Lam v. Wong Chit Sen (1983 1 W.L.R. 1349), not available at the trial of this case, upholds unequivocally the principle that a mortgagee, while exercising his statutory power of sale, owes a duty of care to the mortgagor whom circumstances have placed in his power. The Privy Council there said with concurrence :-

> "Finally in Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. (1971) Ch. 949, Salmon L.J. after considering all the relevant authorities including the views expressed in Kennedy v. De. Trafford concluded, with the subsequent agreement of Cross and Cairns L.JJ., at p.968:
>
> > "both on principle and authority, that the mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it."

In the instant case the learned Judge held that the defendant fell far short of the duty to take reasonable precautions to obtain the true market value of the mortgaged property, a conclusion from which we see no reason to differ.

There is no logic in the defendant's contention that the plaintiffs, having raised no objection to the advertisement for the 27th July auction which but for the

reserved price was in identical terms with that in respect of the November auction, cannot complain of inadequacies in the latter. Damage to their interests resulted from the November auction and that was conducted despite warning from Messrs Munro, Leys & Kermode, the plaintiffs' solicitors, that three days' notice was extremely short for the sale of a lease containing 5,540 acres. The fact that no damage resulted from the 27th July auction does not, in our view, avail the defendant.

We will next consider the defendant's grounds 3, 4,5 and 6 dealing with the value of the property which were argued together by the defendant's counsel. The Third Party's grounds 4, 5 and 6 also relate to the same subject, the two Counsel joining forces to challenge the validity of the learned Judge's finding that the Third Party's bid of £11,100 at the July auction represented the proper value of the land at the date of the November auction.

They contend that -

(a) Yanktesh, who bid £11,000 was not a genuine buyer, his sole purpose, as the plaintiffs' agent, being to bolster the price of the land beyond the reach of serious bidders.

(b) The Third Party, also an agent of the plaintiffs', was there for the same purpose viz. to ensure that no genuine sale takes place.

(c) Plaintiffs themselves had paid only £2,500 for the lease in 1962.

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(d) The term of the lease at the date of sale had only 4½ years to run.

(e) It being a native lease, the land, or part of it, could go into native reserve becoming unavailable for renewal.

(f) Though the Agricultural Landlord and Tenant Act applied to the land renewal could still, under the legislation as it stood at the date of the auction, be refused on notice that it, or part of it, was required by the native owners for their own use.

As for (a) and (b) above, Yanktesh and the Third Party having died before the trial, evidence relating to their part in the July auction had to come from other persons who either knew them or who were present at the auction. Those witnesses were the first plaintiff himself, Anwar Ali, Koya & Co's clerk, Mrs. Yanktesh, Mrs Ramzan Khan and Babu Ram Sharma, a member of a group of farmers who had allegedly chosen Yanktesh to bid on their behalf.

Anwar Ali who represented the mortgagee's interests at the July auction described how it was conducted. After other bidders had dropped out Yanktesh who was standing with the first plaintiff and the Third Party continued to raise their bids. He said :-

> " I recall Yanktesh because there was something funny going on. Mr. Dean was signalling Mr. Yanktesh with his hand to go further up in the bidding. "

Yanktesh's wife Bimla Wati also said that the day before the July auction the first plaintiff had visited them in the afternoon and asked Yanktesh to go to the

auction to raise the price of the land. In return he was to get some land somewhere after the property had been sold.

Ramzan Khan's wife Khairual Nisha, a person who gave her age as more than one hundred years, also remembered the first plaintiff visiting her house in the afternoon of the day before the auction and asking her husband "to save it somehow" from which she understood him to mean the land due to be auctioned. To this her husband had replied, "I will see".

The first plaintiff strongly denied these allegations. The Third Party, he said, was not even on speaking terms with him at the time owing to the exercise, some time earlier, by him of his powers under a bill of sale to seize the plaintiffs' chattels. As for Yanktesh, he described the interest a group of farmers, Yanktesh being one of them, had shown for some time in purchasing the land in question. This was substantiated by Mr. Gordon, a solicitor, who had, under their instructions, written to the Native Land Trust Board to enquire what part, if any, of the land was to be included in the native reserve.

Baburam Sharma, a member of this group, gave evidence in detail of this group's interest in the land. They had inspected the land and were determined to purchase it. The first plaintiff's original price was £20,000 but, in view of the likelihood of losing the land, he had reduced it to £10,000. They went to see Mr. B.K. Pillay, a solicitor, and found that the land was being auctioned. They decided, on Mr. Pillay's advice, to attend the auction and for this purpose they chose Yanktesh and Murugessan Reddy, with instructions to bid up to £11,000. By that time they had collected £6,000 and were to raise the remainder later.

Mr. B.K. Pillay had also died before the trial. Of the evidence of Baburam Sharma, the learned Judge said :-

> "He was thoroughly cross-examined. I take into account the fact that he was giving evidence of events that had taken place over 15 years earlier. I found him a reliable and truthful witness and I accept his evidence to be true. He said that shortly after the auction the Third Party called him to his house and offered to sell the said lease to Baburam Sharma's group at a profit. Baburam Sharma rejected the offer and said he was not interested in buying it from him. It is clear from his evidence that at that stage the Third Party was trying to make a profit out of the resale of the land."

The Judge after reviewing the evidence in considerable detail found Yanktesh to have been a genuine bidder at the auction and the Third Party, also a genuine bidder, to have purchased the land with a view to extracting a higher price later from this interested group of farmers. He rejected the claim that either Yanktesh or the Third Party was an agent of the first plaintiff.

Counsel for the defendant and the Third Party have drawn this court's attention to numerous discrepancies and apparent contradictions in the evidence of the first plaintiff and Baburam Sharma and submitted that, under the circumstances, it would be proper for this court to reverse this finding of fact by the learned Judge. The headnote in Benmax v. Austin Motor Co. Ltd. (1955 1 All E.R. 326), which they cite in support of their submission, reads :-

> " An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding

> of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge. "

The evidence here, however, raises primarily, if not solely, the question of credibility of witnesses who were describing from memory events occurring fifteen years earlier. It would be completely outside the scope of the rule in Benmax v. Austin Motor Co. for an appellate court to hold that such a witness, accepted as reliable and truthful by the trial Judge, had given fabricated evidence. On the evidence before him, and on his analysis of it, the learned Judge in this case was entitled, and indeed correct, to find that neither the Third Party nor Yanktesh was, at the July auction, acting as the first plaintiff's agent.

The question, however, still remains: was the Third Party's bid of £11,100 the true market value of the land at the date of the November sale? It is true that the plaintiffs had paid only £2,500 for it six years earlier but the transaction was between the plaintiffs and the second plaintiff's brother and there is no evidence of any plan of development being in existence at the time whereas, by 1968, the plaintiffs had devised a scheme of sub-division approved in principle by the Native Land Trust Board. The plaintiffs themselves, on the evidence, were completely unable to implement it but the possibility of several titles combined with agricultural use had definite potential of which some interested buyers like Yanktesh's group of farmers would have been aware.

The price of £2,500 paid for the property in 1962 was, therefore, no satisfactory basis for assessing the market value of that land in 1968.

The other two factors viz. the remaining term of the lease and the possibility of the land going into native reserve were of considerable moment. The land came under the provisions of the Agricultural Landlord and Tenant Act, as it stood in 1968, and potential buyers would have known that only the land not required by the native owners for their own use would be available for further leasing.

It was this very information that Yanktesh's group of farmers sought from the Native Land Trust Board through Mr. Gordon. Imamu Dean himself had obtained this information from the Cooperatives Department. It was known to persons interested in the purchase of this land that only a small portion, 300 to 400 acres, would be required for the use of native owners, the remainder being available for renewal. That would, in our view, have been the state of knowledge of potential buyers interested in the land in November 1968.

The defendant, however, called a witness, Jone Naeqe Nakaitoga, who was in 1968 a land agent employed by the Native Land Trust Board and based at Sigatoka. He was also member of a development committee chaired by the local District Officer. Nothing in the evidence indicates the extent of this committee's authority or its exact functions. There is no suggestion, however, that it could take over any of the functions of the Native Land Trust Board or exercise any of its powers over native land. This witness said that the whole general area in which the mortgaged land was situated was earmarked for re-afforestation and "frozen" meaning thereby, presumably, that new applications for land in this general area for agricultural purposes were not being entertained owing to

the development committee's recommendation as to its future use. When asked about the Cooperatives Department's development proposals for the mortgaged land he said :-

> "It was not brought to my office. Suva office was handling all dealings with this lease."

And again :-

> "During whole period I was in Sigatoka. I had nothing to do with this land as far as I remember."

He also conceded that the fact of any land being frozen had not been made known to the general public.

The defendant's counsel refers to the learned Judge's omission in his judgment to make any reference to this witness's evidence and invites us on the authority of Gopal Gosai v. Ram Dass (FCA 1 of 58) to treat it as a defect fatal to the learned Judge's assessment of the proper value of the land. We do not consider that decision to have any application to evidence of this nature. Nakaitoga had conceded that all dealings concerning the land in question were handled by the Head Office of the Native Land Trust Board whose general secretary himself testified that approval in principle of subdivision of this land had in fact been granted. Nakaitoga also knew that part of this land had gone into native reserve, a fact that was also known to persons interested in purchasing the land. The general Secretary of the Native Land Trust Board had made no mention of the mortgaged land, or any native land, being "frozen", whatever that term means.

In Gopal Gosai v. Ram Dass there was a direct contradiction on the main issue between what the plaintiff

was claiming and what was asserted by the solicitor's clerk who had made the document relating to a sale. In this case there is no such contradiction, Nakaitoga himself admitting that he had never handled any matter relating to the mortgaged land. Furthermore, there was no disagreement between the plaintiff's witnesses and Imamu Dean himself as to the area known to potential buyers to have gone into native reserve. We do not, therefore, consider the learned Judge's omission to comment on Nakaitoga's evidence to be a serious flaw in the judgment; nor do we consider an evaluation of that evidence by this court, which this court has certainly attempted to do, to have any significant impact on the issue of value.

We accept the Defendant's Counsel's submission that any restrictive condition or statutory provision must necessarily have a diminishing effect on value. These, in this case, were the short remaining term of the lease and the area unavailable for renewal, both known to potential purchasers. The area required for native owners could, of course, vary if notice to this effect under the provisions of the Agricultural Landlord and Tenant Act, then in force, were given to the lessee. As things, however, stood at the date of the sale potential purchasers would rely on the information furnished by the Native Land Trust Board, the sole authority over such matters.

There was no evidence of comparable sales in the area. The only evidence of value consisted of prices actually offered by Yanktesh and the Third Party at the July auction and the learned Judge, having held that they were genuine bidders, was correct in taking those prices as indications of market value. He also took into account that the next highest bid below those two was £6,000. He decided that the price offered by the Third Party was the true value of land. He, however, also found that the

Third Party was a mere speculator in land who having failed to resell it at a profit refused to complete the contract with the defendant. This, to our mind, is not a satisfactory basis for assessing what a willing genuine buyer would pay. Baburam Sharma's evidence was that they were, at the auction, prepared to go as high as £11,000 but no higher. That was their limit under pressure of competitive bidding, the sole competitor in this case being the Third Party, an unsuccessful speculator. The value they themselves had placed on the land after thorough inspection and assessment of its potential was £10,000 a price acceptable to the plaintiff. But for the abortive auction, that was the price at which the land would have been sold and we consider that to be the correct basis for assessing the true market value of the mortgaged land at the date of the sale, there being no evidence of diminution of values between July and November, 1968.

The appeal, to that extent, is allowed and the value of land reduced from £11,100 to £10,000.

Ground 2 deals with the question of the auctioneer's commission which the learned Judge reduced from 10% to 2½% but allowed in respect of both the July as well as the November auction. The defendant submits that section 64 of the Land Transfer and Registration Ordinance (1955 Laws of Fiji) which applied in 1968 authorises the deduction from the purchase money expenses of the sale and that the auctioneer's fee paid by the mortgagee was such an expense. In his written submission Counsel says :-

> "This section, it is submitted, does not in any way put any constraint on the mortgagor so that he is liable to refund expenses incurred which are unreasonable and excessive."

It is true that the wording of the section does not do so, but we are satisfied that the duty of care that the law imposes upon a mortgagee must extend to expenses under section 64 in the same way as it does to section 63 which empowers him to sell the mortgaged property "without being answerable for any loss". He must under section 64 have reasonable regard to the interests of the mortgagor so as not to eat unreasonably into the surplus to which he would be entitled.

In the instant case the learned Judge accepted the evidence of the auctioneer Joseph that his services had, at times, been used by the defendant and that in case of land of this size he would have charged 2½% plus expenses. He normally charged 5% for cattle and 10% for chattels and furniture.

There was no evidence to suggest that in Fiji auctioneers' fees are regulated by law. In our view a commission of 10% on a sale of large areas of land involving big sums of purchase moneys is exorbitant. We see, therefore, no reason to disturb the finding of the learned Judge on this issue.

Ground 7 complains of interest of 5% allowed to the plaintiff under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act on the ground mainly of delay on the part of the plaintiff in prosecuting his claim. The delay, however, as the Judge found was not entirely due to fault on the plaintiff's part and in any case no steps appear to have been taken by the defendant to expedite the proceedings. The power under the statute to allow interest is discretionary and it was not, in our view, unreasonably exercised.

Ground 8 relates to credibility of the first plaintiff as a witness. We have already dealt with this issue in our treatment of the question whether or not

Yanktesh and the Third Party were acting as the first plaintiff's agents at the July auction. First plaintiff was undoubtedly an interested party and his testimony had to be approached with caution. The learned Judge accepted his evidence largely where it was supported by Baburam Sharma whom he relied upon as a witness of truth. On the issue of value the learned Judge did not accept the first plaintiff's own estimate of £20,000 as the true market value. On negligence, the only other important issue, there were other witnesses such as the auctioneer Joseph and the defendant's own witness Imamu Dean whose evidence indicated inadequacy of time allowed and particulars given by the advertisement. The first plaintiff's lengthy cross-examination by counsel contains numerous discrepancies and some damaging admissions but, on the main issues requiring determination, those discrepancies and admissions could not, in our view, have made any significant difference to the eventual outcome. We, therefore, propose to say no more on this ground.

The defendant's last ground can, more appropriately be considered with the Third Party's Ground 1, which also raises the issue of damages awarded in favour of the defendant. Though the ground of appeal uses the word "indemnity" the judgment itself is in following terms :-

> "As to the defendant's claim against the Third Party there will be judgment for the defendant against the Third Party for $15,400 damages."

The figure $15,400 represented in dollars the difference between the prices obtained at the July and November elections respectively.

The mortgage debt and expenses of sale were fully covered by the price of £3,400 obtained at the November auction and, to that extent, the defendant suffered no damage at all. His claim for damages consists

of the amount he now has to pay to the plaintiff for his failure at the November auction to obtain the true market price. The learned Judge held the July agreement to purchase to be valid and binding and the Third Party liable in damages in respect of the loss suffered by the defendnnt. He, however, also held the defendant to be negligent in failing to take necessary precautions to obtain the true market value viz. £11,100. In Janal v. Moolla Dawood, Sons & Co. (1916 A.C. 175, at 179) the Privy Council said :-

> "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect."

The learned Judge in this case found nothing to suggest a drop in values of land between July and November and found the defendant liable to pay the full difference between £11,100 and £3,400. Any loss, therefore, suffered by the defendant was entirely due to his own failure to take reasonable steps to mitigate it. We concur with the Judge's finding of neglect on the part of the defendant but, having done that, we are unable to agree that the Third Party should be held liable to compensate him for loss resulting from that neglect.

The Third Party's ground 1, consequently, must succeed.

There is, however, another question, raised in the Third Party's grounds 2 and 3 which causes us some concern. The sale agreement between the defendant and the Third Party was entered into on 27th July 1968 both parties, on that day, signing the application for the Native Land Trust Board's consent under section 12 of the Native Land Trust Act which renders null and void any dealing in

native land by a lessee without prior consent of the Native Land Trust Board. This consent was granted on 11th October 1968. The learned Judge said :-

> "Pending the granting of consent of the Native Land Trust Board this agreement, of course, remained incohate (sic) or inoperative: D.B. Waite (Overseas) Ltd v. Sidney Leslie Wallath, Fiji Law Reports Vol. 18 p. 141."

He, however, held that both parties treated the agreement as remaining on foot until after the consent had been granted and found the Third Party guilty of breach after the agreement had become operative and binding. Counsel for the Third Party contends that the agreement had been completely repudiated by the Third Party before 11th October, 1968 and that on that date there was no agreement which could be made operative by the Board's consent. The question before this Court in D.B. Waite v. Wallath was, as Gould V.P. put it, "whether it (the agreement) was binding, pending the consent of the Native Land Trust Board or whether lawfulness depended on its remaining inoperative so that either party could repudiate it at will". All the three Judges there came to the conclusion that in such circumstances no element of enforceability, as far as it touched the land, could be attributed to the agreement without contravening section 12 of the Native Land Trust Act. We accept, and Counsel for the defendant concedes, this proposition to be correct in law and the only issue, therefore, is whether the repudiation by the Third Party occurred before or after 11th October, 1968. In this regard Counsel for the Third Party refers to the letter dated 20th January, 1969 from Koya & Co. to Munro, Warren, Leys & Kermode in which appears the following :-

> "The consent was obtained but before the receipt of such consent, Mr. Khan categorily informed us that he purchased the property as duly authorised agent of

> your client Mr. Shamsud-Dean and in the circumstances he wished to be released from the contract. We refused to accede to his request and subsequently he stopped payment on the cheque. Despite several requests Mr. Khan refused to complete the deal. On the 13th November, 1968 we gave a written notice to Mr. Khan."

If this is correct, and it should be treated as an admission by the defendant adverse to his own interest, then the repudiation was before the consent, there being no question of refusal to release the Third Party from an agreement which was not binding upon him any way. A categorical intimation of refusal to proceed with the agreement followed immediately by stopping of payment on the cheque, in our view, constitutes a sufficient act of repudiation. True, that the Third Party's letter of 7th August, 1968 to Koya & Co. spoke of need for further clarification of conditions of sale as the reason for stopping encashment of the cheque but no clarification was ever sought and the deposit remained unpaid. The reason for repudiation, according to the letter from Koya & Co. to Munro, Warren, Leys & Kermode, given by the Third Party that he was merely acting as an agent, was held by the Judge to be false. But, in our view, it is the fact of repudiation, not its reason, that is relevant.

There is, however, evidence of the Third Party offering this land after the auction to Baburam Sharma at a higher price. At that date he must be taken as treating the agreement as being on foot. Unfortunately there is no precise date given for their meeting, as might well be expected of a farmer describing occurrences 16 years old. According to his evidence the Third Party first called him to his house one week before the July auction and offered to sell him a piece of freehold land belonging to him. Three weeks after this first meeting he called

him again to offer him the mortgaged land at a price higher than his purchase price. In between these two meetings the auction of 27th July had taken place. From this evidence it seems to us more probable than not that the second meeting took place at about the time of the Third Party's meeting with the defendant's solicitors and his letter of 7th August, 1968 stopping payment on the cheque. The imprecise nature of this evidence as to dates is not sufficient, in our view, to dislodge the effect of a precise and cogent admission by the defendant's counsel who would normally have a record of these events. The notice of 13th November 1968 sent to the Third Party indicating the defendant's decision to resell and claim damages would have legal significance only if there was repudiation of a binding agreement. If 'repudiation' occurred before the Native Land Trust Board's consent, there would be no agreement left to rescind.

Similarly S.B. Patel & Co's letter of 15th November, 1968 to the Native Land Trust Board saying that the Third Party was not interested in purchasing the land cannot lead us to the inference that until that date he treated the agreement as subsisting if, in fact, he had, before the agreement became operative, already categorically indicated to the defendant's solicitors that he was not completing it and had stopped payment on the cheque. We must accept the admission to this effect by the defendant's own solicitors who were in a position to know the exact sequence of events to be the best evidence on the issue.

We, therefore, conclude that, repudiation having occurred before the agreement between the defendant and Third Party became operative, there was no breach that could give rise to a claim for damages.

The Third Party must succeed on this ground also.

In the result, the damages awarded against the defendant are reduced from $15,400 to $13,200, interest being payable on the latter sum. The auctioneer's commission, calculated on the actual prices of the two sales, will remain unaltered. The costs of this appeal, as between the plaintiffs and the defendant, will be taxed, if not agreed, on the basis that the defendant's appeal has been partly successful.

The judgment entered against the Third Party is wholly set aside and he is to have costs against the defendant in this court as well as the court below.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal