

IN THE FIJI COURT OF APPEAL
(At Suva)

Civil Jurisdiction

CIVIL APPEAL NO. 11 OF 1988
(High Court Action No. 415 of 1988)

BETWEEN:

BECHANI GOLAY

Appellant

and

NORTH END PROPERTY DEVELOPMENT LTD

Respondent

Date of Hearing : 7.3.89

Date of Judgment : 23.5.89

Mr V.J. Parmanandam for the Appellant

Mr A.K. Narayan for the Respondent

JUDGMENT

This is an appeal from an order of the High Court made upon an application under Section 169 of the Land Transfer Act Cap 131 (the Act) granting vacant possession of certain land to the Respondent.

The piece of land in question comprises some 4 acres 1 rood situate at Tamavua in Suva and contained in Certificate of title No. 24799. One Raghbir (f/n Tulsi) became registered proprietor of this land by transfer on 9/12/1930. Raghbir's whereabouts have been not known since the early 50s and he is believed to have died in 1952 or thereabouts. On 11/11/64 a transmission by death memorial was entered on the title in favour of the District Administrator and on the same date he transferred the land to the Director of Lands. This placed the land in the Crown ownership. On 30th April 1981 the Director of Lands on behalf of the Crown, leased the whole of the land to the Suva Society for the Intellectually Handicapped for a period of 99 years with effect from 1st December 1978. Sometimes in 1979 the Society erected a fence around the whole of the land and in 1983 or 1984 the Society gave the defendant and all others living on the land notice to vacate the land.

During the middle 80s it was ascertained that one Bal Ram Singh of India was the next-of-kin of Raghbir. Bal Ram Singh instructed his Solicitor, Mr Maharaj to lodge a claim with the Government for the return of the land to the estate of Raghbir Singh. On 4/1/87 the land was transferred to Bal Ram Singh in his capacity as an executor and trustee of the estate of Raghbir. Bal Ram Singh sold the land to the Respondent company which became the registered proprietor on 31 August 1987 with the mortgage back to Bal Ram Singh registered simultaneously. On the same day the Society lodged a caveat in respect of 2 acres of land which the Respondent Company had agreed to give to the Society in consideration of the Society surrendering its lease over the whole of the land.

It is common ground that the Respondent's Solicitor on 3.5.88 gave the Appellant notice to deliver up vacant possession and that she failed to do so, hence the Section 169 application.

The Appellant raised three issues before the learned Trial Judge, who, in a considered judgment dismissed all three as being without merit. The first was one of Fraud.

Counsel for the Appellant before us abandoned that ground and we therefore need to make no further reference to it.

The second issue raised was that the matter ought to have been deferred as the Appellant had made or was intending to make an application under the Agricultural Landlord and Tenant Act Cap 270. This point too was abandoned, it being conceded that such application was not being pursued.

The third matter concerned an alleged application for a Vesting Order under Section 78 of the Act. The Appellant's counsel produced a letter from the Bar Table to show that an application for a vesting order submitted to the Registrar of Titles was returned because it did not conform with the provisions of the Land Transfer Act.

The grounds of Appeal insofar as relevant to the Vesting Order issues are as follows:-

3(a).

"9. The Learned Judge misunderstood and thereby failed to properly apply the principles relating to adverse possession and the acquisition of title thereby in holding that:

(a) it was noteworthy the Appellant had not lodged a Caveat to protect her interest in the land; and

(b) she had not sought to enforce her rights by any positive Court action against Bal Ram Singh.

11. The Learned Judge in construing Section 90 of the Land Transfer Act was exempting land owned or occupied by the Crown from the provisions of the principles of acquisition by adverse possession when the sole reason for occupation by the Director of Lands was on account of the absence of the former registered proprietor.

12. The Learned Judge erred in holding that the registration of Director of Lands was sufficient to break the occupancy of the Appellant with respect to her adverse possession."

The whole of the judgment of the learned Trial Judge on the point in issue is as follows (after disposing of the two grounds which have now been withdrawn):-

3. (b)

"(c) A pending Application under the Land Transfer Act Cap. 131 for a Vesting Order

In this regard there is an unstamped application executed by the defendant on the 10th of August, 1988 (i.e. 6 days after the plaintiff company's Section 169 summons was heard).

Such an application must be made to the Registrar pursuant to Section 78 of the Land Transfer Act Cap. 131. It is noteworthy that as of the 17th August, 1988 enquiries by the plaintiff company's solicitor with the Registrar of Titles revealed that the defendant's application for a vesting order had not been lodged.

Nevertheless the defendant claims that she has occupied the land uninterrupted since 1942 and 1952 which on the face of it represents some 45 and 36 years of occupation.

But it is clear from the affidavits and on the face of the title document that between 1964 and 1987 (some 23 years) the land was held by the Director of Lands and as such was "land owned or occupied by the Crown."

This ownership is further exemplified by the 99 years special lease it granted to the Suva Society for the Intellectually Handicapped in 1978.

In my view the fact that the title to the land has now reverted back to its original proprietor namely Raghubir Singh from the Director of Lands, does not entitle the defendant to assert continuous occupation for 30 or 40 years adverse to Raghubir Singh or indeed the administrator and trustee of his estate.

This is the clear effect of Section 90 of the Land Transfer Act which exempts land owned or occupied by the Crown from the provisions of Section 78 under which the defendant's application for a vesting order is brought.

I would dismiss this ground as being without merit.

In the result the plaintiff company's application succeeds and an order for vacant possession is granted, however execution is stayed for a period of 30 days from the date hereof.

The plaintiff company is also given its costs to be taxed if not agreed."

In our view, for the present purposes this resolves itself to one question and that is the meaning of Section 90 of the Act. Essentially the learned Trial Judge held that the appellant had not proved her right to possession because the period of her adverse possession had been interrupted by the Crown ownership between 1964 and 1987 by virtue of Section 90.

Section 90 is as follows:-

"Certain lands exempt

- 90. - The provisions of Section 78 to 89 inclusive shall not apply with respect to -
 - (a) any land owned or occupied by the Crown;
 - (b) any native land as defined in section 2 of the Native Land Trust Act;
 - (c) any land the registered proprietor of the fee simple of which is a local authority as defined in section 10 of the Public Health Act; or
 - (d) any land held in trust for any public purpose, of which trust the Registrar has notice."

Section 78 so far as relevant is as follows:-

"Application for vesting order

- 78. - (1) Where -
 - (a) Any person is in possession of any land subject to the provisions of this Act, for which a certificate of title has been issued or a crown grant registered under the provisions of this Act; and
 - (b) such possession has been continuous for a period of not less than twenty years, and is such that he would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the provisions of this Act,

he may apply to the Registrar in the manner hereinafter provided for an order vesting the land in him for an estate in fee simple or for such other estate or interest as may be claimed by him."

Sections 79-80 provide for the machinery following an application under Section 78.

We think the question here is as to the interpretation of Section 90 (a). The learned Trial Judge obviously interpreted it as meaning that a Section 78 application is not available if the land during the prescription period has been "owned or occupied by the Crown," at least long enough to prevent the prescription period from accumulating.

In our view the meaning of Section 90(a) is that no Section 78 application may be brought at a time when the Crown is in ownership or occupation.

No cases have been cited to us on this point of interpretation and we are not aware of any. However, a perusal of the section will aid interpretation. It is in accordance with principle to construe all subsections according to the same tenor.

Subsection (b) is easily understood. Since under the Native Land Trust Act native land may not be alienated except to the Crown it is not surprising that title for it may not be obtained by the sidewind of prescription.

Subsection (c) contains the significant word "is". This clearly means that a vesting order may not be applied for at a time when a local authority is the registered owner. It says nothing about such an authority having been the owner at some time during the prescription period.

The same may be said of subsection (d). Clearly there the land must be held in trust at the time of the intended application in order to prohibit it.

It would have been perfectly simple for the Legislature to provide that the period mentioned in Section 78 shall be deemed not to be running during any time in which the Crown was the registered owner or in possession of the land.

Section 90 was first introduced in 1971 by the Land Transfer Act 1971 (No. 19 of 1971). We note that it is in very similar terms to Section 21 of the Land Transfer Amendment Act 1963 of New Zealand. The provisions of Section 3-20 of that Act are also closely mirrored in Sections 78-89 of the Fiji Act. This would lend support to its use in construing the Fiji Act.

The New Zealand Act provides, as far as relevant, as follows:-

"21. This Part not to apply in certain cases -

No application shall be made under Section 3 of this Act -

- (a) With respect to any land owned by the Crown, except as provided in section 17 of this Act;
- (b) With respect to any Maori land within the meaning of the Maori Affairs Act 1953;
- (c) With respect to any land the registered proprietor of the fee simple of which is a local authority;
- (d) With respect to any land held in trust for any public purpose, being a trust noted or deemed to be noted on the register pursuant to Section 129 of the principal Act;"

(Section 3 is the equivalent of our section 78. Section 17 deals with cases where the registered proprietor is a company or corporate body that has been dissolved and the property of which has vested in the Crown as bona vacantia. It is not therefore relevant to the present purpose).

It will be seen that the tenor of the provision is almost identical with Section 90 of the Fiji Act, but the opening phrase makes clear the point here in issue: "No application shall be made." It clearly speaks of the position at the time of the proposed application.

In our view Section 90 should be construed in the same way. If a different construction was intended it would have been expressed quite positively, having regard to the far reaching effect.

Therefore, although this precise point was not argued before us we hold that Section 90 in itself does not prevent the appellant from claiming title by adverse possession.

With regard to Section 78 we are of the view that the application for or obtaining of a vesting order is not a pre-requisite to defending a Section 169 application, though it may be prudent. The Fiji Court of Appeal in Lee Bow Yiu v Patel & Anr. 5 FLR.62 said at p. 64:-

"Until she obtained a vesting order under Section 83 of the Fiji Ordinance, which it is conceded counsel for respondents she could have obtained at any time between 1928 and the date of issue of Certificate of title No. 7818, her title would not be evidenced by a document over the signature of the Registrar of Titles; - but it was nonetheless an absolute and indefeasible title recognized by law."

and at p. 66:-

"There is however, not one word in the Real Property Limitation Act or the Ordinance Cap 120 to say that a title acquired by adverse possession is ineffectual against the registered proprietor until perfected by the issue of a vesting order. Before an adverse possessor who has acquired such a title is able to transfer his title to a third party it would no doubt be desirable, and from the point of view of the transferee necessary, that he should have official written evidence of his title; and for that purpose he may apply for a vesting order under section 83. That section is permissive and not mandatory."

We respectfully adopt those statements.

Having decided that the learned Trial Judge's construction of Section 90 was erroneous we proceed to consider whether the Defendant/Appellant has discharged the onus placed upon her by statute. It is desirable that this Court should bring litigation to finality if it can properly do so on the material before it.

The Court has power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require.

Under Section 172 LTA the Defendant to the application (the present Appellant) clearly carries the onus of proving "to the satisfaction of the judge a right to the possession of the land."

There are a number of unsatisfactory features in the evidence and the Appellant herself has made conflicting statements in her evidence. Several matters stand out particularly: She states in an application for a Vesting Order annexed to her affidavit of 10.8.88.: "The permission for entry onto the land was given by the owner, Raghubir Singh." This fact alone would negative any claim on her part to adverse possession.

In Allen v Roughley, 94 C.L.R., Williams, J. in the High Court of Australia said this on p. 115:-

"Holdsworth continues (p.65) : "(b) if an action of ejection is brought against a defendant whose possession is not adverse to that of the plaintiff (e.g. if the defendant is in possession merely as a bailiff for the plaintiff) the plaintiff, by construction of law, is and has always been in possession: and the defendant being estopped from disputing this fact, the plaintiff is entitled to succeed."

I would have thought that it would have been open to his Honour to have found on the evidence that the defendant and his wife were permitted by William to live in the homestead and that the defendant was permitted by him to work the adjoining land both Martin's block and Hyland's block for his own benefit.

In that event the occupation of the defendant would not have been adverse to the possession of William but on his behalf and the latter's possession would have continued by construction of law and the defendant would have been estopped from disputing it."

(See also Hughes v Griffin and Anr. 1969, 1 All E.R. 460).

Secondly, the period of possession of the land claimed by the Appellant is uncertain. She states in her affidavit of 29.7.88 that she has been living on the land since 1959, with her husband and children, and elsewhere in the same affidavit that she has been living there since 1964. In the Vesting application she claimed that she started cultivating the land (with her husband) in 1945, and elsewhere in the same puts that date at 1942. She claims that she and her husband moved on to the land to live in 1952.

Thirdly, one Ram Gati - who is the son of the Appellant - in an unchallenged affidavit sworn on the 17.8.88 deposes that during the early years of his life - he was born in 1937 - he lived with his parents on land next to the land here in issue as tenants of the owner one Ram Saroop. He deposes from his own knowledge that neither of his parents took possession of the land in issue in 1945. He also states that Raghubir would not have given permission to enter his land.

Moreover, annexed to Ram Gati's affidavit is a letter written by his father, the late husband of the Appellant in 1972 to the Minister for Lands in which he states that for the past about 50 years he had been a tenant of Ram Saroop and had cultivated Raghubir's land "by remaining on my own site which is at a distance of only 7 chains."

Furthermore, the extent of the land laid claim to by the Appellant is also uncertain. In her affidavit of 29.7.88 she states: "That since 1964 I have been living on part of land with my children and family to the exclusion of all others except that about half an acre has been used by the Crippled Childrens Society of Fiji." In her vesting application she states that the Fiji Blind Society acquired half an acre in 1984.

It is essential for a person claiming title by adverse possession to prove the precise area he claims:

Abdul Rahman Sahu Khan v Dhupraji - 14 F.L.R. 181.

Yakub Ali & Others v Ram Singh & Others 13 F.L.R. 69.

The following issues at least are therefore unresolved on the evidence:-

1. The very identity of the land claimed;
2. The extent of the land and its precise area;
3. The period of possession;
4. Whether the possession was adverse;
5. Whether it was the Appellant who was in possession rather than her husband.

The Appellant carried the onus of resolving these issues in her favour in order to satisfy the Judge that she had a right to possession. In our view - leaving the Section 90 question completely to one side - the learned Trial Judge could not have been satisfied and nor are we satisfied that the Appellant has discharged that onus even on the balance of probability. In order to constitute title by adverse possession, the possession relied on must be for the full period; it must be actual, open, exclusive and continuous.

[See - McDonnell v Giblin (1904) 23 N.Z.L.R. 660 at p. 662.]

In those circumstances the Appeal is dismissed with costs.

Moti Tikaram

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Sir Moti Tikaram
JUSTICE OF APPEAL

M.D. Jesuratnam

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M.D. Jesuratnam
JUSTICE OF APPEAL

H.D. Palmer

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H.D. Palmer
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