

45
IN THE FIJI COURT OF APPEAL
Civil Appeal No. 4/90

BEFORE THE HON JUSTICE MICHAEL M HELSHAM
PRESIDENT OF THE FIJI COURT OF APPEAL
AND THE HON JUSTICE SIR MOTI TIKARAM
RESIDENT JUDGE OF APPEAL
AND THE HON JUSTICE SIR MARI KAPI
JUDGE OF APPEAL

TUESDAY THE TENTH DAY OF MARCH, 1992 AT 2:17 P.M.

BETWEEN:

PRINCE VYAS LAKSHMAN
VEENA DEVI LAKSHMAN

APPELLANTS

AND :

THE TRUSTEES OF SANATAN DHARAM
STRI SABHA PITAMBAR
MADHAVJI RANIGA
KADAVU DEVELOPMENT COMPANY LIMITED
SUVA CITY COUNCIL

RESPONDENTS

MR V KAPADIA
MRS T JAYATILLEKE

FOR THE APPELLANTS
FOR THE FOURTH RESPONDENT

46

J U D G M E N T

JUSTICE HELSHAM : Under section 39(1) of the Land Transfer Act, a person who acquires land registered under the provisions of that Act, takes it free from any encumbrances affecting the land except those that have been noted on the title in the way specified. This is subject to certain exceptions that do not apply here, and a requirement that there be no fraud, which is not alleged in this case.

The plaintiffs brought proceedings in effect to obtain declarations that their land, which is land registered under the provisions of the above-named Act, is free from certain what might be thought to be encumbrances, a course which one might think was prudent in the circumstances that will be detailed later.

The plaintiffs are the registered proprietors of two parcels of land, the transfers to them having been registered in 1983 and 1985 respectively. The first three defendants are the registered proprietors of three parcels of land which adjoin those of the plaintiffs. The contours of the whole area are such that water in a natural state would flow on to the plaintiffs' land from that of the three defendants or from some other higher land which is channelled through those lands on to theirs.

At the time of the acquisition, the position has been described thus:

"At present water in an underground drain flows from the Second Defendant's property (Certificate of Title No. 11643) and enters the western boundary of the First-named Plaintiff's property (Certificate of Title No. 11771). There is no drainage easement registered on the plaintiff's property in Certificate of Title No. 11771.

JUSTICE HELSHAM

Also at present water flows in an open concrete drain from the First Defendant's property (Certificate of Title No. 11778) at the northern boundary. There is no drainage easement registered on the plaintiff's property in Certificate of Title No. 11778.

Also water flows in an open concrete drain from the Third Defendant's property (Certificate of Title No. 11767) into the plaintiff's property (Certificate of Title No. 11778) and enters that boundary at the eastern boundary."

(Record page 127)

There is no suggestion that the plaintiffs were not aware of these drains at the time they acquired their land but in the events that occurred, this is of no moment.

In early 1986, the plaintiffs decided that they wished to develop their land and that the presence of the drains would interfere with this. In May 1986, they gave a separate notice to each of the defendants requiring each of them "to divert the said drain so that it does not flow out into our client's property." The notices added "Our clients intend to seal off the said drain where it enters their property after the 31st day of May, 1986."

(Record page 21)

The notices were not complied with and the plaintiffs commenced proceedings on the 19th June 1986. The Originating Summons sought a declaration that the plaintiffs were entitled to seal off the drains that entered their properties. They joined as defendants the owners of the land from which the water flowed in the drains and also the Suva City Council, the latter presumably because it was the Local Government Authority charged with matters of drainage in the area. It is to be noted that the present drains appear to discharge from the land of one of the plaintiffs on to a public road or reserve.

JUSTICE HELSHAM
(Contd)

The proceedings wound their way slowly through the channels of the court system and eventually came on for hearing in May or June 1989. Of the defendants, only the fourth defendant, the Suva City Council, was represented at the hearing. It is interesting to note that at the hearing, the plaintiffs relied on the matter of the indefeasibility of their title and the absence of any encumbrances noted on it, while the fourth defendant sought to establish that, in the circumstances, that did not avail the plaintiffs and that they were bound to retain the drains on their land and the flow of water through them.

The judge gave judgment on 14th August 1989. He upheld the submissions put on behalf of the plaintiffs and held that their lands were not burdened with any rights of others to discharge water on to their lands and were entitled to a declaration as sought that they were entitled to seal off the drains. In this regard, we think he was quite right and do not propose to interfere with his finding. The contrary has not been argued before us.

Notwithstanding the position taken by the Suva City Council and the grounds of their opposition, His Lordship ordered the parties to pay their own costs. Unfortunately, having decided that the plaintiffs were entitled to their declaration, His Lordship went on thus:

"However, I consider that this right which I find they have must be conditional on them undertaking to indemnify and keep indemnified all other land owners in the vicinity of the Plaintiffs' properties who are likely to be affected by my decision. I also direct that the works which they propose to undertake on the land in question must have the approval of the Suva City Council at the Plaintiffs' cost."

(Record page 132)

JUSTICE HELSHAM
(Contd)

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(Record page 132)

These qualifications were incorporated into the formal order of the court. It is only against these qualifications that the plaintiffs now appeal.

The trial Judge, in our opinion, was not entitled to impose them. There is no suggestion that they were raised during counsel's submissions and certainly not in the evidence filed, and, of course, they could not have been argued unless some kind of cross appeal had been filed, which is not the case. There is no suggestion that the plaintiffs did not intend to comply with such legal requirements as might be applicable to anything that a land owner does on his land which relates to or touches upon drainage matters. In reaching our conclusions, we do not wish it to be thought that we are suggesting that the plaintiffs might ignore any such requirements if they were to seal off the drains. Indeed, counsel for the appellants has assured us that that is not the case. We can only assume that the trial Judge, in what he saw was an attempt to achieve some form of justice for everyone who might be involved if the drains were to be sealed up, and in the absence of the adjoining owners before him, imposed a requirement as to indemnity, and assumed that any actual work to be undertaken in the process of sealing up the drains would need Council approval. There was no evidence that it would and we are informed that if any such work were to be undertaken, it would not require Council approval.

As we said earlier, this has nothing to do with the rights and duties imposed by law on the Suva City Council as drainage authority nor the requirement of the plaintiffs to adhere to any legal requirements in this respect. The declaration originally sought by the plaintiffs was merely used as a convenient means of obtaining the court's imprimatur on their assertion that their lands were not burdened with

JUSTICE HELSHAM

any encumbrances of a legal or equitable nature relating to the drains in question, nor easements of any kind in favour of adjoining land holders. It was certainly not an attempt by them to avoid any responsibilities that might lie upon them as registered proprietors to comply with the laws relating to drainage. It was probably not necessary for them to go to court at all to establish their rights as registered proprietors vis a vis neighbouring land holders, although, as we have said, one might think that it was prudent for them to do so. Perhaps this is what motivated the Judge in making the order that he did about costs. Having been joined as a party, probably unnecessarily, it is not surprising that the Suva City Council argued to maintain the status quo.

As a result, the appeal will be upheld and a declaration made in the terms of the first declaration of His Lordship. In all the circumstances, we feel that the proper order as to costs is that each party should pay its own costs of the appeal.

Appeal allowed. Order of the trial Judge quashed and in lieu thereof, we substitute the following declaration:

Declare that the plaintiffs are entitled to seal off the drains that enter their properties namely the lands comprised in Certificates of Titles 11771 and 11778. Each party to pay his, hers and its costs of the appeal including the costs at first instance.



M. M. Helsham
PRESIDENT
for FIJI COURT OF APPEAL