

IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 10 OF 1993

(High Court Civil Action No. 293 of 1992)

BETWEEN:

DIRECTOR OF LANDS
ATTORNEY-GENERAL OF FIJI

APPELLANTS

-and-

ABDUL RAZAK
HASIM ALI

RESPONDENTS

Mr. Daniel Singh for the Appellants
Dr. Sahu Khan for the Respondents

Date of Hearing : 10th November, 1993
Date of Delivery Judgment : 11th November, 1993

JUDGMENT OF THE COURT

On 21st August 1989, one Shaukat Ali, the proprietor of a lease of Crown land at Vatumami, Ba, secured \$12,300 by a mortgage, number 1890, on the land to the first respondent, Abdul Razak. Interest was payable at 13.5 percent per annum.

There appears to be some conflict as to the exact nature of the lease at that time and neither this Court nor the High Court has been shown a copy. However, the case proceeded on the basis that it was a protected lease between the Director of Lands as lessor and Shaukat Ali as lessee and the mortgage was, therefore, submitted to the Director of Lands for his consent under section 13 of the Crown Lands Act. Consent was given on 13th November 1987.

In February 1990 Abdul Razak wished to transfer the mortgage to the second respondent, Hasim Ali, for \$19,788.16. Application was made to the Director of Lands for his consent on 26 February 1990 but, in the meantime, Shaukat Ali had advised the Divisional Surveyor Western that no mortgage application in respect to his farm should be processed. That letter is not exhibited but the Divisional Surveyor wrote to the Respondent's solicitors on 1st March telling them that the lessee had advised them "not to process any mortgage application" in respect of his farm and stating they would "only consent to this dealing on receipt of a letter from Mr. Shaukat Ali stating he has no objection to this transfer of mortgage".

The respondents nevertheless, then transferred the mortgage on 2nd March 1990 and registered the transfer with the Registrar of Deeds on 9th March 1990. They also sought and obtained a declaration from the High Court in Lautoka "that no consent of the Director of Lands was required for the transfer of the Mortgage Number 1890 from the first plaintiff, Abdul Razak, to the second plaintiff, Hasim Ali".

The Director of Lands now appeals from that decision on the following grounds:-

- "1. That the Learned Judge erred in law and in fact when he held that the transfer of mortgage number 1890 is not a dealing with the land within the meaning of Section 13 of the Crown Lands Act, Cap. 132.

2. *That the Learned Judge erred in law and in fact when he granted a declaration that the Director of Lands is not required to be consulted let alone to be asked for his prior consent to transfer mortgage number 1890.*
3. *That the Learned Judge erred in law and in fact when he failed to take into account that the prior consent of the Director of Lands to the mortgage was granted for the sum of \$12,300.00 and the transfer of the said mortgage is for the sum of \$19,788.16, a sum different from the one consented to earlier on.*
4. *That the Learned Judge erred in law and in fact when he held that it is not the concern of the Director of Lands how much the new mortgagee pays for the debt."*

Dr. Sahu Khan for the respondents suggests the only question for this Court is whether the consent was required under section 13 which is ground two. The remaining matters were not, he says, raised in the High Court and cannot be raised now. We agree the appeal is to be decided on section 13 but it is clear the meaning of "dealing" and the increased consideration for the transfer were raised and referred to by the Judge and indeed he based his decision on a finding that the transfer was not a dealing in land.

With respect to the Judge that was not correct. The definition of dealing in the Land Transfer Act defines dealing as any transaction by which land or any estate or interest therein is affected. By the same Act, estate or interest includes any mortgage on the land in question.

Clearly the transfer of a mortgage is a transaction that affects an interest in land and is thus a dealing. However, we have already stated the question is resolved by reference to section 13 of the Crown Lands Act:-

"13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."

We consider the wording of that section is clear. It makes it unlawful for the lessee to deal with the land in any way without the prior written consent of the Director of Lands. Consent is also required for the lease to be dealt with in court proceedings or under any court process before the registration of any caveat affecting the lease. A mortgagee's sale, for example, would require the consent of the Director although it involves the lease being dealt with other than by the lessee.

In all cases covered by section 13, failure to comply renders the dealing null and void.

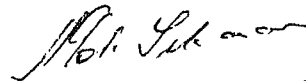
Mr. Singh for the appellant invites the Court to read the last paragraph of subsection (1) as widening the provisions to include every dealing in land whether or not it falls within the earlier provisions of the subsection. We cannot agree. Such an interpretation does not accord with the clear meaning of the section and would make the whole of the preceding part after the passage in parentheses unnecessary. The last passage simply states the effect of failure to comply with the earlier stated requirements of the section.

Dr. Sahu Khan correctly points out that subsections 2 & 3 refer only to the lessee. Indeed, the reason the respondents had to seek a declaration in the High Court was because subsection 3 gives a right of appeal against a refusal only to the lessee.

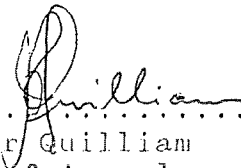
We consider the provision of section 13 are limited to the lessee and the specific proceedings mentioned in the section.

The first mortgage between the lessee and the first respondent was clearly a dealing that required the Director's consent. The subsequent transfer, although a dealing affecting the land, is not a dealing by the lessee and is not caught by the section.

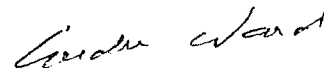
Although the Judge reached it by the wrong route, the declaration made is, for the reasons we have given, correct and so the appeal is dismissed with costs to the respondents.



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Sir Moti Tikaram
Vice-President, Fiji Court of Appeal



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Sir Peter Quilliam
Justice of Appeal



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Mr. Justice Gordon Ward
Justice of Appeal