IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 12 OF 1992
(High Court Civil Action No. 296 of 1991)

BETWEEN:

FAROOK AKBAR
MIRDULA DEVI — APPELLANTS

-and-

WESTERN LAND DEVELOPMENT AND INVESTMENT COMPANY LIMITED
THE ATTORNEY GENERAL OF FIJI — RESPONDENTS

Dr. Sahu Khan for the Appellants
Mr. Moses Gago for the 2nd Respondent

Date of Hearing : 10th May, 1993
Date of Delivery of Judgment : 25th November, 1993

JUDGMENT OF THE COURT

We suppose that Courts often wonder how it comes about that matters are brought to Court or that appeals are taken from decisions made in them.

The first defendant was, at least in 1973, a developer of land. It can be inferred from the evidence that it acquired an area of land, being the whole of the land comprised in CT 11650, and proceeded to draw up a plan of subdivision, one of the lots of which was Lot 49. On 16th November 1973 it contracted to sell Lot 49 to the first appellant. Whether it was then or ever in a position to confer a legal title on the first appellant is not known. Certainly no separate title did ever exist, so far as this case is concerned.

By November 1981 the first appellant had paid to the developer the full purchase price. On 30th November 1981 the developer gave him what is called a transfer, clearly on a form suitable for registration under the provisions of the Land Transfer Act Cap 131. Whether it could have been registered then or later seems to have been regarded as immaterial. Perhaps it was. There was no separate title ever in existence for this lot as far as we are aware, certainly not at any time material to these proceedings. The transfer that the first appellant received referred to the land in question as the whole of the subdivision and proceeded to transfer to the appellant "all the transferor's estate and interest in the said land" (record p.9). The description given of the land was Lot 49 on the deposited plan. However, as we said, any deficiencies in the so called transfer turn out to be irrelevant.

The transfer was not lodged for registration. No caveat was ever lodged by or on behalf of the first appellant.

On 2nd May 1983 the Commissioner of Inland Revenue caused to be registered on the title to the land a charge to secure a debt owing to him by the developer. Seeing that the registered owner of the whole of the land, including Lot 49, was the developer, it became a charge effective over this Lot.

What might be called a peculiar transaction took place. On 25th October 1991 an agreement was entered into by which the first appellant is said to have agreed to sell Lot 49 to his

wife, the second appellant. Clause I provided that the purchase price was to be paid by the purchaser and possession was to be given "upon acceptance of a registrable transfer of the said land for registration by the Registrar of Titles by the 31st day of October 1991" (record p.10). That gave six days. Clause 6 was:

> *"6. PROVIDED ALWAYS that if the Commissioner of Inland Revenue has not withdrawn his charge by the 31st day of October, 1991 the Purchaser shall be entitled to rescind the agreement without any liabilities."*

It was unnecessary for the Judge to say anything about the genuineness of this agreement, so we do likewise. He did note that the agreement had not been stamped, but accepted an undertaking from counsel.

On 7th November 1991, that is after the lapse of a further six days, proceedings were commenced by the first and second appellants. They sought an order that the Registrar of Titles be ordered to register the transfer of Lot 19 to the "plaintiffs" (there was no such transfer) upon the basis that the developer was holding the Lot as trustee for the "plaintiffs", which it was not, and that the charge in favour of the Commissioner of Inland Revenue did not have priority over the rights of the plaintiffs in respect of the Lot, so that the charge should be removed so as to enable registration of transfers from the developer to the first appellant and from him to his wife.

The trial Judge virtually dismissed the originating summons out of hand, and rightly so.

The Income Tax Act Cap 201 creates an automatic charge over all realty of a person liable to pay monies in respect of certain matters (s.76(3)). There is no challenge to the existence of such a charge over the realty of the developer here. The Land Transfer Act provides that no estate in a transferee of land arises until registration of the necessary document. Not only was the necessary document not lodged for registration here, but so far as we can tell there wasn't one. As the Judge pointed out there are procedures provided under the Act for protection of the interest of purchasers such as the one that was created here, and which, if followed, allow a purchaser to take such steps as may be necessary to ensure that any interest which is entitled to priority over a later one can be given effect to. Whether such procedures could be used to obtain priority here over a charge created by statute can await another day. The first appellant did not avail himself of those procedures.

The appeal will be dismissed with costs of the second respondent to be paid by the appellants. It does not suprise us that the developer did not appear at the hearing of the appeal.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Moti Tikaram
Resident Justice of Appeal