IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0007 OF 1995

IN CHAMBERS

BETWEEN:

RAM SWAMY f/n Shiu Narayan

First Applicant/Appellant
(Original 5th Defendant)

and

ADI NARAYAN aka Tota f/n Shiu Narayan

Second Applicant/Appellant
(Original 6th Defendant)

and

PADMA WATI d/o Viraiya

Respondent
(Original Plaintiff

Mr. C. B. Young for the First and Second Applicants/Appellants
Mr. A. Khan for the Respondent
(on instructions from Haroon Ali Shah Esq)

Date of Hearing : 23 April 1996
Date of Delivery : 6 May 1996

DECISION

(Stay Application pending Appeal)

On 4 December 1995 the two Applicants filed a notice of appeal against an Order of immediate possession made against them by the Lautoka High Court (Sadal J) on 3 November 1995. They applied to the Lautoka High Court to stay the Order

pending appeal but Sadal J refused this application in a written decision delivered on 16 February 1996. The Appellants have now applied to a single judge of this Court for "an Order that the Order of execution and all other proceedings" be stayed pending determination of the appeal.

This application has been opposed by the Respondent Padma Wati who was the original Plaintiff in the Court below.

There are three affidavits before me in support of the stay application. The Respondent has filed an affidavit in opposition. Both parties have also filed written submissions and have made brief oral submissions in support by their respective cases.

Padma Wati issued a Writ on 6/10/82 against six Defendants. The writ was subsequently amended. The 1st Defendant Shiu Narayan was the father of the present Applicants (Original 5th and 6th Defendants). He died before judgment was given against the present Applicants.

It is not in dispute that the 1st Defendant came to the land (now in dispute) at a time when the old C.S.R Company used to allocate lots to tenants for residential and farming purposes. Viraiya (Respondent's father) was one such tenant. He was related to the 1st Defendant who invited or permitted him (1st Defendant) to stay on the land. In 1970 the Native Land Trust Board took over all such land. Padma Wati has been

living on the land since her birth in 1938. Her mother was first issued with an approval notice by the Native Land Trust Board. Padma Wati now has a proper Native Lease 23775 but this was not registered until 19 February 1996. (See Annexure `A' to Padma Wati's affidavit dated 27 March 1996)

It is Padma Wati's contention that the Applicants are continuing to live on her leased land without any colour of right and without any approval from the Native Trust Board and as such their occupation is illegal. She says they are causing her hardship and are interfering with her right to quite enjoyment. The Appellants deny this and say there is no evidence of interference.

Padma Wati further contends that she should be allowed to immediately enjoy the fruits of her success in litigation especially in the light of findings of fact made by the trial judge that the Applicants are living on Respondent's land. The Applicants on the other hand contend that they are living on a piece of land with an area of 3 roods 8.9 perches over which they have a better title then Padma Wati. In the alternative they claim that she is estopped from denying them occupation on equitable grounds.

The Applicants have a right of appeal. They are pursuing their appeal in earnest. Security for costs has already been fixed at $750. They have also given a written undertaking as to damages should their appeal fail. There appears to be some

substance in their contention that some important issues of fact and of law were not addressed by the High Court. Furthermore it is desirable that the Court of Appeal gives a definitive ruling whether the doctrine of estoppel as enunciated in by Privy Council in Sheila Maharaj v. Jai Chand (Privy Council Case No. 63 of 1984) is applicable to the facts and circumstances similar to those pertaining to the present case. This will be in the interest of not only the parties themselves but also of the Courts in Fiji as well as the practitioners. All in all the Appellants appear to have an arguable case. Certainly their appeal cannot at this stage be characterised as wholly unmeritorious and thus clearly destined to fail.

Cognisance should also be taken of the following facts:

(a) that the Applicants and their families had been living on the land since 1940 i.e. 30 years before the Native Land Trust Board assumed control of C.S.R lands;
(b) that they have effected considerable improvements on the land three of which consist of dwellings of a substantial and permanent nature;
(c) that the judgment was given 5 years after the trial of the action had commenced, the writ itself having been issued 13 years ago.

In my view the prospects of the appeal being rendered substantially nugatory are considerable if the stay is not

granted. On the other hand the Respondent is not likely to suffer any real prejudice or injustice if it is granted.

Having considered the the competing interests of the parties I have come to the conclusion that the balance of convenience demands that there should be a stay pending determination of the appeal.

In the circumstance I exercise my discretion in favour of the Applicants and grant the stay sought.

The Respondent is at liberty to move this Court to dissolve or modify the stay Order if the Applicants interfere with her right to quite and peaceful enjoyment of her property at any time before determination of the appeal.

Costs to be in the cause.

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Sir Moti Tikaram
<u>President, Fiji Court of Appeal</u>