

within 6 weeks of the day on which the judgment or order of the court appealed from was signed, entered or otherwise perfected. The notice of appeal was thus filed about 2 months out of time, the time for its filing having expired on 10 May 1999.

Prior to the hearing of the appeal, the respondents gave notice that they would object to the competency of the appeal. The matter was raised as a preliminary matter when the appeal was called on for hearing. Discussion ensued. The appellant sought leave to appeal out of time pursuant to the Rules of the Supreme Court as applied to the Court of Appeal. Initially the application was opposed, but, after further discussion, the respondents agreed to withdraw their opposition in order to obtain a more expeditious final outcome of the appeal than may have been the case if there had been an adjournment to allow the appellant to prepare an application for an extension of time. Accordingly, the court made an order deeming the time for filing the appeal to have been extended to 8 July 1999. The hearing of the appeal then proceeded.

By summons dated 9 December 1992 filed pursuant to s.169 of the Land Transfer Act Cap 131, the respondents, the plaintiffs in the action, sought possession of portion of land occupied by the appellant, the defendant in the action, known as Matasawalevu on the island of Vanua Levu being Lot 3 on Plan 5800 and being part of the land comprised in Certificate of Title volume 27109.

The respondents' summons had been the subject of an earlier judgment by the primary judge which had led to the making of an order for possession of the same land on 28 April 1995. The appellant appealed to the Court of Appeal against the making of the order. The

appeal was upheld on 27 February 1998. The Court of Appeal held that the issues between the parties, namely whether the appellant held an equitable interest in the land and whether the respondents were guilty of fraud, were inappropriate for summary trial on affidavit evidence. The earlier order for possession was set aside and the Court ordered that the matter be set down for trial in the High Court.

On 20 April 1998 the matter came back to Pathik J. for directions. It was agreed that the affidavits already filed be "regarded" as pleadings. The matter was fixed for hearing for 21 July 1998. The hearing in fact proceeded on 22 July 1998 and continued on 23 July. It was then adjourned until 11 November 1998 when the hearing concluded and the matter was reserved for judgment.

It may be observed that there was no direction for pleadings other than that the affidavits filed in the earlier proceedings were to be treated as pleadings. At the hearing a number of witnesses were called. The principal were the respondent, Santa Wati, and the appellant, Ambika Prasad. Additionally Tahir Ali gave evidence on behalf of the respondents and Ami Chand, a farmer, gave evidence on behalf of the appellant. Mr Ali was the President of the Matasawalevu Land Co-operative Society Limited. He had been a member of the Society for 20 years.

Pathik J. delivered judgment in the matter on 22 March 1999. He referred to his earlier judgment and to the appeal to the Court of Appeal. He referred to the witnesses mentioned. He said that there was no doubt that the plaintiffs, i.e. the now respondents, were the registered proprietors of the land. The circumstances under which the appellant, i.e. the

defendant, came to be on the land were as stated by Mrs Wati in her evidence and also by Mr Ali. Mr Ali said that the defendant did not pay any money to the Co-operative Society in respect of any land. Pathik J. said that he accepted the evidence of Mrs Wati and Mr Ali. He regarded them as witnesses of truth. He found that the plaintiffs had become the registered proprietors of the land which gave them an indefeasible title under the Torrens System. He said that in view of these findings of fact the plaintiffs were entitled to bring proceedings under section 169 of the Land Transfer Act.

Pathik J. said that nothing had been put to Mrs Wati in cross-examination in the nature of fraud. He said that the only question put to her was in relation to payment of the deposit of \$700.00 said to have been contributed by Mr Prasad. This was denied by Mrs Wati. His Lordship said that he was not satisfied on the balance of probabilities that Mr Prasad contributed anything towards the purchase of the land. He added that from the evidence it was clear that "the issue of the alleged dealings of the defendant" were with Mrs Wati's father, Kali Charan, who was dead. There was no note or memorandum of any kind to show that the defendant had an equitable interest in the land.

Pathik J. went on to say that the defendant had testified that he paid half the purchase price for the whole of the land, namely \$700.00, to the Society and a receipt was issued. He said his name was on the receipt but it was crossed out and he did not know by whom. His Lordship said that the original of the alleged receipt had not been produced by either the plaintiffs or the defendant. He concluded that there was "no admissible documentary evidence" that the defendant was the one "who actually paid" a portion of the purchase price and was entitled to a share in the land. There was no evidence from the Society to show that

the defendant had at any time been regarded as a joint purchaser of the land along with Mrs Wati's father, Mr Charan.

Pathik J. said that the defendant's witness, Mr Chand, testified that he prepared the receipt for his (Mr Chand's) father. He was secretary of the Society. The receipt he said was in the name of Kali Charan, Santa Wati and Ambika Prasad but that neither the original nor a carbon copy of the alleged receipt was tendered to the court. His Lordship concluded that on the whole of the evidence there was nothing to show that at any time the defendant had any interest in the land. He added, "That is the correct position."

The concluding paragraphs of His Lordship's judgment were as follows:-

"To conclude, I find that the plaintiffs had no knowledge of the defendant's alleged interest in the land when the property was transferred to her by Kali Charan. In fact the defendant admits that the first plaintiff was not a party to any alleged arrangement between him and Kali Charan. The defendant has neither alleged any fraud on the part of the plaintiffs nor were any questions directed by the defendant's counsel on the alleged fraudulent transfer to the plaintiffs. On what constitutes 'fraud', it has been considered by me in considerable detail in my previous judgment herein. The evidence before me does not disclose any elements of fraud on the part of the Plaintiffs.

On the evidence before me I am not satisfied on a balance of probabilities that either the defendant paid the sum alleged to have been paid by him or that he has any beneficial or equitable interest in the land by virtue of him having been brought on the land by the deceased Kali Charan.

Finally, if the defendant had paid a portion of the purchase price and was entitled to an interest in the land then he should have had it reduced to writing as required under section 59(d) of Indemnity, Guarantee and Bailment Act Cap. 232."

His Lordship said that for the reasons he had given the plaintiffs succeeded on their summons and that there would be an order for possession of the land.

Mr Prasad's case was put succinctly in paragraphs 28-31 of his affidavit which was treated as a pleading. In substance those paragraphs said that Mr Prasad had a beneficial interest in the land and that the plaintiffs had no right or claim to possession. He had been cultivating the land for more than 13 years separately from the deceased, Mr Charan, that is from the time Mr Deo, the second respondent, came to live with Mrs Wati. Mr Prasad said that if the plaintiffs had purchased the land as alleged then they did so with full notice and knowledge of his rights in the land. He said the action was designed to defeat his rights after obtaining a fraudulent transfer of the land. He claimed a beneficial interest in the land and was thus entitled to live on, use and occupy it.

In his submissions counsel for the appellant referred to the notice of appeal, which contains five separate grounds, and consolidated these into the following:-

- “1. *The learned trial judge erred in law and in fact in holding that the Appellant had no interest in the land at any time.*
2. *The learned trial judge erred in law and in fact in holding that the Respondent had no knowledge of the Appellant's interest in the land when she acquired the property from Kali Charan.”*

Counsel said that it was not disputed that the appellant, Mr Prasad, had been living on and cultivating the land for some time. He said that Mrs Wati had said in her evidence that her father had died seven years before 22 July 1998 when she gave evidence, and that the

appellant had been on the land for four years before her father died. Mr Prasad was living on the land and cultivating about 2.5 acres of it when Mrs Wati and Mr Deo acquired the land. Counsel made reference to s.39 of the Land Transfer Act Cap.131, to which we shall refer in detail a little later. It provides for indefeasibility of title. It is clear on the face of the submissions that the central question in this case is whether the two respondents have been guilty of fraud within the meaning of s.39 of the Land Transfer Act.. Fraud is a matter which would defeat the indefeasibility of title which the respondents, Mrs Wati and Mr Deo, would otherwise have.

It is necessary before proceeding to deal with his Lordship's statement earlier quoted that Mr Prasad had not alleged fraud on the part of the respondents, Mrs Wati and Mr Deo. That statement cannot be correct. Mr Prasad's affidavit was treated as a pleading. It plainly alleges fraud. His case on fraud, as we understand it, is based on a combination of factors, namely, his payment to Mr Charan of \$700.00, his long occupation of the land and Mrs Wati's and Mr Deo's knowledge of these matters. His case is that, knowing of these matters, they procured the registration of a transfer to themselves thus conferring on them an indefeasible title. Mr Prasad's case was that the conduct of Mrs Wati and Mr Deo was, in these circumstances, fraudulent. So fraud was at the heart of the case.

There is another matter which needs to be emphasised. The evidence discloses that before Mr Charan's death, Mr Prasad built a dwelling on the land which he occupied. The existence of the dwelling no doubt accounts for His Lordship's order that either the respondents, Mrs Wati and Mr Deo, pay Mr Prasad the value of improvements, if any, effected by him on the land which are to be valued by a registered valuer within two months from the

date of the order or Mr Prasad be permitted to remove any improvements he had effected on the land. The existence of the dwelling is not a matter dealt with by his Lordship in his judgment. But he must have been well aware of it for he made the order concerning improvements to which we have referred.

We shall refer to some authorities on fraud in this context in due course. Counsel said that there was ample evidence that the respondents had knowledge of the fact that the appellant was occupying and cultivating more than 2 acres of the land. There is no question about that being the case. But whether that of itself amounts to fraud on the part of the respondents is far from clear.

In his submissions counsel for the respondents put the matter fairly and squarely as one where a judge had heard conflicting evidence and accepted the evidence of the respondents. The appellant was therefore faced with adverse findings of fact by a Judge who had seen and heard the witnesses. The circumstances under which an appellate court would interfere with such findings were limited.

An initial question is whether His Lordship's finding in relation to the alleged payment of \$700.00, should be disturbed. As counsel for the respondents has submitted, the learned Judge saw and heard the witnesses. It was open to him on the evidence which he had to reach the conclusion which he did. We detect no misdirection or other error which would warrant the interference of this court in relation to his finding that he was not satisfied that the sum of \$700.00 had been paid.

What then is left? As counsel for Mr Prasad conceded, there are only the facts that Mr Prasad over a number of years occupied portion of the land, lived on it and cultivated it. There is some evidence of disputes between Mr Charan and Mr Prasad and some indication in the evidence that some of these disputes went to court. But nothing was done to have Mr Prasad removed from the property either by Mr Charan in his lifetime or by Mrs Wati and Mr Deo until the present proceedings were instituted. Undoubtedly, Mrs Wati and Mr Deo were well aware of the fact of Mr Prasad's occupation of the land and of the fact that he cultivated it and kept the proceeds of the sale of produce grown on the land for himself.

The question is whether those matters alone are sufficient to indicate fraudulent conduct on the part of Mrs Wati and Mr Deo when they became registered as proprietors of the land in circumstances where they had knowledge of Mr Prasad's occupation and activities on the land.

In order to give that matter proper consideration it is necessary now to refer to the provisions of s.39 of the Land Transfer Act. S.39(1) is as follows:

"39.—(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except—

- (a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and*
- (b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously*

included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and
(c) *any reservations, exceptions, conditions and powers contained in the original grant."*

The emphasis is added.

S.39(2) deals with possessory titles and is not relevant for present purposes. With s.39 should be read s.40 which provides that, except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of the Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor of such estate or interest is or was registered.

In order to deal with counsel's submissions, it is necessary to refer to some authorities. Sections 39 and 40 of the Land Transfer Act are in a common form. They have their counterparts in many countries including Australia and New Zealand. There have been very many cases dealing with what will amount to fraud in given sets of circumstances. Each case must, of course, depend upon its own facts and circumstances and it is to the authorities that one goes, not to compare factual situations, but for the principles which guide one in determining whether, in a given case, fraud exists. Perhaps the best known statement of what will, and what will not amount to fraud is to be found in the judgment of Salmond J., a member of the New Zealand Court of Appeal, which determined the case of *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1923] NZLR 1137. In the course of his judgment Salmond J. said (at 1174-5)

"Where a purchaser actually knows for certain of the existence of an adverse right which will be destroyed by his purchase he is, as already indicated, guilty of fraud. Where, on the contrary, he has no knowledge that such a right exists or is even claimed he is a purchaser in good faith. In between these two extremes there lie those intermediate cases in which, although there is no certain knowledge of the existence of an adverse right, there is knowledge of a claim and of the possibility of that claim being well founded. The purchaser does not actually know that the right exists, but he knows that it may exist, or fears or suspects that it exists, or doubts whether it exists or not. If in such circumstances and in such a state of mind he acquires the property intending to hold it for an unencumbered title and to destroy the right in question if it does exist, is the case one of fraud or one of bona fides within the meaning of the Act? An extreme view, which cannot be supported, would place all cases of this kind within the sphere of fraud. According to this view, knowledge of the existence of an adverse claim, coupled with an intent to defeat that claim by a purchase of the property, is always inconsistent with good faith, even though the claim is not known or believed to be well founded. This view, however, is not in conformity either with the spirit and purpose of the Land Transfer Act or with any reasonable standard of good faith and honest dealing. One of the main objects of the Land Transfer Act is to facilitate the alienation of land by eliminating the encumbering influence of unregistered interests, and by relieving purchasers from the necessity of inquiring into the existence and validity of adverse equitable claims and interests. Moreover, a proper standard of honesty and good faith regards the interests of the owner no less than those of the adverse claimants. An owner of land is not necessarily bound to abstain from alienating his property because of the existence of some adverse claim which he does not know or believe to be well founded, and because he knows that the effect of such alienation under the Land Transfer Act will be to destroy that claim. Nor is a purchaser necessarily bound to abstain from acquiring the property for the same reason. Good faith requires that due consideration be given to the conflicting interests both of the owner and of the claimant in such a case, and not that exclusive consideration be given to the interests of one of them only. Knowledge, therefore, that an adverse claim exists, that it may possibly be well founded, and that it will be destroyed by an alienation of the property, is not in itself sufficient to stamp the transaction as fraudulent within the meaning of the Land Transfer Act."

The decision of the New Zealand Court of Appeal in the Waimiha case was upheld by the Privy Council, 1926 A.C.101. What Salmond J. said has been cited many times by Judges in Australia and New Zealand and also by the Privy Council when dealing with appeals from the courts of those countries.

What Salmond J. said towards the end of the passage quoted from his judgment was echoed by Kitto J. of the Australian High Court in *Mills v. Stokman* (1967) 116 C.L.R. 61 where his Honour said (at 78) that merely to take a transfer with notice or even knowledge that its registration will defeat an existing unregistered interest is not fraud.

In *Frazer v. Walker* [1967] A.C. 569 the Privy Council said (at 580) that "fraud", where used in a similar provision, meant actual fraud; in other words dishonesty.

In *Bahr v. Nicolay* [No. 2] (1988) 164 C.L.R. 604 the question of what would amount to fraud was considered by the Australian High Court. There Wilson and Toohey JJ. said that the fraud referred to was actual fraud, involving some act of dishonesty on the part of the person whose title was sought to be impeached. They continued (at 630)

"It is equally clear that to acquire land with notice of an unregistered interest such as a lease, to become the registered proprietor and then to refuse to acknowledge the existence of the interest is not of itself fraud: Oertel v. Hordern (1902) 2 S.R. (N.S.W.) (Eq.) 37; Wicks v. Bennett; Friedman v. Barrett; Ex parte Friedman [1962] Qd. R. 498; R. M. Hosking Properties v. Barnes ([1971] S.A.S.R. 100; Achatz v. De Reuver ([1971] S.A.S.R. 240. The point is made by Kitto J. in Mills v. Stokman ((1967) 116 C.L.R. 61, at p.78, where his Honour said "but merely to take a transfer with notice or even actual knowledge that its registration will defeat an existing unregistered interest is not fraud".

There was some difference of view concerning the correct approach to the problem expressed in the joint judgment of Mason CJ and Dawson J. (at 614). They said that not all species of equitable fraud stood outside the statutory concept of fraud. What was there said is not material for present purposes and it may be noted that their Honours concluded their discussion by saying (at 614) that, according to the decisions of the High Court, actual fraud,

personal dishonesty or moral turpitude lie at the heart of the two sections and their counterparts. They referred to *Butler v. Fairclough* (1917) 23 C.L.R. 78 at 90, 97.

In the submission of counsel for the respondents in this case the various dicta to which reference has been made establish that the circumstances of this case are not to be regarded as fraudulent. So much of the appellant's case as is dependent upon the payment of the \$700.00 has been taken away by his Lordship's finding which we consider should not be disturbed. What is left, as we have said, is knowledge of the appellant's occupation and cultivation of the land. That is all.

In support of his submissions, counsel for the appellant referred to two decisions of this court, namely *Dharam Pal v. Suruj Pal* (14 July 1975, Civil Appeal No. 66 of 1974) and *Gajadhar v. Jai Pal* (21 July 1982, Civil Appeal No. 49 of 1981). We have read these judgments. They contain elaborate analyses of the law on this matter and they refer to a number of authorities including some of those referred to by us. There is nothing in the discussion of the principles which apply which runs counter to the thrust of the authorities to which we have referred. The cases of course involve the application of the relevant principles to different sets of facts but it is not profitable for us to examine the facts of the two cases because the facts of each case differ in substance from those of the present one.

In all the circumstances we have reached the conclusion that the appellant has not made out a case of fraud. He has not established that he has any legal or equitable right in the land. On the authorities to which we have referred there is no basis for imputing fraud to the respondents. Accordingly the appeal is dismissed. We order the appellant to pay the

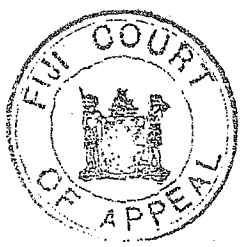
respondents' costs of the appeal which are assessed at \$1000.00.

[Handwritten signature]

Eichelbaum JA, Presiding Judge

[Handwritten signature]

Sheppard JA



[Handwritten signature]

Tompkins JA

Solicitors:

Messrs Kohli & Singh, Labasa for the appellant
Messrs Maqbool & Co., Labasa for the respondents