IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0053 of 2004S
(High Court Civil Action No.HBC028 of 1995L)

BETWEEN:

HARI PRASAD

Appellant

AND:

1. MUNI PRASAD
2. DAYA RAM
3. DIRECTOR OF LANDS
4. REGISTRAR OF TITLES
5. ATTORNEY GENERAL OF FIJI
6. FIJI SUGAR CORPORATION LIMITED

Respondents

Coram: Henry, JA
Scott, JA
McPherson, JA

Hearing: Tuesday, 5 July 2005, Suva

Counsel: Dr M.S. Sahu Khan for the Appellant
Mr. H.A. Shah for the 1st and 2nd Respondents

Date of Judgment: Friday, 15 July 2005, Suva

JUDGMENT OF THE COURT

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[1] This is an appeal against the decision of Prakash J. delivered on 21 November 2002 dismissing the appellant's application to strike out the statement of claim and enter judgment for the appellant on his counterclaim.

[2] The appellant the first respondent and the second respondent are brothers. The appellant is the registered proprietor of a lease of a property in Malomalo Nadi

(which has the benefit of a sugarcane contract) purchased in his name in 1966. In their statement of claim the first and second respondents alleged that there was an agreement that the purchase was to be by the appellant on behalf of all three brothers. In substance the claim is that the appellant holds the property and the sugarcane contract in trust for himself and the first and second respondents. Consequential relief is sought. In his counterclaim the appellant alleges that the first respondent is in unlawful occupation of the property and seeks to recover possession and damages.

[3] Before Prakash J. and again in this Court the appellant based his strike out case on five separate grounds, of which four were finally pursued at this hearing. The first is that the absence of a note or memorandum evidencing the agreement for the purchase of the property in the names of the three brothers rendered the agreement unenforceable. The second is that the action is barred by s.13 of the Crown Lands Act (Cap. 132). The third is that the claim breaches s.4 of the Subdivision of Land Act (Cap. 140) or its regulations. The fourth is that the claim is inconsistent with an earlier claim made by the first respondent to the Agricultural Tribunal and therefore an abuse of process of the Court.

[4] Although the appellant's submissions both in this Court and in the High Court were based on Order 18 Rule18, it would appear the inherent the jurisdiction of the Court was being invoked, because in each case the argument centered on the premise that as a matter of law on undisputed facts the claims of the first and the second respondents as plaintiff's must fail. It is doubtful that on a strict interpretation 0.18 R. 18 applies to the appellant's arguments. We turn to the grounds upon which it is said the claim cannot be sustained.

Agreement Unenforceable

[5] In his statement of defence the appellant has pleaded s.59 of the Indemnity Guarantee and Bailment Act (Cap. 232) alleging the absence in writing of the

required note of memorandum evidencing the pleaded agreement. The allegation is supported by an affidavit which has not been countered by the respondents, nor has it been denied in their reply to the statement of defence. However it has been made clear that the first and second respondents will rely on the doctrine of part performance. Although this should have been pleaded in the reply with appropriate particulars, its omission can be rectified by amendment. It is established principle that if a pleading can be amended to meet a strike out application, then the discretionary power should not be exercised. Clearly the issue of part performance can only be addressed in the context of a trial.

[6] But perhaps of greater significance on this point is whether s.59 can be said to apply at all. The relevant provision in section 59 states:

> ***"59. No action shall be brought –***
>
> ***(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them.***
>
> ***Unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."***

Effectively the claim being made is that the leasehold interest was acquired by the appellant as a trustee for himself and his two brothers and is still being held by the appellant in that capacity. His refusal to acknowledge the beneficial interest of the first and second respondents is alleged to be fraudulent. Although the amended statement of claim refers to an agreement of 1966 that the three brothers should purchase the leasehold and interest, it is clear what is being alleged is that that is what gave rise to the constructive trust. It is arguable whether that could constitute a contract for the sale of land within the meaning of s.59 (See ***Bannister v. Bannister*** [1948] 2 All ER 133) and is an issue better left for determination at trial when the background facts relating to the acquisition have been established.

Section 13 Crown Lands Act (Cap. 132)

[7] Section 13(1) of the Crown Lands Act (now the State Lands Act), provides:

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

[8] The background is that the land in question was originally owned by the Colonial Sugar Refining Company Limited, and from sometime in 1966 it was occupied by the three brothers, although the actual form of tenure is not in the material presently before the Court. In 1988 the land became Crown Land, and on 8 October 1988 the lease now in question was registered with the appellant being recorded as lessee. The lease is expressed as being a protected lease and is therefore subject to s.13 of the Act.

[9] The argument under this head is twofold. First it said that the prior written consent of the Director was required before the present action could be instituted and therefore the Court is prohibited from giving effect to the relief claimed. Whether that represents the true construction of s.13(1) is arguable. It may be that the prohibition is a prerequisite to the Court actually dealing with the lease, for example by making a declaration or directing a transfer rather than embarking on a claim. In

this respect we note that the Director is a party to this proceedings. Secondly it was contended that the declaration of trust as claimed is itself a dealing requiring prior consent of the Director. Whether that assists the appellant is also arguable. The claim does not on its face involve any dealing with or alienation of the land on the part of the registered lessee. Rather the claim is to have recorded beneficial interest in the land as it has alleged to have existed since 1966. In the course of argument Dr. Sahu Khan also placed reliance on Regulation 21(a) of the Crown Lands Act (Leases and Licences) Regulations. This provides:

> ***"21. All leases shall be subject to the following conditions in so far as they are applicable to the circumstances of any case:-***
>
> ***(a) that the lessee shall not transfer, mortgage, sublet or part with the possession of the whole or any part of the demised land nor shall he enter into a partnership agreement to work the land or any part thereof or any other arrangement of a like nature for the working of the demised land or any part thereof, without the written consent of the lessor first had and obtained. "***

[10] We think it doubtful that this takes the argument any further when what is at issue is the beneficial ownership of the leasehold interest at the time of acquisition of title by the registered lessee. In each case any finding can only be properly be made when the surrounding circumstances and the relevant factual position has been ascertained.

Subdivison

[11] Dr. Sahu Khan also contended that if the claim were to succeed the provisions of s.4 of the Subdivision of Land Act (Cap.140) would be breached. There is no substance in this contention. Subdivision of land is not envisaged, because if the claim is upheld the result would simply be that the three brothers are declared lessees as tenants in common in named shares in respect of the whole of the land.

Abuse of Process

[12] The remaining ground is based on an earlier claim made by the first respondent against the appellant in the Agricultural Tribunal seeking a declaration of tenancy in respect of the property. It was submitted that the claim was inconsistent was present claim of ownership. We think this ground is misconceived for two reasons. First such an inconsistency, even if established, is not necessarily to be classed as an abuse of process, although in so far as these proceedings are concerned it may raise questions of credibility. More importantly however, a perusal of the record of the Tribunal shows that in fact the first respondent was claiming to be a co-owner of the property and his claim was dismissed but only on the ground that the Tribunal had no jurisdiction to adjudicate disputes between co-owners.

Conclusion

[13] For the above reasons we are in agreement with Prakash J. that proper grounds for a strike out have not been made out and that the claim should proceed to trial. None of the issues raised by the appellant are appropriate for resolution on this application, and agree that they are better considered in the context of a trial when the factual background has been established and the legal arguments, some of which may be complex, can be fully developed. A strike out application is seldom the appropriate vehicle to determine discrete issues of law which are not clear cut and possibly dependent on dispute facts.

[14] It follows that the appellant is not presently entitled to judgment on the counter-claim, even if it were possible procedurally to grant such relief on the application under consideration.

[15] The appeal is therefore dismissed. The first and second respondents are entitled to costs which we fix at $1,000.

Henry, JA

Scott, JA

McPherson, JA

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant
HA. Shah Esq., Nadi for the First and Second Respondents

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