

In the High Court of Fiji at Labasa
Civil Jurisdiction
Civil Action No. 23 of 2015
Between
Vinesh Ram
Plaintiff
And
Water Authority of Fiji
Defendant

COUNSEL: Mr A. Kohli for the plaintiff
Ms M.Akosita for the defendant
Dates of hearing : 14th and 15th February,2017
Closing submissions of the plaintiff filed on 23rd February, 2017
Date of Judgment: 16th March,2017

Judgment

1. This case is concerned with an alleged trespass by the defendant, in October, 2013, on land belonging to the estate of the plaintiff's late father Babu Ram, without consent. The plaintiff, the executor and trustee of the estate, claims that the land has been damaged by the construction of a reservoir by the defendant. The estate has lost use of approximately one acre cultivated with sugar cane and cash crops. He claims general, aggravated, punitive and special damages.
2. The defendant, in its amended statement of defence and counter-claim states that initially the reservoir was being built on "Salen's" land, but when it was found that water would affect the foundation of the reservoir, they searched for an alternative site. The late Mr Babu Ram offered his land. The reservoir was built as a community project with his consent and oversight. There was no protest by him. The plaintiff assisted in the construction and allowed the project to be completed. His house was the first to be connected with water. The land on which the reservoir was built was not cultivated with sugarcane and other cash crops. It is less than one acre. It is impossible to harvest sixty tonnes from the area occupied by the reservoir. The profit from a tonne of cane is \$20.00 to \$25.00 per tonne and not \$50.00 as pleaded. The claim is exorbitant. The defendant counterclaims for the costs of installation of the reservoir of \$176,092.96 and a sum of \$134,660.43 to remove it, as a result of the change in the plaintiff's position.

3. The plaintiff, in his reply to the amended statement of defence and counter-claim joins issues with the defence and states that he is suffering loss of income from the land. The occupation of the land by the defendant is illegal and in contravention of section 13 of the Native Land Trust Act.

The hearing

The evidence as to whether the consent of the landowner was given

PW1 and PW2

4. PW1,(the plaintiff) and PW2,(Rajinesh) in evidence in chief said that the reservoir was built by the defendant on their father's land in 2013, when he was alive. He died in 2014. He did not consent to the reservoir being built nor oversee its construction.
5. These witnesses said that pipelines were laid from a creek to the reservoir and then connected to Natabe. They were not members of the committee which initiated this rural project, nor was their late father. None of them assisted in the construction or cooked for the defendant's staff. Their family had their own water source from the mountain to their home. Although a pipe was connected from the reservoir to their house, they did not need nor use the reservoir water.
6. In cross-examination, PW1 denied that he and his father invited the staff of the defendant to build the reservoir. The materials for the construction were kept with them. The left over materials were used by members of the committee, which initiated the project. His brother did complain to the Police. The Police requested him to complain to the District Officer. He complained to the District Officer.
7. PW2 said that the reservoir was forcibly constructed by the defendant's workers on his share of the land. Three places were excavated. When his father complained, the defendant threatened that 150 Army Officers would take him to the barracks. They went to the Advisory Counsellor and Commissioner Northern. They wrote a letter to the Ministry of Environment, but did not receive a reply.

8. PW2 said that he did not contribute to the construction. He produced the letter of 3rd September,2014, he wrote to the iTLTB and their reply of 18th September,2014. The iTLTB did not give its consent for the construction. He was not offered compensation by the defendant.

PW4

9. PW4,(Malakai Tuibola, Estate Assistant at the iTLTB) said that a lessee had to obtain the consent of the iTLB to make any construction on the land, unless it was for residential or purposes ancillary to agriculture. He confirmed that Babu Ram had native lease no. 28259. PW2 made a written complaint in this regard. PW4 referred to iTLTB's reply of 18th September,2014, to PW2.
10. In cross-examination, Ms Akosita, counsel for the defendant put it to this witness that although the iTLTB had not consented, the owner of the land consented to the construction. He said that he was unaware if the owner, Babu Ram had consented. He had to obtain the consent of the iTLTB.
11. This witness was not re-examined.

DW1

12. DW1,(Timoci Bola, retired civil servant employed with the Water Supply Dept and later, the Water Authority of Fiji from 2010 to 2016) said that he was a Supervisor for the supply of water to rural villages and settlements for 12 years. The Divisional Engineer refers requests for water by rural villages to the defendant. The community provides the land for the project.
13. He said that he was involved with this "*Daku Chandmai project*" in 2013. A request was made by the settlers through their committee and the Advisory Counsellor for water.
14. DW1 said that when he conducted the survey, he met the owner of the land, an "*old man*". He gave his land for the construction of the reservoir. The survey plan was made. Approval was given by the head office. The landowners made 1/10th contribution to the cost of installation of the reservoir.

15. In cross-examination, DW1 said that when there was a request from a community for water, a feasibility project was carried out. That was followed by a consultation process. In order that there was no dispute, the consent of the landowner or Mataqali was obtained in writing.
16. Mr Kohli, counsel for the plaintiff asked this witness to produce any minutes of a meeting, which provides that Babu Ram had consented to give his land for the project. His response was that he left the matter of obtaining the consent to the committee and the Advisory Counsellor. Their records did not contain the written consent of Babu Ram. He received a document that 70 people had agreed to the project. Babu Ram's name was not on the list, but his name was listed as one of the recipients of water.
17. Mr Kohli continued to ask the witness if the defendant had not ascertained from the title, as to who the land owner was, and if, he had consented to the construction. DW1 finally agreed that the defendant should have verified, if consent was obtained. At that stage, Ms Akosita said that the consent was verbal.
18. DW1 admitted the following facts: a \$ 170,000 project to build a reservoir could not be initiated on the verbal consent of the landowner; an engineering plan had to be passed; the defendant hired a school for the carpenters to sleep; the owner of the land gave his vacant unoccupied thatched bure where goats were kept, to store cement.

DW2

19. DW2,(Vilikesa Ramaqa, Technical Officer, Water Authority of Fiji) in evidence in chief said that he was involved in the rural and outer island schemes to provide water. When a request is made by the community to the Divisional Office for water, the Divisional Office requests the defendant to carry out a survey. Before the community makes the request, they identify the source, the site for the reservoir and obtain the consent of the landowner.
20. In 2013, he was given the Natabe project. The Government funded 9/10th of the costs, while the Labasa Cane Producers Association contributed 1/10th. For 40 years, the community had to depend on water from wells and springs.

21. Babu Ram offered his land. His verbal consent was obtained. No objections were raised by him during the construction.
22. In cross-examination, he said that he ascertained that Babu Ram was owner of the land from the survey plan. The committee decided that the reservoir be built on his land.
23. He admitted that they commenced construction on land belonging to “*Peceli*” and when it was found to be unsuitable, the defendant decided to move on to Babu Ram’s land. Peceli’s land was situated at a distance from the houses and the school to which water was to be supplied and would require more pipes.
24. Babu Ram gave his consent for the construction. He worked with the staff of the defendant and brought them tea. When it was put to him that Babu Ram did not assist, the witness admitted they told him to sit and look on, as he was an old man.
25. DW2 said that there was no requirement to lodge a plan for the approval of the construction of the reservoir to the Macuata Rural local authority, as it was a self help project assisted by the community.
26. The first connection was given to the eldest son of Babu Ram. Connections were given to seventy-seven houses and to a school. The community assisted in the construction. They carted material, dug trench, cut the site and made the connections to individual houses.
27. DW2 hesitatingly said that he is claiming \$ 176,092, from the plaintiff, being the cost of installation of the reservoir. The Court asked him if the owners of the land had asked the defendant to remove the installation. His answer was in the negative.
28. The survey plan depicted that Babu Ram was the owner of the land. There was no consent obtained from him in writing.
29. He admitted that at the commencement of the project, the officers of the defendant were working on Peceli’s land, but since his land was not suitable, it was decided to build the reservoir on Babu Ram’s land.

30. Babu Ram pointed out the site for the reservoir to be constructed. He worked with them on the site and brought tea for them. They asked him if they could stack cement in his bure. Some 77 people signed on the form requesting for water project. Babu Ram's signature is not on the form.

31. This witness was not re-examined.

DW3

32. DW3,(Krish Chand,a Carpenter in the Maintenance and Water Rural Supply of the defendant) said that he had worked on the Natabe project on Babu Ram's land. Babu Ram's sons assisted by bringing them tea sometimes and placing gravel towards the side. Cement was kept in Babu Ram's bure. He kept his toolkit in Babu Ram's son's house.

33. In cross-examination, he denied that he was asked by DW2, to persuade Babu Ram and his sons to agree to the construction of the reservoir on their land and since they did not, he threatened that he would bring 150 army officers. He also denied that he was removed from the site and sent elsewhere because a complaint was lodged against him. He admitted that DW2 took him to another site.

34. This witness was not re-examined.

DW4

35. DW4,(Kasiano Rokovika, an employee of the defendant) said that he started construction of the reservoir at the places levelled. He was unaware as to who owned the land. Only committee members helped during the construction.

36. This witness was not cross examined.

The determination

37. The plaintiff claims damages against the defendant for trespass, in excavating and installing a reservoir on land belonging to the estate of his late father Babu Ram.
38. The case for the defence is that the late Babu Ram gave verbal consent for the reservoir to be built on his land. Babu Ram together with his sons PW1 and PW2 assisted in the construction and provided its workers with food and tea. PW1 and PW2 denied that their father consented. None of them assisted in the construction.
39. DW1, in cross-examination said that Babu Ram had allowed the defendants' workers to store cement in a thatched bure, where he kept his goats. DW2 and DW4 said that the community assisted in the project. DW2 said that he declined Babu Ram's offer to help, as he was too old. DW3 said that Babu Ram's sons brought them tea sometimes and assisted in placing gravel towards the side.
40. In my view, these contentions do not arise for consideration. The land in question is a native lease. The defendant has admittedly, constructed the reservoir without the written consent of the iTLTB.
41. PW4, tendered the relevant lease no28259. Condition 2 (i) provides that the lessee cannot carry out any development on the land other than for agricultural or residential purposes, without first obtaining the consent in writing of the lessor.
42. Gates J (as he then was) in ***Prasad v Chand***,(2001) 1 FLR 164 said:
- Section 13 of the State Lands Act prohibits any dealing which is comprised in a State Lease, without the Director of Lands' consent. Whatever the nature of the permission granted to the Defendant (by the Plaintiff) to occupy the relevant State land, it was clearly unlawful because it lacked the Director's consent...*
43. When DW1 was confronted in cross-examination by Mr Kohli that there was no written consent produced by the defence, Ms Akosita said that Babu Ram had given verbal consent.

44. PW 4 acknowledged that iTLTB had received a letter from PW2 complaining that the defendant entered his land illegally and constructed a reservoir.

45. The Board, in its reply of 18th September, 2014, stated as follows:

On the 5th September 2014, a joint inspection was carried out in regards to the content of your correspondence and noted the following:-

1. Concrete Reservoir & two (2) extraction sites were constructed in October last year according to your information.

*2. **The Board has determined the damaged area to be 0.3681 hectares.***

*3. **The developed site is within his cane area.***

As for the assessment of compensation, the Board will not be able to be in good position to determine as the production record from 2012 to 2013 has increased by 127.87 tons. We will be in a better position to estimate the loss by the end of the year as the total tonnage harvested will be determined by the Sector.(emphasis added)

46. I find and hold that the defendant has trespassed on the land.

47. The plaintiff is entitled to be compensated in damages for the trespass. He has not sought an order for the removal of the reservoir.

48. The closing submissions filed on behalf of the plaintiff claims aggravated damages for trespass. The statement of claim does not support a claim for aggravated damages.

49. *The Supreme Court Practice*, (Vol 1, 1988) at para 18/12/9 states :

The facts relied on to support a claim for aggravated damages should be specifically pleaded

50. On damages, 12 *Halsbury's Laws of England*,(4th Ed) para 1170:

Where the defendant has by trespass made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason.

51. In *Swordheath Properties Ltd v Tabeth and Others*, [1979] 1 All ER 240 it was held that the measure of damages will be the value to the trespasser of the use of the property for the period during which he has trespassed, which in a normal case will be the ordinary letting value of the property.
52. PW1 said that the areas on which the reservoir is built was planted with sugar cane. The road to cart cane is still visible, although pipes have been laid on that part now. The FSC measured the damaged area.
53. PW1 and PW2 said that 60 tonnes of sugar were produced in the relevant area.
54. PW2 said that the profit from sale of sugar cane was 35%. As a result of the construction of the reservoir, sugar cane will not be able to be produced on 1 acre of land for the balance period of the lease of 23 years.
55. PW3 of the FSC also said that 60 to 70 tonnes of sugar cane can be produced in 1 acre of land annually. A net profit of 50 % can be obtained. In 2016, the price of cane was \$67.20 per tonne.
56. DW1 said that the land was barren. There was evidence that cane was planted earlier. DW2 and DW3 said that there was nothing planted in the relevant area.
57. I accept the evidence of PW1 and PW2 that the area where the reservoir was constructed was planted with cane, supported as it is by iTLTB's letter of 18th September, 2014.
58. In my judgment, the plaintiff is entitled to claim the loss of use of the land for sugar cane cultivation from 2014 to 2037.
59. Taking the price of cane at \$50.00 per tonne and profit at 35%, (as testified by PW2) the closing submissions of the plaintiff reaches a profit of \$17.50 (35% of \$50.00) for a tonne. 60 tons of cane at \$17.50 gives an annual profit of \$1,050.00.

60. In my view, the plaintiff has established that the estate of the late Babu Ram suffered loss in a sum of \$24,150.00 (23 years x 1,050.00). I would discount the sum of \$24,150.00 by 10% for the vagaries and vicissitudes of life and award the plaintiff a sum of \$ 21,735, as damages to be paid by the defendant .

The counter-claim

61. The defendant counterclaims for the costs of installation of the reservoir of \$176,092.96 and a sum of \$134,660.43 to remove it, as a result of the change in the plaintiff's position.

62. The basis of this claim is that the plaintiff is estopped from making this claim, due to his consent and conduct.

63. I have already dealt with the irrelevance of this contention.

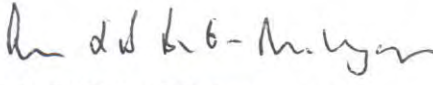
64. As Gates J (as he then was) in *Prasad v Chand*, (*supra*) held section 13 of the State Lands Act is a complete bar to any equitable estoppel.

65. I decline the counter-claim.

66. Orders

- a. The defendant shall pay the plaintiff a sum of \$ 21,735.
- b. I decline the counter-claim.
- c. The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 5000.




A.L.B. Brito-Mutunayagam
Judge
21st March, 2017