KUPPAN (f/n KESHAVAN) *v.* UNNI (f/n APPUTI)

[Appellate Jurisdiction (Hyne, C.J.) February 8th, 1956]

Native Land Trust Ordinance—S. 13—permission of Native Land Trust Board not obtained—effect of non-compliance with section.

The appellant claimed that the respondent agreed to pay him all monies received from the Nadi Sports Club on account of sugar cane grown on the land known as " Naitovo " near Nadi and that the respondent had so received £175 12s. 3d. and had refused to pay it over.

The respondent admitted entering into an agreement but he contended it was not a genuine agreement but it was intended to cover a *de facto* transfer of land which, however, was unenforceable and void as the consent of the Native Land Trust Board had not been obtained in accordance with the provisions of section 13 of the Native Land Trust Ordinance.

The 1st Class Magistrate at Lautoka at the resulting civil proceeding gave judgment in favour of the respondent holding that a written agreement which was produced at the trial of the action was illegal being an attempt to avoid the provisions of the latter section.

On appeal against the order of the Magistrate.

HELD.—The transaction being in breach of section 13 of the Native Land Trust Ordinance was null and void.

Cases referred to:—

Bowmakers Ltd. v. Barnett Investment Ltd. [1944] 2 A.E.R. 579.
Bullivant & Others v. Attorney-General for Victoria (1901) A.C. 196.
Chaplin v. Smith [1926] 1 K.B. 198.
Cope v. Rowlands 2 M. & W. 149.
Currie v. Misa L.R. 10 Ex. 153.
Fleming v. Bank of New Zealand, (1900) A.C. 577.
Gaskell v. Walters (1906) 2 Ch. D. 1.
James v. Kent [1951] 1 K.B. 551.
Mahmoud v. Ispahani [1921] 2 K.B. 716.
*Ram Khelawan v. Mohanlal.**
Simms v. Registrar of Probate (1900) L.J. P.C. 56.

P. Rice for the appellant.

R. Kermode for the respondent.

HYNE, C. J.—The grounds of appeal are:—

1. The learned Magistrate erred in law as to the true meaning of the word " alienate " as used in section 13 of the Native Land Trust Ordinance.
2. Even if the learned Magistrate were correct in his definition of such word (which the appellant denies) then the proved facts did not disclose an " alienation " by the respondent to the appellant.

* *See p. 37.*

3. The learned Magistrate was wrong in law in excluding the application of the *ejusdem generis* rule.
4. The learned Magistrate erred in law in admitting parole evidence to vary the terms of the written agreement upon which the appellant founded his case.
5. The learned Magistrate erred both in fact and law as to the fair inference to be drawn in relation to the substance of the agreement between the appellant and the respondent.
6. The learned Magistrate was wrong in law in holding that the appellant's claim was based on a contract to do something illegal.
7. The learned Magistrate erred both in fact and law in holding that he could give a verdict upon the claim as to wages.

Grounds 3 and 4 were abandoned by Mr. Rice at the hearing of the appeal.

No evidence was given on behalf of the plaintiff.

Defendant said plaintiff had been on the land for 11 years, and that plaintiff had bought a house on the land from defendant for £300 (Exhibit B). He also claimed that there was some negotiation as to plaintiff's taking over the land for £1,000. This came to nothing. Defendant gave evidence to the effect that he paid plaintiff wages at the rate of a least £240 a year. No claim for wages was made.

Mr. Park, Solicitor, gave evidence to the effect that defendant occupied part of " Naitovo " as tenant of the Club. He also said that the plaintiff wanted tenancy in his own name. Mr. Park said further that there were rumours that defendant had sold out. He spoke to defendant who denied this and said that Kuppan, now the appellant, was working for him.

In a letter, Exhibit D, dated 15th April, 1953, to the Secretary of the Nadi Sports Club, defendant also denied selling his rights over the cane area to anyone. He also stated that a document (which from the general context appears to be Exhibit A) referred to in a letter from Mr. Park, was false, and that he made no agreement with Kuppan.

This last statement is obviously untrue, because in his Statement of Defence he admits having entered into an agreement with Kuppan dated 6th March, 1950.

The learned Magistrate held that the agreement, Exhibit A, was illegal and that it was an attempt to evade the provisions of the Native Land Trust Ordinance, and, in particular, section 13, which requires the consent of the Board to any alienation or dealing with the land comprised in a lease whether by sale, transfer, or sublease, or in any manner whatsoever.

The first question to be considered is whether the agreement is an evasion of the provisions of the Ordinance and, if so, whether it is a permissible evasion or otherwise.

In *Maxwell, Interpretation of Statutes, 9th Edition,* at page 117, the learned author quoted the following from *Simms v. Registrar of Probate* (1900) L.J. P.C., 56:—

> " Everybody agrees that the word (evade) is capable of being used in two senses—one which suggests underhand dealing and another which means nothing more than the intentional avoidance of something disagreeable."

Commenting on this the author says:—

> " As regards the first of these senses, it does not really involve a question of construction at all. It is simply fraud . . . But when the second sense of ' evasion ' is under consideration it merits careful, though not necessarily favourable, scrutiny, and if the result of the investigation shows that the ' avoidance ' is not, in fact, within the mischief contemplated by the statute, it is in a legal sense neither an evasion nor blameworthy."

At page 124 he says further, " It is not evading an Act to keep outside it."

In *Bullivant and Others v. The Attorney-General* for Victoria (1901) A.C. 196, at p. 207, *Lord Lindley* said:—

> " As I have said there are two ways of construing the word ' evade ': one is that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how do to something which does not bring him within the scope. That is evading in one sense, but there is nothing illegal in it. The other is when he goes to his solicitor and says, ' Tell me how to escape from the consequences of an Act of Parliament, although I am brought within it.' That is an act of quite a different character."

On the authority of the foregoing it is submitted by Mr. Rice, Counsel for the appellant, that if one intends to keep outside the statute and achieves it, then this is perfectly lawful, and that the real question is whether the agreement, Exhibit A, came within section 13 at all, i.e., to say whether " evade " has the first or second meaning given to it by *Lindley, L.J.*

Counsel for the appellant dealt next with the question of alienation. He contended that the learned Magistrate held that Exhibit " A " was an alienation of the land. I am unable to agree that he did so hold. It is true he said that he did not decide the meaning of " dealing ", but I think Mr. Kermode, for the respondent, is right in saying that in paragraph 3 of his judgment the Magistrate dealt with section 13 of the Ordinance as a whole, and he cannot, therefore, be said to have confined himself to alienation and to have held that the transaction was an alienation of the land and nothing else.

Mr. Rice, having contended it was not an alienation, referred to the definition of " alienation " in *Stroud*, Vol. 1. 3rd Ed., at p. 109. The definition is as follows:—

> " ' Alienation ' is as much to say, as to make a thing another man's; to alter or put the possession of lands, or other things from one man to another. . . . It is the making over of land or an interest therein; but not the making over of a mere personal right, not in the nature of property."

Mr. Rice laid particular stress on the words " from one man to another," and the words " not the making over of a mere personal right ".

In *Gaskell v. Walters* (1906) 2 Ch. D., p. 1., *Cozens-Hardy, L.J.*, says at page 10:—

> " Alienation implies a transaction by which property is given to another person."

The next point raised by Mr. Rice was as to whether the appellant had parted with the possession of the land. He cited the case of *Chaplin v. Smith*, [1926] 1 K.B. 198, the head note to which is as follows:—

> " The plaintiff demised to the defendant for a term of years certain premises under a lease which contained a convenant by the lessee that he would not, without the lessor's consent, assign or under-let or part with the possession or otherwise dispose of the premises or any part thereof otherwise than by will or codicil. The lease contained the usual power of re-entry for breach of covenant or stipulations. The defendant, failing to obtain from the plaintiff permission to assign the term or under-let the premises to a limited company, which he had formed and registered for the purpose of carrying on his business of a garage proprietor on the demised premises, which was, in fact, a ' one-man ' company, the defendant being managing director thereof and the ' one-man ' verbally entered into an arrangement with the company that they should indemnify him against payment of the rent, rates and taxes of the premises, and carried on there the company's business of garage proprietors for some three years, the registered office of the company being the address of the demised premises, but the defendant retained the key thereof, and in addition to acting as managing director made use of the office for his private correspondence. The company then assigned its goodwill to a second company, of which the defendant was appointed managing director, and the second company carried on its business on the demised premises under exactly similar arrangements to those made with the first company. The plaintiff brought this action asking for forfeiture of the lease on the ground that the defendant, in breach of his covenant, had parted with the possession of the premises successively to the two companies:—Held, reversing the decision of *Shearman, J.*, that the defendant had not parted with the possession in either case, but had retained possession thereof and had committed no breach of the covenant."

Mr. Rice also referred to a letter written by the defendant to the second company, reading:—

> " My position in law in reference to my landlord is such that I cannot make any agreement about the premises and I must remain and continue the actual tenant according to my lease and if, under those circumstances, you like to enter into this agreement, you and I, the company may have the use of these premises. I am retaining my position as lessee and remaining in possession."

Bankes, L.J., commenting on this letter, said:—

> " I do not quite follow the learned Judge's reasoning on this point, but he seems to say: ' There is no dispute about the facts, but in spite of that I find for the plaintiff,' and I think it must be upon that ground that the learned Judge's view was that the man could not retain possession in law and give the exclusive occupation to somebody else. With great submission to the learned Judge, I think it is quite possible in law."

Mr. Rice has contended that the position in the present case is precisely the same as in the letter quoted above.

I am afraid I cannot agree. In *Chaplin v. Smith* the defendant made it perfectly clear that he was remaining in possession.

There is nothing in Exhibit "A" explicitly stating that possession by the respondent is retained nor is there anything in the agreement from which such possession can reasonably be inferred. The respondent, Unni, expressly agrees that he will not interfere with the farming of the land by Kuppan.

Mr. Rice further submitted that the appellant was the agent of the respondent for farming purposes. He so argued also in the Court below, and the learned Magistrate held that the appellant was not an agent. I think the Magistrate was right for the reasons he gives.

If the agreement does not effect a complete transfer of the land to the appellant, it seems to me it does create a tenancy of some kind in favour of Kuppan, and it cannot be argued that it is wanting in con sideration.

Consideration is thus defined by *Lush, J.* in *Currie v. Misa*, quoted at p. 586 in *Fleming v. Bank of New Zealand* (1900) A.C., p. 577:—

> " A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

The respondent was the tenant of the Nadi Sports Club—he is so described by Mr. Park—and as such he was presumably required to cultivate the land in the manner and to the extent demanded by the Nadi Sports Club. By getting the appellant to farm in accordance with Clause 4, he was getting the work done in such a manner that he would not lose his licence from the Club. The consideration was therefore that he received a benefit accruing from the appellant's labour while the appellant got the proceeds of his labour.

If the agreement confers no other rights on the appellant, it creates, at the very least, it seems to me, a tenancy at will in his favour.

The question for determination is whether this agreement is outside the statute. If it is the appellant would be entitled to succeed.

It is common ground that this land is native land and, this being so, the provisions of the Native Land Trust Ordinance will apply.

Section 13 of the Ordinance prohibits any alienation or dealing with native land whether by sale, transfer or sublease or in any manner whatsoever.

Even if the respondent has not made over the land, has he not made over an interest in the land by permitting the appellant to enjoy all the benefits accruing from the land, benefits which the respondent himself formerly enjoyed? It seems he has done so, and this would constitute an alienation as defined.

If I am wrong in this, however, and there is no alienation, then there still remain the words " dealing . . . in any manner whatsoever."

These words, as the Magistrate says, are so wide as to render it impossible for the agreement not be caught up in it. The agreement must therefore be held to be within the statute, and it follows, therefore, that the provisions of the Ordinance apply and that the consent of the Board was necessary. No such consent was obtained, and it follows that the agreement is illegal.

Scrutton, L.J., clearly indicated in *Mahmoud v. Ispahani* (1921) 2 K.B. at p. 728, what the position is in relation to an illegal contract, when he said:—

> " I think the law is laid down in *Cope v. Rowlands* (2 M. & W. 157), where Parke, B., delivering the judgment of the Court, said: ' It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: *Lord Holt, Bartlett v. Vinor* (Carth. 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract ? If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract . . . and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which *Parke, B.*, refers in *Cope v. Rowlands* (2 M. & W. 157, 158), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public."

Both section 8 and section 13 of the Native Land Trust Ordinance prohibit any sale, lease or other disposal of native land except in accordance with the provisions of the Ordinance. Such prohibition is a matter of public policy.

It is quite immaterial, in my view, whether the document, Exhibit " A " is called a *de facto* transfer, a licence to farm or a tenancy agreement. Whatever it is called, it has resulted in a dealing in land—even if it may not be alienation—in contravention of the Ordinance.

I have been referred to *Bowmaker's* case, *Bowmakers Ltd., v. Barnett Instruments Ltd.* [1944] 2 A.E.R. as supporting the appellant's case, and in particular I am referred to the concluding paragraph on page 582, which reads:—

> " In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings or in the course of the trial, that the chattels came into defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim."

It has been contended that in the present case it was the respondent who did all this. I regret I cannot agree. Surely appellant in this case is claiming by virtue of the agreement, which for reasons given is illegal. In other words, his claim is founded on an illegal contract and is not independent of it. Bowmaker's case, therefore, does not help him.

The agreement in question was drawn up by a firm of well-known solicitors, and it is superfluous to say that there can be no suggestion whatever that in drawing up the agreement the solicitors were acting otherwise than in the bona fide belief, if it were an intentional evasion, that it was a permissible evasion of the Ordinance.

There remains the question of wages.

There was no claim for wages by the appellant. His statement of claim asks simply for the payment of a sum of money in accordance with Clause 1 of the agreement. Mr. Rice has submitted an interesting argument. He admitted that there was no claim for wages, but submitted that wages could be awarded by invoking the provisions of section 27 (2) of the Magistrates' Courts Ordinance. This section reads as follows:—

> " A Magistrate in the exercise of the jurisdiction vested in him by this Ordinance shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or relief whatsoever, interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which shall appear in such cause or matter; so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The appellant's Counsel relied on the words " or which shall appear in such cause or matter ". I do not think these are the vital words of the section. I think the important words of the section, which give the necessary powers to the Magistrate are " so that as far as possible all *matters in controversy* between the parties respectively may be finally determined." The question of wages is not a matter *in controversy* between the parties. Plaintiff did not claim wages, and nothing would have been heard of wages, but for the fact that the defendant, in his endeavour to escape liability for payment of money claimed by plaintiff under the agreement, set up the defence that the plaintiff had received all the money to which he was entitled by the payment to him of wages.

The question of wages was not in controversy between the parties, and I do not think, therefore, that section 27 (2) can be invoked.

Mr. Rice has argued further that wages are payable by reason of what *Denning, L.J.*, in his book, *The Changing Law* at page 62, calls the " law of restitution ". I do not think that this is applicable to the present case, nor does the case of *James v. Kent* [1951] 1 K.B. 551, p. 1099, apply. The contract between the parties was, in my view, an illegal contract and no Court would lend assistance in enforcing an illegal contract prohibited by statute. No wages can therefore be awarded in this action.

The learned Magistrate gave judgment for the defendant, now respondent.

As Carew, J., said in *Ramkhelawan v. Mohanlal* (C.A. No. 31 of 1950), where a claim is based on an illegal contract neither party should have the assistance of the Court. The Magistrate should have dismissed the action rather than give judgment for the defendant. This, however, does not assist the appellant in his appeal.

The appeal is dismissed. I do not think I should be justified in awarding the respondent costs, and no costs will be awarded.