

## IN THE SUPREME COURT OF FIJI

## Civil Jurisdiction

Civil Action No. 277 of 1958

Between:

KARSANJI NARAINJI

Plaintiff

v.

BHAGWAN KALYAN  
BHANNBHAI KALYAN  
FULCHAND KALYAN

Defendants

Trading as F. KALYAN &amp; Co.

Land (Transfer and Registration) Ordinance, (Cap. 136)—Section 18—  
meaning of.

The facts arising in this case are clearly summarised in the first part of the judgment. The case involved the interpretation of section 18 of the Land (Transfer and Registration) Ordinance, Cap. 136, which reads:

“ 18. No instrument purporting to deal with any land under this Ordinance shall be or be deemed to have been invalid or ineffectual by reason only that the same purports to have been executed at a time when the person executing the same was not actually registered as the proprietor of such land.”

*Held.*—Section 18 does not validate an instrument otherwise invalid. It merely provides that an instrument otherwise valid shall not be invalid solely because at the date of execution the person executing it was not actually registered as the proprietor of the land. Section 18 does not make valid an instrument executed by a person who was not registered at the time of execution, if in fact that person had no right then to be registered as the proprietor and no right then to execute the instrument.

*A. D. Patel* for the Plaintiff.

*S. M. Koya* for the Defendants.

HAMMETT, Ag. C.J. (9th November, 1961).

The plaintiff's claim is for damages against the defendants for the wrongful occupation of a shop in Lautoka on Crown Lease No. B.2 together with an injunction restraining the defendants from occupying the said premises. The plaintiff claims his title as lessee from one Chaganlal under a tenancy agreement dated 25th March, 1958.

The defendants assert that they are in lawful possession and occupation of the premises under a tenancy agreement dated 8th April, 1954, for five years, which was subsequently extended for a further five years. The defendants claim title from one Dhanji the registered proprietor at the material time. The defendants challenge the titles of both the plaintiff and Chaganlal from whom the plaintiff claims he derived his title.

The facts upon which the original titles of the parties depend are not in dispute and I hold them to be as follows.

The premises in question are built on a part of the land held under Crown Lease No. B.2. The title to this Lease was registered in the name of Bhimji on 10th July, 1918. Bhimji (or Bhimji Mulji to give him his full name) died on 11th October, 1933. By his will dated 16th November, 1932, he appointed his son Dhanji (or Dhanji Mulji) his sole executor. Probate of the estate of Bhimji was granted to Dhanji on 22nd October, 1934 and Dhanji was registered as the registered proprietor of the title in his capacity as executor on 5th April, 1937.

In his will Bhimji devised his leasehold property to Chaganlal and Lachmidas and his son Dhanji as "special trustees" on the following trusts—

1. To pay his wife an annuity of 30 rupees a month,
2. To pay the residue of income to Dhanji Mulji or to allow him to occupy the property subject to the payment of the annuity to his wife,
3. After the death of his wife to hold the property on such trusts as Dhanji Mulji should by will appoint and in default of appointment the property was to go to the deceased's nearest male descendant.

In spite of this demise Dhanji never did in fact transfer the title to this lease from himself, in his capacity as executor, to himself, Chaganlal and Lachmidas in their joint capacities as trustees. This is understandable since Dhanji himself was to enjoy almost the entire beneficial interest in the property.

On 8th April, 1953 (there is some dispute as to whether the correct date was 1953 or 1954 but for the time being this is not material) Dhanji in his capacity as executor of the estate of Bhimji deceased granted the defendants an agreement for a sub-lease of the premises in question for five years. It is the case for the defendants, which was disputed by the plaintiff, that Dhanji renewed this agreement, on its expiry, for a further five years in consideration of the defendants paying part of the cost of certain structural alterations which were required by the local Health Authorities at the time.

Dhanji died on 4th August, 1957. Probate of the estate of Dhanji was granted on 17th October, 1957, to the executors named in his will dated 21st June, 1957, namely Sakarben, Bhikha Bhai and Jethalal Narainji. By his will Dhanji left all his property to his executors and trustees on trust to divide it equally between his widow and his five sons. He did not specifically exercise the general power of appointment by will given him over the lease in question by the will by his father Bhimji. This property over which Dhanji had the general power of appointment did therefore pass under this general devise of his property.

On 25th March, 1958, Chaganlal executed an Agreement for the sub-lease of the two shops on the leasehold property in question for five years in favour of Karsanji Narainji, the plaintiff in this action. Chaganlal, in this agreement, described himself as the sole surviving trustee in the estate of Bhimji deceased. On this date, 25th March, 1958, the person actually registered as the proprietor of the lease was not Chaganlal, but Dhanji in his capacity as executor of the estate of Bhimji deceased. As and from the death of Dhanji on 4th August, 1957, the persons entitled to be registered as the registered proprietors of the title were the personal representatives of Dhanji, and not Chaganlal or the special trustees under the will of Bhimji deceased.

On 1  
against  
the de  
right t  
establi

The  
regist  
1961.  
Ordin  
the d

Th  
the d  
regist  
after  
defen  
been  
perso  
prop  
May,  
" as t

Cha  
13th

It  
Chaga  
lease  
dated  
of Cha  
posses

Cou  
terms  
136, w

O  
re  
th  
pl

I th  
valida  
that a  
reason  
was no  
not ma  
at the t  
as the  
otherw  
ment c  
consent  
date be

On 14th August, 1958, the plaintiff began this action setting up his title against that of the defendants, who the plaintiff treated as trespassers. Since the defendants were admittedly in possession on 14th August, 1958, their right to possession was good against everyone except persons who could establish a better lawful title to the property.

The personal representatives of Dhanji deceased were not registered as the registered proprietors of the title by transmission on death until 13th May, 1961. By virtue of section 99 of the Land (Transfer and Registration) Ordinance, Cap. 136, their title related back and took effect as from the date of the death of Dhanji, the last registered proprietor, namely 4th August, 1957.

The plaintiff in this action after the writ was issued presumably realised the defects in his own title, and realised that in fact Chaganlal had never held a registered title which he could transfer to the plaintiff. At all events, long after the 14th August the date that this action was started and after the defence had been delivered, during a period when the trial of the action had been adjourned by consent with a view to a settlement not only were the personal representatives of Dhanji registered on 13th May, 1961, as the proprietors by transmission on death, but also, on that same date, 13th May, 1961, a transfer from these personal representatives to Chaganlal "as trustee" was registered.

Chaganlal therefore first became a registered proprietor of the land on 13th May, 1961.

It is the contention of the defence that prior to 13th May, 1961, since Chaganlal was not the registered proprietor, he had no right or title to grant a lease or sub-lease to the plaintiff. It is claimed that the plaintiff's sub-lease dated 25th March, 1958, being based on what was then the non-existing title of Chaganlal is a defective or non-existing title as regards the defendant in possession.

Counsel for the plaintiff has countered this argument by reliance on the terms of section 18 of the Land (Transfer and Registration) Ordinance, Cap. 136, which reads as follows:—

"18. No instrument purporting to deal with any land under this Ordinance shall be or be deemed to have been invalid or ineffectual by reason only that the same purports to have been executed at a time when the person executing the same was not actually registered as the proprietor of such land."

I think it must be clearly understood that this section does not in fact itself validate any instrument which is otherwise invalid—what it does is to state that an instrument which is otherwise valid shall not be invalid by reason only of the fact that at the date of execution the person executing it was not actually registered as the proprietor of the land. This section does not make valid an instrument executed by a person who was not registered at the time of execution, if in fact that person had no right then to be registered as the proprietor and no right then to execute the instrument. To hold otherwise would permit a total stranger to the land to execute a valid instrument conferring enforceable rights on third parties without the knowledge or consent of the registered proprietor at the time if the stranger at some later date became the registered proprietor.

In my opinion therefore the plaintiff must prove more than the mere fact that Chaganlal although not the registered proprietor of the land on 25th August, 1958, when he made this agreement with the plaintiff did in fact at some later time become registered as the registered proprietor of the land. What the plaintiff must prove is that on 25th August, 1958, Chaganlal was entitled as of right, then, to be, on that date, the registered proprietor of the land.

According to the evidence in this case, Chaganlal's title is derived from his appointment as one of three special trustees by the will of Bhimji deceased. Under the terms of that will Chaganlal and his two co-trustees were to be trustees of the land until the death of both Dhanji and Bhimji's widow. It was agreed that Bhimji's widow died in 1955. After the death of Dhanji on 4th August, 1957, therefore, the purpose for which Chaganlal and his two special trustees had been appointed had been completed. The property then, according to the terms of Bhimji's will was to pass to the person appointed by Dhanji's will, or in default to the nearest male descendant of Bhimji.

Once therefore Dhanji had died, Chaganlal had no right to be appointed the registered proprietor of the land as a trustee appointed by the will of Bhimji deceased. His registration, therefore, on 26th May, 1961, as "trustee" of the land by transfer from the executors of the will of Dhanji Mulji deceased therefore, did not and could not relate back in law to any date prior to the date of the actual registration so as adversely to affect the existing rights of persons in possession of the property or of third parties.

The document actually transferring the title from the executors of Dhanji to Chaganlal was dated 29th April, 1961, and it was this instrument that was registered on 13th May, 1961. The rights of Chaganlal to deal with this land arose as a result of this transfer and were only effective from the date of its execution, i.e. 29th April, 1961.

In these circumstances the title of the plaintiff in this action is defective in that it depends on the non-existent right of Chaganlal to grant him a sub-lease on 25th March, 1958.

The defendants being in possession are entitled to assert their rights and to retain possession of the premises, even if they are trespassers, against those of everyone save those who can show a superior title.

It is not therefore necessary for me to go further and decide whether or not the defendants are trespassers. They are in possession and the plaintiff in this action has failed to establish a good title upon which to base his claim against them for possession.

There will therefore be judgment for the defendants.

Lay  
loquit  
This  
small  
while  
defenc  
killing  
other  
The d  
establ  
Helo  
the de  
defend  
(2) I  
assesse  
Judg  
Case  
Law  
Hall  
Liffe  
Bark  
Kam  
K. P.  
J. N.  
HAM  
The p  
Estate c  
servant  
motor ad  
is broug  
Ordinan