A

ABDUL RAHMAN SAHU KHAN

v.

DHUPRAJI

B [SUPREME COURT* 1967 (Mills-Owens C.JJ.), 25-27th September, 16th October]

Civil Jurisdiction

Limitation of actions—land—adverse possession—requisites of proof—entry as tres-
C *passer unnecessary—area claimed to be proved with particularity—land claimed in occupation of tenants under unregistered agreements—time running against tenants but not owner of freehold—Real Property Limitation Act 1833 (3 & 4 Will. 4, c.27) (Imperial)—Real Property Limitation Act 1874 (37 & 38 Vict., c.57) s.2—Supreme Court Ordinance (Cap. 4—1955) s.35—Land (Transfer and Registration) Ordinance (Cap. 136—1955) ss.14, 25, Pt. 9—Suva (Subdivision of Land) By-Laws (Cap. 78—1955).*

Landlord and tenant—prescription—claim by adjoining owner land leased to tenants —time does not run against landlord until expiration of tenancies—Real Property
D *Limitation Act 1833 (3 & 4 Will. 4, c.27) (Imperial)—Real Property Limitation Act 1874 (37 & 38 Vict., c.57) s.2—Supreme Court Ordinance (Cap. 4—1955) s.35.*

Landlord and tenant—land under Land (Transfer and Registration Ordinance)—entry under unregistered lease—unregistered lease operating as agreement to lease—estate or interest at common law—Land (Transfer and Registration) Ordinance (Cap. 136—1955) ss.14, 25.

To prove "adverse possession" for the purpose of establishing a title
E to land by prescription it is not necessary to show entry as a trespasser; it is sufficient if acts are done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it. Enclosure is the strongest (though not necessarily conclusive) evidence of possession.

Section 25 of the Land (Transfer and Registration) Ordinance
F by virtue of which an unregistered instrument is ineffectual to pass an estate or interest in land, does not prevent a "lessee" who enters upon the land under an unregistered lease from acquiring an estate or interest therein at common law by reason of such entry. Such an unregistered instrument operates as an agreement for a lease. Where land is so held by a succession of tenants, time does not begin to run against their landlord as owner of the freehold and in favour of a person claiming
G by adverse possession, until the last of such tenancies has expired.

In an action to establish a title by adverse possession to land under the Land (Transfer and Registration) Ordinance the plaintiff must prove a right to the precise area he claims.

Cases referred to: *Leigh v. Jack* (1879) 5 Ex. D. 264; 42 L.T. 463:
H *Seddon v. Smith* (1877) 36 L.T. 168: *Walter v. Yalden* [1902] 2 K.B.

* This judgment was given in 1967 but was not reported in the volume for that year as an appeal had been lodged. The appeal has not, however, been brought to hearing. — Ed.

304; 87 L.T. 97: *Fairweather v. St. Marylebone Property Co. Ltd.* [1963] A.C. 510; [1962] 2 W.L.R. 1020: *Moore v. Diamond* (1930) 43 C.L.R. 105: *Walsh v. Lonsdale* (1882) 21 Ch. D. 9; 46 L.T. 858.

Action in the Supreme Court claiming title to land by prescription.

M. S. Sahu Khan for the plaintiff.

R. G. Q. Kermode and C. D. Singh for the defendant.

The facts are set out in the judgment of the Chief Justice.

MILLS-OWENS C.J.: [16th October, 1967]—

The plaintiff is the registered proprietor in fee simple of the plot of land comprised in Certificate of Title No. 4601, containing 32 perches, while the defendant is the registered proprietor in fee simple of the adjoining plot comprised in Certificate of Title No. 4769, containing 24½ perches. I will refer to the plots as 'plot CT 4601' and 'plot CT 4769' respectively. The two plots front on to Waimanu Road in the City of Suva, and are contiguous throughout their whole depth rearwards from Waimanu Road. The plot CT 4769 is the right-hand plot when the faces that road. The true common boundary between them, according to the registered titles, is delineated on the plan prepared for the purposes of this action (Ex. A) as the line 'AC.' Point 'A' is the boundary point at the Waimanu Road frontage, and point 'C' is the boundary point on their rear boundary line. The rear boundary line is a continuous line on a fixed bearing throughout.

The plaintiff claim to have acquired a title under the statutes of limitation to a triangular piece of land being an encroachment upon the plot CT 4769 and containing 4½ perches; marked 'Lot 1' on the plan Ex. A. The apex of the triangle is point 'A'. One side of the triangle is the line 'AC' which I have described. Point 'B' has no counterpart in the registered title. At some time a survey peg has been placed there, consisting of a prominent iron rod. It is 28 links from point 'C'. It is a curious feature that it is not on the rear boundary line but about a foot away from it, into plot CT 4769. The other two sides of the triangular piece of land in dispute Lot 1, are, therefore, the line 'AB' but extended one foot to meet the rear boundary line, and the line commencing from point 'C' running to meet the extension of the line 'AB' at the point where it meets the rear boundary line. It will be observed, therefore, that there is a wedge-shaped piece of land which falls outside the triangle formed by the survey pegs at points 'A', 'B' and 'C', represented by (1) the line 'CB', (2) the rear boundary line, and (3) an imaginary line projecting from point 'B' to the rear boundary line. However, Lot 1, the area claimed by the plaintiff, includes this small wedge-shaped piece.

Dealing with the registered titles: The Certificate of Title No. 4601 was issued on the 10th November, 1922 to the plaintiff's father, Sahu Khan (otherwise Sahoo). He died in the year 1950. The plaintiff proved his will as sole executor and became the registered proprietor of plot CT 4601 in 1957. It appears to be immaterial, in the circumstances of the case, whether, with respect to the land in dispute, the plaintiff succeeded to his father's rights as an immediately succeeding adverse possessor or as the residuary devisee under his father's will. The Certificate of Title No. 4769 was issued on the 8th December, 1924 to one Budhu. His

son, Misri, became the registered proprietor of the plot CT 4769 comprised therein in 1933. In 1937 Misri transferred a one-half undivided share to his wife, the defendant. In 1960 he transferred to her the remaining one-half share. Misri died in about the year 1962.

It is accepted that the substantive law relating to limitation of actions for the recovery of land is that contained in the Real Property Limitation Acts, 1833 and 1874, which extend to Fiji by virtue of section 35 of the Supreme Court Ordinance (Cap. 4). Under section 37 of that Ordinance the Acts of 1833 and 1874 have force in Fiji subject to any local laws. One such law is the Land (Transfer and Registration) Ordinance (Cap. 136) under which the titles to the plots are registered. Under section 14 of that Ordinance the acquisition of title to registered land by adverse possession is contemplated; Part IX of the Ordinance provides a means whereby a vesting order may be obtained in such a case on application to the Registrar of Titles by the person claiming a prescriptive title. It is suggested on behalf of the defendant that another such law is that regulating the subdivision of land within the City boundaries; I shall refer to this later.

It has not been argued that the transfer of 1960 vested in the defendant an indefeasible title to the one-half share.

These proceedings commenced with an application by the plaintiff to the Registrar of Titles for a vesting order to be made under Part IX of the Ordinance Chapter 136. The defendant entered a caveat and the case now comes before the Court for determination, both on the facts and the law, whether the plaintiff has established a title by 'adverse possession' to Lot 1. It is accepted that the onus lies upon the plaintiff to establish his case on the balance of probabilities.

The plaintiff's claim is based on dispossession of the defendant's predecessors in title by enclosure of Lot 1 by the planting of a line of coconut trees and hibiscus hedge; subsequently the building of a house on a portion of it; and continuous possession and enjoyment of the whole area of Lot 1 over a considerable number of years. The plaintiff says that it was only in 1965 that he became aware that the land in dispute was, according to the registered titles, a part of plot CT 4769. The defence contends that this in itself is fatal to his claim; that to constitute adverse possession there must be entry as a wrongdoer, a trespasser. I do not accept this contention. "Adverse possession" has ceased to have its former, pre-1833, technical meaning. It it sufficient if acts are done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it (*Leigh v. Jack* (1879) 5 Ex. D. 264 at p.273 per Bramwell L.J.) Enclosure is the strongest evidence of adverse possession (*Seddon v. Smith* (1877) 36 L.T. 168 at p.169 per Cockburn C.J.), although not indispensable or necessarily conclusive.

The defendant says that for the period of 16 years up to 1964 her plot was 'leased' to a Chinese person named Ma Hoi for successive periods of 10 years, 5 years and 1 year and that previously it was continuously occupied by tenants. The plaintiff agrees that the defendant's plot was continuously occupied by tenants from the year 1924, in which Budhu acquired it, until 1964. The defence rely on *Walter v. Yalden* [1902] 2 K.B. 304 in support of the contention that such occupation prevented time from running against the defendant and her predecessors in title

until 1964. That case has in fact been overruled by *Fairweather v. St. Marylebone Property Co. Ltd.* [1962] 2 W.L.R. 1020 although not on that point. I shall refer later to this matter of occupation of the defendant's plot by tenants.

The plaintiff's case is that in the year 1922, shortly after his father purchased plot CT 4601, he (the plaintiff) planted a line of coconut trees for the purpose of establishing a physical boundary between that plot and the plot CT 4769 afterwards bought by Budhu. He says that Misri was there when he did this and actually assisted him in sighting the line of the boundary 'AB'; the plaintiff says he found the survey peg at point 'B' and stood there while Misri stood at point 'A', and between them they guided a third person to dig holes in which to plant the coconuts. The third person was Sher Mohammed, an uncle of the plaintiff, who gave evidence in purported corroboration of the plaintiff's version of this alleged event. Misri was, as I have mentioned, Budhu's son and is now deceased; apparently Budhu ran a store on plot CT 4769 prior to acquiring it in 1924 and that might, if the plaintiff and his witness are to be believed, afford a reason why Misri happened to be there in 1922. It is clear that the line of trees was not planted along the line 'AB'; according to the plaintiff they were planted some 18 inches to 2 feet inside that line, i.e. on the plaintiff's side; the plaintiff implied that this was done in order to allow for growth. The trunks, he says, have now spread to within 1 foot of the line 'AB'. Some coconut trees remain standing today and the stumps of others remain visible; this appears to be accepted, but only as a present-day fact. The plaintiff says that he acted quite innocently in taking the boundary to be the line 'AB', in particular in taking the survey peg at point 'B' to represent the rear boundary point. Shortly after planting the coconut trees, he says, he planted a hibiscus hedge between the growing trees so as to constitute an unbroken physical boundary. This hedge has now largely disappeared. In 1935, he says, he superintended the erection of a house on plot CT 4601 for his own occupation. The house was erected, as it remains today, partly on Lot 1, and has occupied it ever since. In 1961 he added a kitchen building, which was built and remains wholly within plot CT 4601, and he constructed a septic tank which was, and remains, wholly within Lot 1. The plaintiff says that from the year 1922 onwards, continuously until the year 1965, Lot 1 was occupied and enjoyed by him, and his father before him, as an assumed part of the plot CT 4601; the grounds were regularly mown and tended up to the line of the coconut trees and hedge; and they enjoyed the fruits of the trees. No dispute or questions arose, he says, until the year 1965 when the defendant caused a survey of her plot to be made by a surveyor, Mr. Tetzner, and thereupon it came to his knowledge for the first time that the survey peg at point 'B' should have been at point 'C', according to the registered titles.

Mr. Tetzner gave evidence, which I accept. He carried out a survey for the plaintiff at the end of 1965. Earlier in the year 1965 his firm had carried out a survey for the defendant but he had no personal knowledge of that survey. On the survey made later in the year for the plaintiff he found the peg at point 'B' in situ; it is an old peg such as surveyors commonly use. It is a prominent iron rod, protruding almost a foot above ground. There was then no peg at point 'C'; finding it missing he placed one there. Mr. Tetzner also said that the remaining coconut trees and remains of the hedge 'approximated' to the line 'AC'.

He was not prepared to agree that peg 'B', merely because it protruded a foot or so above ground, was not put in by a surveyor. But he did agree that it was a distance of one foot away from the rear boundary line. He was not prepared to agree or to disagree that this in itself was an indication that it had been put in by someone other than a surveyor, e.g. by an amateur.

As to the peg at 'C' which Mr. Tetzner said was missing when he did his survey for the plaintiff later in the year 1965, the plaintiff said distinctly that it was there earlier in that year when Mr. Tetzner's firm carried out a survey for the defendant. The plaintiff denied that he had moved it from point 'C' to point 'B'. He was ready to agree that it would have been to his apparent advantage to do so. At this point Counsel for the defendant applied for and was granted leave to amend the statement of claim by adding a claim that the plaintiff had been guilty of concealed fraud in removing the peg from 'C' to 'B'.

I very much doubt the plaintiff's assertion that the coconut trees were planted in 1922; It would have been far more likely if he had said that they were planted in 1935 when the house came to be built, but there is no evidence of that. His witness, his uncle Sher Mohammed, did not inspire any confidence in giving evidence purporting to corroborate that the trees were planted in 1922. There was, in my view, no necessity or real occasion for forming a physical boundary between the two plots CT 4601 and CT 4769 only, and not one on the rear boundary and one between CT 4601 and the plot on the other side of it, namely plot CT 4996, also. At that time plot CT 4996 was owned by Budhu (the plaintiff's father did not acquire it until 1926).

The plaintiff's son gave evidence. He had lived in his father's house on plot CT 4601 all his life practically, until $2\frac{1}{2}$ years ago, and he is now 39 years of age. He said he had never, at any time, seen any survey pegs on his father's land; he first saw the peg at point 'B' some few weeks ago. In my view this throws further doubt on the whole story of the plaintiff and his witness, Sher Mohammed, that the line of coconut trees was planted by reference to a sighting of the line 'AB' by reference to a survey peg at point 'B'. It seems to me most improbable that the peg could have been there continuously from 1922 to 1965 without the plaintiff's son having seen it. Further, if the line 'AB' was sighted as the plaintiff said it was, why were the trees not planted along or just within that line? I doubt the whole story of Misri joining in. The plaintiff's son produced a photograph in which he himself appears and in which a line of coconut trees is plainly visible. He said this was taken in 1954. I accept that. The trees appear in the photograph as fairly well grown. It must therefore be the case that they were planted more than 12 years before the date when the present action was instituted, which was the 28th December, 1966, but I cannot say precisely when they were planted. I can only say that it must have been before 1954.

This brings me to the matter of the tenancies of the defendant's plot CT 4769, tenancies which, as the plaintiff expressly agreed, existed continuously from 1924 to 1964. The defendant said the last tenant had successive leases for the 16 years expiring in 1964 but obviously if any lease in writing was ever executed, which I doubt, it was not registered. Under section 25 of the Ordinance Chapter 136 an unregistered instrument is ineffectual to pass an estate or interest in land but that does not in

my view prevent a 'lessee' who enters upon the land under an unregistered lease from acquiring an estate or interest therein at common law by reason of such entry, notwithstanding that the Ordinance makes no provision for over-riding interests such as the rights of persons in actual occupation. On general principles, such a 'lessee' would on entry become, initially, a tenant at will. On paying rent he would hold on a good common law periodic tenancy, on the terms of the lease so far as applicable to the periodic tenancy (*vide Moore v. Dimond* (1930) 43 C.L.R. 105). He acquires such estate or interest, as it appears to me, not under the unregistered instrument but by reason of the unregistered instrument operating as an agreement for a lease, and by entry and payment of rent pursuant thereto. As between the parties the tenant may be lessee in equity under the doctrine of *Walsh v. Lonsdale* (1892) 21 Ch. D. 9, but that appears to be immaterial for the purposes of the present case. In the circumstances, therefore, that Lot 1 was, throughout the period that the plaintiff was in occupation thereof, held by tenants holding under the defendant and her predecessors, certain passages in the judgments in the case of *Fairweather v. St. Marylebone Property Co. Ltd.* (supra) appear to me to lead to the conclusion that time did not begin to run against the defendant until the last of the tenancies expired or was determined, which in the state of the evidence was in 1964. I refer particularly to the judgment of Lord Morris at p.1043 where he said —

> "I can see no difference in principle between a case where there is possession which is adverse to a tenant who has a lease for a fixed term and a case where there is possession which is adverse to a tenant from year to year. If a landlord lets from year to year and if there is adverse possession for a statutory period against the tenant then the title of the tenant will be extinguished. His tenancy will however not be transferred to the adverse possessor. The position will be that the tenant will have lost the right to eject the adverse possessor. The landlord can however give an appropriate notice to quit to his tenant and upon its expiration the landlord will be entitled to possession."

(See also per Lord Denning at p.1034 where he refers to the case where "the leasehold is a tenancy from year to year").

Counsel for the plaintiff referred to the statement in the judgment in *Walter v. Yalden* (supra) that a reversion on a lease is not a future interest. That was said in reference to the later part of the section of the Act under discussion (sec. 2 of the Act of 1874). It does not affect the earlier part of the section whereunder a reversioner has 12 years from the date when the lease or tenancy expires in which to bring his action for recovery of the land.

Accordingly I would hold that the plaintiff's claim fails on the ground that time did not begin to run until 1964.

It is desirable perhaps that I should deal with other aspects of the case. The plaintiff claims up to the line 'AB' but on his own evidence the enclosure effected by the line of coconut trees and hibiscus hedge was not along that line; he says he planted the coconut trees 18 inches or 2 feet away from the line and the spread of their trunks brought them to within 1 foot of the line. Mr. Tetzner said they 'approximated' to the line 'AB'. Their evidence is not inconsistent. As it appears to me

the plaintiff has not proved a right to the precise area he claims. For the purpose of acquiring a registered title he must identify the land
A claimed by reference to a survey plan which may be made part of the register maintained under the Ordinance Chapter 136. Without such particularity the 'Torrens' system would be ineffective. I do not think I can properly apply the *'de minimis'* rule. In short, the plaintiff has failed to show title to a strip approximately one foot wide running roughly parallel to the line 'AB' and that, in my view, is fatal to his claim.

B I make no finding of fraud against the plaintiff, as contended for by the defence. The circumstances are not such, in my view, as to warrant such a finding. It can only be a matter of inference and the evidence, I consider, does not justify such an inference.

The defendant's evidence of an alleged arrangement between her late husband, Misri, and the plaintiff under which the plaintiff agreed to remove the house, was merely hearsay. She was obviously not in a position to
C give a first-hand account of events, in many respects. The evidence of her witness Mr. Bhim was to the effect that the plaintiff's father agreed, in 1949, to remove the house to allow the defendant's husband who was then alive to build a block of flats. I do not place any reliance on his evidence, one way or the other; it appears, in any event, to be immaterial whether or not there was such an arrangement with the plaintiff's father.

D

I have made a brief reference to the contention for the defence that a title to a portion of land comprised in a registered title, within the boundaries of the City of Suva, cannot be acquired, even by adverse possession, unless the City Council has approved of the subdivision of the land under the Suva (Subdivision of Land) By-Laws. Holding as I do in favour of the defence for other reasons it is necessary for me to deal
E with this contention.

For the reasons given above I dismiss the claim and give judgment for the defendant with costs.

Action dismissed.