

KUMAR GURDIAL SINGH

A

v.

MEHAR SINGH & ANOTHER

[SUPREME COURT—Madhoji, J.—31 July 1980]

B

Civil Jurisdiction

H. M. Patel and N. C. Prasad for the Plaintiff
J. Singh and D. C. Maharaj for the Defendants

C

Crown Lands Ordinance S.13—Lessee not to alienate without prior consent—otherwise transaction null and void—consent to sublease unreasonably withheld—parties in pari delicto—lessee retaining possession must vacate.

D

Action for damages and other relief against the defendants for unreasonably and arbitrarily withholding consent to a proposed subletting by the plaintiff.

By agreement dated 5 December 1975 defendant sublet to plaintiff portion of land comprised in a Crown Lease. It was common ground that it was a protected lease under the Crown Lands Ordinance S. 13.

E

The lease contained a clause prohibiting subletting without prior consent of the lessors, such consent not to be unreasonably withheld in the case of responsible sub-tenant.

Not until 19 December 1975 was application made for the consent of the Director of Lands to the agreement to sublet. This was given on 8 June 1976 and endorsed on the agreement to sublet on 9 June 1976 by which time plaintiff had been in possession of the premises from 1 December 1975.

F

In December 1979 plaintiff sought to sublet the premises to K. C. Lala for the balance of the term. Defendants refused to consent insisting that plaintiff surrender his sublease and vacate the premises whereby they would consider subletting direct to K.C. Lala. On 10 January 1980 plaintiff wrote to defendants asking for this consent. On 22 June 1980 by their reply the application was refused though without any objection raised to the proposed sub-lessee. Later K.C. Lala found other premises.

G

In February 1980 plaintiff left the premises, retained possession of the keys and paid rent to the end of 1979.

H

The Court noted the burden of proof is on the tenant to show landlord has unreasonably withheld his consent: it was generally unreasonable for landlord so to

refuse a sublease on a basis not connected with the personality of the sub lessee. It was not sufficient to say "I want to oblige the lessee to sell to me....."

A The Court found the reason for defendant's withholding the consent was to coerce the plaintiff into surrendering his term. However the learned judge found that the defendants did withhold their consent unreasonably in the case of K. C. Lala, a respectable and responsible person. In such circumstances plaintiff had been entitled to sublet to K. C. Lala without consent or apply to the court for a declaration of entitlement to sublet.

B However, the Crown Lands Ordinance S. 13 requires that it was not lawful for a lessee to alienate or deal with the land in a lease (including by subleasing) without the written consent of the Director of Lands first had and obtained; **without which such alienation or sublease was null and void.** The Judge held the original sublease to the plaintiff was *void ab initio*. In his view the dealing was void as plaintiff had been in possession of the land first, then the agreement was executed and later the consent applied for. Subsequently given consent could not validate a transaction unlawful *ab initio*. Accordingly the claim of the plaintiff and defendants's counter claim arose from an unlawful transaction, the parties being *in pari delicto*.

D **Held: Neither party had any right of action arising against the other. The plaintiff's claim failed. Plaintiff could not justify remaining in possession by relying on an illegal agreement.**

The plaintiff was ordered to deliver vacant possession of premises to the defendants forthwith.

E It was noted that defendants had obtained the consent of the Director of Lands to institute these proceedings.

Cases referred to:

Bates v. Donaldson (1986) 2 Q.B. 241

Jenkins v. Prince (1907) 2 Ch.d 299

Jai Kissun Singh v. Sumitra (1970) 16 F.L.R. 165

F *Court Bros. (Furnishers) Ltd. v. Sunbeam Transport Ltd.* 15 F.L.R. 206

Phalad v. Sukh Raj 24 F.L.R. 170

Mistry Amar Singh v. Kulubya (1963)3 All E.R. 499

Chalmers v. Pardoe (1963) All E.R. 552

MADHOJI, J.

G Judgement

The defendants are lessees from the Director of Lands of the land comprised in Crown Lease No. 2833 situated at 58 Votua Road, North Samabula, Suva. I am satisfied and it is not in dispute that it is a protected lease under Section 13 of the Crown Lands Ordinance.

The following facts are also not in dispute:

By an agreement dated the 5th December 1975 (Ex. A) the defendants sublet to the plaintiff a portion of the land comprised in this Crown Lease, namely, a shop and living quarters in the building erected on the land, for a term of 5 years commencing on the 1st December, 1975 at a monthly rental of \$270.00 payable on the 15th day of each month, the first payment to be made on 15th December 1975 with a period of grace allowed for such payments.

Clause 2(c) of this agreement restricts assignment subletting or parting with possession of the premises sublet without consent of the landlords as follows:

"2(c) Not to assign sub-let or part with possession of the demised premises or any part thereof for the whole or any part of the term hereby created without the prior written consent of the Lessors *Provided However* that such consent shall not be arbitrarily or unreasonably withheld in the case of a responsible and respectable assignee or sub-tenant."

By clause 5 of the agreement it was agreed that the agreement was subject to the consent of the Director of Lands.

Prior to the execution of this subletting agreement, however, namely on the 28th November 1975 the plaintiff and the defendants entered into a sale and purchase agreement (Ex. B) whereby the plaintiff agreed to purchase from the defendants all the stock in trade and certain chattels described in the schedule to the agreement, which stock in trade and chattels were in the said premises. Under the terms of the agreement the purchase price of the stock in trade was to be ascertained by a stock taking on 30th November 1975 and the purchase price of the chattels was agreed at \$1020.00. It was also agreed that possession of the stock in trade and chattels would be given and taken on 30th November 1975 after the stock taking.

The stock taking stipulated in the agreement was carried out on 30th November 1975 as agreed and the defendants gave to the plaintiff possession thereof and also of the shop premises and living quarters on the 1st December 1975 as from which date the plaintiff commenced carrying on business in the shop premises and also to occupy the living quarters. It was subsequent to the giving and taking of possession of the shop premises and living quarters that the subletting agreement Ex. A mentioned earlier was executed on 5th December 1975.

It was not until 19th December 1975, however, that application was made for the consent of the Director of Lands to the agreement to sublet Ex. A. Such consent was given by the Director of Lands on 8th January 1976 and was endorsed on the agreement to sublet on 9th January 1976.

The plaintiff had in the meantime been in possession of the shop and living quarters from the 1st December 1975.

Sometime in December 1979 the plaintiff decided to discontinue his business and go to live in Tailevu where his son has a shop. He therefore had to decide what he should do with the balance of the term of the agreement to sublet. He held several discussions with the defendants and with K. C. Lala (PW2) and Vivek Mudaliar. As to what transpired during these discussions I have considered all the evidence very carefully and have seen and heard the witnesses. I accept the version of the plaintiff and his witness K.C. Lala to be true. I found them to be truthful and reliable witnesses. The evidence of the second defendant corroborates some of this evidence

but he was evasive and did not come out frankly with all that had happened. I am satisfied and find that the following is what actually took place:

- A Plaintiff learned that K. C. Lala was looking for a shop to rent as he had been asked to vacate the shop in Bureta Street where he was then carrying on supermarket business. K. C. Lala was interested in plaintiff's premises for his shop and they discussed the matter. They agreed on the terms on which plaintiff should sublet his premises to K. C. Lala for the balance of his term in the agreement to sublet. The rental was to be \$325 a month and K. C. Lala was to pay \$850 for the chattels mentioned in sale and purchase agreement (Ex. B) plus
- B the value of the kerosene remaining in the underground tank. There was very little stock for some time. According to this arrangement with K. C. Lala plaintiff stood to gain \$55 a month from the subletting. They discussed the proposed subletting with the defendants. However, the defendants refused to consent to the proposed subletting. They insisted that the plaintiff surrender his sublease and vacate the premises and that they would then consider subletting the premises direct to K. C. Lala for a term of 5 years if he agreed to pay \$350 a month rent
- C for the first year and \$400 a month for the remaining four years of the term. K. C. Lala had no objection to taking a direct sublease from the defendants for 5 years but he was not prepared to agree to the higher rent demanded and negotiations broke down.

- D Subsequently, on 10th January 1980 the plaintiff wrote to the defendants through his solicitors (Ex. C) formally asking for consent to sublet to K.C. Lala. The defendants replied by letter dated 22nd January 1980 (Ex. D) which reads as follows:

"Messers Parmanandam, Ali & Co.,
Solicitors.
Nina House,
Suva.

- E Dear Sirs.

re Kumar Gurdial Singh

I refer to your letter of 10th January addressed to me and my brother, Mehar Singh. Mehar Singh is presently out of Fiji.

- F I am not agreeable to have the balance term of tenancy assigned by your client to K.C. Lala. If your client is not prepared to continue to rent the premises, I am prepared to accept an earlier surrender of the lease by him.

Yours faithfully
Sgd. P. Singh
Pritam Singh"

- G There were other discussions between the plaintiff and defendants. In those discussions the terms on which plaintiff should surrender his sublease to the defendants were discussed but nothing came of these discussions and they proved abortive.

- H In the meantime K.C. Lala found other premises at Lami at the end of January 1980 where he opened a supermarket investing about \$62,000 in it and is no longer interested in plaintiff's premises.

The plaintiff later found one Vivek Mudaliar interested in subletting his premises and he again applied to the defendants for consent by letter dated 13.2.80 (Ex. E). However before the defendants could reply to this letter the plaintiff instituted these legal proceedings on 25th February 1980. A

The plaintiff left the shop premises and living quarters sometime in early February 1980. However he still retains possession and has the keys to them. He has paid his rent up to the end of 1979. His cheque for January rent was dishonoured and has still not been paid. B

In this action the plaintiff claims damages and other relief from the defendants for unreasonably and arbitrarily withholding consent to the proposed sublettings by the plaintiff.

According to Halsbury (3rd Edition) Volume 23 paragraph 1340 the burden of proof is on the tenant to show that the landlord has unreasonably withheld his consent. The landlord is not bound to give any reason for refusing his consent but the Court will more readily imply that the withholding of consent is unreasonable if the landlord gives no reason for his refusal. C

This paragraph of Halsbury further reads:

"It will generally be unreasonable for the landlord to refuse consent on grounds unconnected with the personality of the proposed assignee or the nature of the proposed user or occupation of the premises. Thus refusal of consent is unreasonable if the main object of the landlord is to obtain some advantage for himself, as for example to obtain a surrender of the lease or to prevent the proposed assignee from giving up other premises of which he is also landlord." D

In *Bates v. Donaldson* 1896 2 Q.B. page 241 the Court considered a lease containing a covenant by the lessee similar to the one in this case. It was a covenant not to assign without licence "such licence not to be unreasonably withheld in the case of any respectable or responsible person who may be the proposed assignee". The lessor withheld licence to assign because he desired to obtain possession of the premises. In an action to recover possession for breach of covenant it was held that the licence had been unreasonably withheld, and that the lessor was not entitled to recover. At page 241 Kay LJ says: "As the proposed assignee is a respectable and responsible person the plaintiff must show a strong reason for withholding his consent. Clearly it is not sufficient for him to say 'I want to oblige the lessee to sell to me.....'. The lessee had a right to assign without the permission if he withheld it unreasonably." E

A.L. Smith L.J. in the same case said:

"Now when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable or responsible assignee, in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, a true reading of this clause that permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce the tenant to surrender the lease so that the lessor might obtain possession of the premises, which was the reason why, in the present case consent was withheld." F G H

A As to the lessee's remedy where consent is unreasonably withheld it was stated in *Jenkins v. Price* 1907 2 Ch. D 229 (at page 233) that "there is no covenant by him (the lessor) to give consent; it is only this, that if he unreasonably withholds his consent then she (the lessee) is entitled to assign, an unreasonable refusal releases the restriction against assigning, but it gives her no cause of action against the lessor."

B It was also held in this case that if consent is unreasonably withheld the tenant, besides being entitled to assign without the landlord's consent, may obtain a declaration by the Court of his right to do so.

C On the evidence before me and the facts as I have found them I am satisfied that the plaintiff has discharged the onus on him to show that K.C. Lala was a responsible and respectable person to be accepted as a sub-tenant. He was a businessman of long standing. The evidence shows he had a supermarket in Bureta Street which he had to vacate as his landlord was demanding higher rent. He subsequently obtained premises at Lami where he now operates a substantial supermarket. The defendants had an opportunity to see and speak to him personally and find out more about him. Indeed the defendants were willing to give him a five-year sublease if the plaintiff agreed to surrender his term. Furthermore he needed the premises for a shop, a user similar to that of the plaintiffs.

D The only reason for the defendants withholding consent was to coerce the plaintiff into surrendering his term. Even the defendant's written reply to the plaintiff's letter (Ex. D) when refusing consent and giving no reason for such refusal, states that defendants were prepared to accept an earlier surrender of the lease by him.

E I find on the authorities quoted above and the facts of this case that the defendants did withhold their consent unreasonably and arbitrarily in the case of K.C. Lala who I am satisfied was a respectable and responsible person.

The plaintiff upon such refusal was entitled to sublet to K.C. Lala without consent. He could also have applied to the Court for a declaration. This he did not do.

F As to Vivek Mudaliar there is very little information about him and I find that the plaintiff has not discharged the onus resting on him to show that he was a responsible and respectable person. In any event the plaintiff did not allow the defendants a reasonable time to reply before instituting this action.

G Before I deal with the reliefs claimed by the plaintiff I will deal with the question of consent of the Director of Lands to the agreement to sublet (Ex. A.). It is the defence contention that this agreement is null and void and illegal by virtue of Section 13 of the Crown Lands Ordinance as consent to it was not first had and obtained.

H As I found earlier Crown Lease No. 2833 is a protected lease under Section 13 of the Crown Lands Ordinance. The plaintiff was let into possession of a shop and living quarters built on land comprised in this Crown Lease on 1st December 1975 after sale and purchase agreement Ex. B had been executed on 28th November 1975 and stock in the shop was taken pursuant to that sale and purchase agreement on 30th November 1975. As was contemplated by clause 11 of the Sale and Purchase agreement, which provided for the execution of a lease agreement within five days, on the 5th December 1975 the agreement to sublet was executed. This agreement was deemed to have commenced on 1st December 1975 and it provided that it would be subject to the consent of the Director of Lands. Although plaintiff was let into

possession and the agreement to sublet signed the consent of the Director of Lands had not at this stage been applied for or obtained. Application for such consent was not made until 19th December 1975 and consent was given on 8th January 1976 and endorsed on the agreement on 9th January 1976. A

Section 13(1) of the Crown Lands Ordinance reads:

"13(1) Whenever in any lease under this Ordinance there has been inserted the following clause:

'This lease is a protected lease under the provisions of the Crown Lands Ordinance' B

(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. C

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void." D

This section, therefore, makes any alienation or dealing with such land or *any part thereof* whether by sale transfer or *sublease* or in any other manner whatsoever without the written consent of the Director of Lands *first had and obtained* null and void and unlawful.

This section is similar in effect to Section 12 of the Native Land Trust Ordinance and both these sections have been considered by various Courts on a number of occasions each involving its particular set of facts and circumstances. E

Chalmers v. Pardoe (1963) 3 All E.R. 552 was a case in which by "friendly arrangement" with the owner of Native Leasehold land the appellant built a house on part of the land and entered into possession. No consent of the Native Land Trust Board was obtained. The Privy Council considered the transaction as a sublease but even regarding it as a licence to occupy land coupled with possession, their Lordships held that it was a "dealing" within the meaning of Section 12 of the Native Land Ordinance and consequently unlawful. F

In *Jai Kissun Singh v. Sumintra* (1970) 16 F.L.R. 165 the Fiji Court of Appeal held an agreement for sale of a native lease, under which the purchaser had, on his own showing, taken over possession and control for a number of years, had passed the stage at which it could be called a permissible agreement and had become unlawful as a dealing contrary to Section 12. G

In this case Gould V.P. said at page 168:

"If an agreement is signed and held inoperative and inchoate while the consent is being applied for I fully agree that it is not rendered illegal and void by Section 12. Where then is the line to be drawn? I think on a strict reading of Section 12 in the light of its object, an agreement for sale of native land would become void as soon as it was implemented in any way touching the land without the consent having been at least applied for." H

In dealing with an option to purchase Crown Land in *Court Bros (Furnishers) Ltd. v. Sunbeam Transport Ltd.* 15 F.L.R. page 206 Marsack, J.A., at page 209 says:

- A "Put shortly, my view is that no transaction or negotiation can be held to be a dealing in land unless it creates an immediate interest in land in some person other than the owner."

Section 13 requires consent to be "first had and obtained".

- B In this case possession was given even before the agreement to sublet was executed. At the time of the giving and taking of possession or later at the time of execution of the agreement consent had not been obtained or even been applied for. The transaction or dealing in this case created an immediate interest in land in a person other than the owner before consent was obtained or applied for. In my view the dealing was void *ab initio* because plaintiff was put in possession of the land first, then the agreement was executed and two weeks later consent was applied for and consent was given over five weeks later. Subsequent consent in my opinion could not validate or make unlawful a transaction or dealing which is unlawful *ab initio*. The consent given later cannot act retrospectively in such a case. It cannot revive what was already a nullity. In *Phalad v. Sukh Raj* 24 F.L.R. 170 Henry J.A. says:

- D "If before consent, acts are done pending the grant of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void."

I therefore hold that the plaintiff's entering into possession and the subsequent agreement to sublet were an lawful dealing in land comprised in a protected Crown Lease and null and void.

- E The rule is that "ex turpi causa non oritur actio". The claim of the plaintiff and the defence and counterclaim are based on and arise from an unlawful transaction and agreement and both plaintiff and defendants are in this case in *pari delicto*. It follows that neither party has any right of action arising therefrom.

The plaintiff, however, is in unlawful possession of the land and he cannot justify remaining in possession.

- F In the Privy Council case of *Mistry Amar Singh v. Kulubya* 1963 3 All E.R. page 499 it was held that a registered owner of land was entitled to recover possession because his right to possession did not depend on the illegal agreements in that case but rested on his registered ownership and as the person in possession could not rely on the agreements because of their illegality he could not justify his remaining in possession.

- G The defendants have obtained the consent of the Director of Lands to institute proceedings to obtain vacant possession of the premises (Ex. G).

I therefore order the plaintiff to deliver vacant possession of the premises to the defendants forthwith. Except as aforesaid the claim and counterclaim are both dismissed. In the circumstances of this case I propose to make no order as to costs.

- H

Order for possession.