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GHANA PRASAD
SNEH LATA

v.

VIVEK PRASAD & 3 OTHERS

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[COURT OF APPEAL—Tuivaga, P., Kermode, J. A., Tikaram, J.A.]

Civil Jurisdiction

C *Injunction—Application ex parte must show urgency—not appropriate to make findings of fact on affidavit evidence—Judge should make any such injunction initially for a short not indefinite period—Practice on ex parte and interim injunction outlined.*

Hearing: 19 May 1988
Judgment: 1 July 1988

D *G. P. Shankar* for the Appellant
M. S. Sahu Khan for the Respondents

Ghana Prasad and Sneh Lata appealled against a decision given on 24 December 1986 by Kearsley, J. wherein he refused to set aside an ex parte injuction granted to the respondents on 6 December 1986.

E He confirmed the Order which he had made on 6 December 1986.

The issue before the Court was whether the learned Judge erred in refusing the appellants' application to have the injunction discharged.

F The appellants apparently had prevented the respondents from taking pineapples from the land and/or prevented the respondents from entering. The first named respondent had claimed he had a lawful right to occupy the land. There was an issue for the Judge at first instance as who had the right to occupy it. Various plans were produced which could have been interpreted as applying to different land, though purporting to be the same land. The second appellant, even so, might establish at the hearing that he was in fact occupying the disputed land. The learned Judge however

G said that the allegation in the first defendant's affidavit that the second defendant had an interest in the land was "patently contradicted" by the plan attached to his affidavit.

Held: The learned Judge had not been required to make the last mentioned finding on affidavit evidence and on an ex parte hearing or one seeking interim relief. The Judge's statement might have indicated that prima facie the first respondent was

H entitled to the land. The Court found no merit in the second ground of appeal.

The Court reviewed the practice related to the granting of interim injunctions in Fiji.

The practice in Fiji where there is urgency is for a Judge to grant an interim injunction for a short limited period. The plaintiff, if he seeks extension of the injunction must apply inter partes. The defendant is then enabled to oppose the application. The learned Judge, in this instance granted an interim injunction not limited as to time but "until further order". He granted liberty to the defendant to apply on two days notice to vary or rescind the order and he further ordered that the copies of all papers filed in Court be served on the defendants.

This departure from the normal practice put the respondents at a disadvantage in that instead of defending an application they were put to the trouble and expense of applying for variation or rescission of the order, a much heavier burden than they should have had to bear.

The Court then stated it had not had to consider whether the trial Judge should have granted the application ex parte; having not read into the application any sense of urgency. The learned trial Judge did, apparently, see the necessity for urgency. The Court, it said, was not entitled to set that decision aside. It noted that at the hearing facts would be disclosed which would indicate whether the application should have been inter partes.

Appeal dismissed.

Costs to be costs in the cause.

Judgment of the Court

This is an appeal against a decision given on the 24th December 1986 by Kearsley J. which the applicant seeks to have set aside on the following grounds—

"1. That the learned hearing Judge erred in law and in fact in granting leave to institute action no. 740/86 without due and proper considerations of all relevant matters on an Ex parte application rather than on Inter-parte

2. That the learned hearing Judge in confirming the Injuction granted ex parte erred in law and in fact in not taking into account all facts and circumstances including the fact that the Defendant was in possession of the land in question and held the Tenancy Agreement over it which is registered and protected under the provisions of Agricultural Landlord and Tenant Act, Cap. 270.

A 3. That the learned hearing Judge erred in law and in fact that the Plaintiffs had equitable interest in the land when there was no consent of the Native Land Trust Board pursuant to Section 12 of the Native Land Trust Act Cap. 134 for the said settlement amongst the parties or any subsequent dealings amongst the parties."

The decision dated the 24th December 1986 was pursuant to the appellant's application to set aside ex-parte order made by the learned Judge on the 6th December 1986.

B

Mr Sahu Khan raised a valid objection to the first ground of appeal and that is that the decision appealed against is that dated 24th December 1986 and not the order made on 6th December 1986. The first ground accordingly fails.

The second and third grounds can be considered together.

C There is some merit in Mr Shankar's argument that the application for an interim injunction should not have been made ex parte. On the facts there would appear to have been no real urgency and there was time to take out an inter parte summons. The acts complained of had been going on for some time. Mr Shankar raised other objections to the order being made on the 6th December 1986 as an argument for not confirming the injuction.

D We do not have to consider whether the injunction should have been granted in the first place. That is not in issue but whether the learned judge erred in refusing the appellants' application to discharge the injunction.

The appellants did not deny that they were taking pineapples from an area of land being part of Native Lease No. 10551 or that they were preventing the first respondent from entering on that land. They claimed the second named appellant had

E a lawful tenancy to that land. The first named respondent claimed he had a right to occupy the land.

One issue the learned Judge had to consider was which of the parties appeared to be entitled to occupy the land. He had before him the affidavits of the parties and a number of documents, including the Native lease, and the tenancy agreement both of which had plans of the land attached thereto.

F

There was also a plan attached to instructions given to a surveyor to subdivide the land in accordance with the instructions as to boundaries on the plan. The plan shows 7 lots and each lot shows the area and the name of the person presumably entitled to each lot. Lot 3 has the name of the first respondent on it.

The plan attached to the tenancy agreement appears to have been traced from

G one of the plan plans. It appears to be the same scale. There are prominent features in the plan namely a creek running from West to East at the top northern portion of the land and either an access road or continuation of another creek running more or less North and South.

The second appellant's land according to her tenancy agreement falls on the western side of this latter feature whereas the first respondent's land is on the eastern

side. They do not appear to overlap. This led the learned Judge to make the following statement— A

> "The allegation in the first defendant's affidavit sworn on 8th December that the second defendant (his wife) has an interest in the 29 acres by virtue of a tenancy agreement (annexure "C") is patently contradicted by the plan which is attached to that agreement".

From our perusal of the plans this would appear to be a correct statement but it could transpire that the appellants can. in the action. establish that the second appellant in fact was occupying the land. B

The learned Judge was not required to make that finding of fact on affidavit evidence and it cannot be pleaded in the action in which it is a live issue. It is in the nature of obiter.

The learned Judge's statement should have indicated that the evidence prima facie indicated the first respondent was entitled to the land. This was an issue to consider when considering the application before him. C

As regards the second ground we find there is no merit in it. Prima facie there was evidence that the tenancy agreement was not over the land shown as Lot 3 in the first respondent's name. The learned Judge was not required to consider all the facts. D

It may eventuate that the pineapples were in fact on the second appellant's land. This could have been but was not established by evidence from a surveyor when the appellants sought to set aside the injunction.

As regards Mr Shankar's complaint that the first respondent did not make full disclosure. the learned Judge found as a fact that the first respondent had disclosed an order made by Dyke J. in an earlier action. E

The affidavit sworn by the first defendant is a very full one. He does not disclose the date when the alleged wrongful acts first occurred but it does disclose that they were being committed at the time the ex parte application was made.

As regards the third ground Mr Shankar had little to say about this ground. His skeleton argument does not deal separately with the grounds in the order they appear in the Notice of Appeal. F

On the learned Judge's finding that the second appellant's tenancy did not cover the land the first respondent claimed. the question whether he was there legally or not or had an equitable interest in the land is no concern of the appellants.

We would agree with Mr Shankar that the practice in Fiji where there is urgency is for a Judge to grant an interim injunction for a short limited period. The plaintiff. if he seeks extension of the injunction. must apply interpartes. The defendant is then enabled to oppose the application. The learned Judge in this instance granted an interim injunction not limited as to time but "until further order". He granted liberty to the defendant to apply on two days notice to vary or rescind the order and he further ordered that copies of all papers filed in court be served on the defendants. G

This departure from the normal practice put the respondents at a disadvantage in that instead of defending an application they were put to the trouble and expense of applying for variation or rescission of the order a much heavier burden than they should have had to bear. H

A There is nothing in the rules which makes it obligatory to follow normal procedure but, in any event, we are, on our perusal of the record, satisfied that a situation existed which called for one or other of the parties to be restrained. We propose to dismiss the appeal but before doing so we wish to explain our reasons for not granting the respondents costs.

We have not had to consider whether the learned Judge should have granted the B application ex parte. We do not read into the affidavits any sense of urgency but have to assume that the learned Judge did and that decision we are not entitled to set aside.

At the hearing of the action facts will be disclosed which will indicate whether the application should have been inter partes.

Accordingly we dismiss the appeal and order that costs of this appeal abide the C result of that action and be treated as costs in the cause.

Appeal dismissed.