IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Civil Appeal No. 20 of 1979

Between

BABU LAL
BABU LAL s/o Venkat Appellant

- and -

RAMA SWAMY REDDY
RAMA SWAMY REDDY alias
Gonda Reddy s/o Changa Reddy Respondent

Messrs. G.P. Shankar & Co., Solicitors for the Appellant
Messrs. Vijay Chand & Co., Solicitors for the Respondent

JUDGMENT

Since there is an appeal and a cross appeal from the judgment of the Magistrate at Sigatoka it will be more convenient to continue to refer to the parties as plaintiff and defendant.

The plaintiff is and was at all material times the registered proprietor of land at Lawai in Sigatoka District, which includes an area of about 1 chain by 1½ chains presently occupied by the defendant, and on which the defendant has built a house. The defendant has been occupying the land since January 1972, when he was permitted to live on the land temporarily after being forced to leave his previous residence. In 1973 the plaintiff served a notice to quit on the defendant and then on 4/1/74 the plaintiff and defendant came to some agreement, the terms of which seem to have been embodied in a written document purportedly signed by the defendant and submitted in evidence in the Magistrate's Court (Exhibit E). The defendant at first denied that he had signed this document, but then admitted that he had signed some document, although he claimed that not all of the terms were read out to him.

Although the magistrate made no specific finding of fact on this point, I think it can be taken that he was satisfied that the defendant did sign it and it was intended to embody the terms of the

agreement between the parties. I think that is a perfectly justifiable conclusion. It should be noted that according to the terms of the agreement embodied in Exhibit E, the occupation of the premises by the defendant was described as a tenancy at will for a house site although it was said to expire on 31/12/74, and the rent of $50 was stated to be for the year 1974 only.

Be that as it may the defendant continued in occupation and the plaintiff continued to receive rent up till December 1976.

The defendant alleged that he was not explained all the terms of Exhibit E and was told by the plaintiff that he could occupy the land for his life. The magistrate seems to have compromised somewhat between the conflicting stories and has found that, at least when the defendant signed Exhibit E he did so on the condition that he would stay there for as long as he liked and continued to pay the rent. He later reiterated as a finding of fact that the arrangement between the plaintiff and the defendant was for a tenancy of no fixed duration.

Neither party has appealed against this finding of fact.

The magistrate went further and found that since this was a tenancy of no fixed duration it came within the ambit of Section 89 of the Property Law Act 1971. The relevant portion of Section 89(2) of the Act is as follows:

> "In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly, yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows -
>
> (a) Where the rent is payable yearly or for any recurring period exceeding one year, at least six months' notice expiring at the end of any year of the tenancy;"

One of the grounds of appeal by the plaintiff is that the trial magistrate erred in holding that the tenancy was properly terminated under section 89 of the Property Law Act 1971. That is not quite what the magistrate found. What he said was -

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"To reiterate, I find as a fact that the arrangement between Plaintiff and Defendant was for a tenancy of no fixed duration, and that the correct notice has been served in accordance with sec.89(2) of the Property Law Act 1971, terminating the tenancy with effect from 31/12/77."

I do not think that this finding can be challenged, and I think that what the ground of appeal means, and what counsel for the defendant argued was to the effect that, notwithstanding that this was a tenancy of no fixed duration, and notwithstanding that a proper notice to terminate the tenancy was served on the defendant - which notice would normally suffice to terminate the tenancy - the court must look beyond this and consider the defendant's position in the light of the principles of equity and estoppel.

It is common ground that the defendant built a house on the land in question. He built it in part in 1972 when the value was stated to be $400. Since the land was owned by the plaintiff it was the plaintiff who had to make the application to and get approval from the Local Authority to build the house. In the application the plaintiff claimed that he was the owner and builder of the house, because again it is common ground that the defendant would not have been able to get permission for himself. The defendant has since extended the house from three rooms to five rooms, and he has also, according to him had to reerect it after it was blown down by a hurricane. Apparently this additional building was done without getting approval from the Local Authority. The plaintiff says the extension work was done without his being aware of it, but not surprisingly the magistrate appears not to have accepted this and has found that it was within the knowledge of the plaintiff that the defendant finally finished up with a house bearing no relation to that for which the plaintiff had obtained approval.

The defendant has also planted some citrus and other fruit trees on the plot and has put a fence round it, and it is at least part of the defendant's case that the plaintiff having directly permitted or tacitly and knowingly allowed the defendant to expend effort and money on the land, he should now be estopped from denying the defendant's right to remain on the land, and the doctrines of equity should be called into play to grant the defendant some protection from the plaintiff's action. There is merit in this argument and there are many authorities for the proposition, which fact was recognised by the

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magistrate when he referred to the long line of cases decided by Lord Denning M.R. But he decided that he could not grant the relief sought for two reasons.

The first reason given by the magistrate is as follows -

> "the statute law says that this is a tenancy and no equitable right can be granted to overrule the statute".

Not surprisingly this is the basis for the first ground of appeal by the defendant. I must confess that I don't know exactly what the magistrate means. If he means that the court cannot make an order that would result in an illegality I would agree. If he means that since the defendant's purported title was not registered, or no caveat was entered against the plaintiff's title, the court cannot grant him relief, I cannot agree. The long line of cases to which he referred show at least that the courts will grant relief, and may even recognise a title, as against a landowner who has made promises and stood by whilst the prospective tenant has spent money on the land on the strength of such promises.

Perhaps I should deal at this stage with the question of the indefeasibility of the plaintiff's certificate of title. The magistrate referred specifically to the cases of <u>Davidas and Anor.</u> v <u>Rachumal Singh</u> Civil Appeal Case 42/78 (FCA) and <u>Harilal Ranisa</u> v <u>Trikam Ranisa (No.1)/ER.</u> Civil Appeal Case 48/78 (FCA) and counsel for the defendant referred me to Sutton v O'Kane (1973) 2 NZLR 304 and <u>Fraser</u> v <u>Walker</u> (1967) 2 WLR 411. But all of those cases can be distinguished since they all relate to successors in title in relation to others' rights which by statute should have been registered, but were not. Whilst relief might have been granted as against the original title holders, the unregistered rights were ineffective as against successors in title, in the absence of fraud.

The second reason given by the magistrate for not granting relief to the defendant is that the whole transaction was tainted with illegality. I have already referred to the fact that the defendant could not get approval to build a house for himself, so the plaintiff obtained approval by pretending that the house was for himself. No approval would have been given to the defendant without a subdivision of the land so as to give title to the land in question to the defendant. It was apparently common ground between the parties that no application for a subdivision was made and that no application for a subdivision of this

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area, even if it had been made, should have been legally successful. The reason for this is to be found in section 5 of the Subdivision of Lands Ordinance (Cap. 118). The land is admittedly land to which the Ordinance applies, the land is outside the boundaries of Sigatoka Township and is not otherwise exempt from the provisions of the Ordinance under section 2 thereof, and the subdivision was for an area of less than 5 acres. A breach of the provisions of section 5 is an offence for which a punishment is prescribed, so that the whole arrangement between the plaintiff and defendant was to effect an illegal purpose, i.e. an effective subdivision contrary to Section 5. Both parties quite obviously knew that they were doing wrong and neither the plaintiff nor the defendant can therefore rely on the illegal arrangement. The defendant cannot rely on it to defeat the plaintiff's claim for possession of the land, and the plaintiff cannot rely on it for his claim for rents or mesne profits. See Chalmers v Pardoe (1963) 3 AER 552.

On this point the magistrate's decision was quite correct, and this effectively deals with both appeals which are dismissed. The only modification I would make is to allow the defendant a period of 3 months in which to vacate. Since the appeals of both parties have been dismissed there will be no order as to costs.

With regard to the plaintiff's argument that he should have got costs in the magistrate's court in the first place, he obtained an order for possession but the rest of his claim for rent and mesne profits was dismissed. In the second place the award of costs is in the discretion of the presiding judge or magistrate and in view of the fact that the plaintiff did not come to court with clean hands, I would not disturb the magistrate's decision not to make any order as to costs.

LAUTOKA,
2nd May, 1980.

(G.O.L. Dyke)
JUDGE