IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 44 of 1981

Between :

SUBRAMANI s/o Armorgam — Appellant

- and -

PRICES AND INCOMES BOARD — Respondent

Mr. S. P. Shankar — Counsel for the Appellant

J U D G M E N T

The appellant was convicted on 8th September, 1981 for increasing the rent of a flat at Celeloa, (Nadi) from $65.00 to $70.00 without giving 12 weeks' notice to the Prices and Incomes Board of the proposed increase contrary to clause 2 of the Counter-Inflation (Application of Section 15) Order, 1976 and Sections 33(1) and 35 of the Counter-Inflation Act 11/73 (now Cap. 73), The 1978 Edition of the Laws of Fiji). The flat is one of a block of four flats and described as flat No. 4.

He appeals against that conviction on the ground that the learned magistrate erred in law and in fact in not holding that the tenancy was void and in holding that section 12 of the Native Land Trust Ordinance did not render the tenancy "void ab initio".

The appellant does not dispute the evidence that the rent was increased and that notice was not given to the Prices and Incomes Board. He contends that the lease is a native lease and that any dealing therewith requires the consent of the Native Land Trust Board under section 12(1) of the Native Land Trust Act Cap. 134. He submits that absence of such consent renders any dealing with the tenancy of the flat null and void. The appellant gave evidence to the effect that he had not applied to the Native Land Trust Board for consent to let the flat to the complainant.

The tenancy of flat 4 is not of a piece of land as such nor of an entire building on a piece of land. It is a letting on a monthly basis, of flat No. 4, which is one of a block of four flats on a piece of native land. At any given time any or all of the occupants of the flats could be replaced. The block of four flats could have as many as 48 different monthly tenants in a year - although this is unlikely. It is obvious that the appellant is engaged in the business of leasing flats on a monthly basis.

Counsel for the appellant failed to draw the attention of the learned magistrate nor my attention during the appeal to the fact that the land held by the appellant was granted by way of a sub-lease No. 38/317 created in 1932, i.e. 50 years ago. It is, I think, an important factor which should have been pointed out. The area of land leased is just under half acre. When the appellant or his predecessor in title took the land 50 years ago, it may have been under laws which did not include any of the restrictions which exist to-day in regard to dealings with leases of native land.

In 1932 the Native Land Trust Ordinance upon which the appellant seeks to rely had not been enacted. So far as I have been able to ascertain, and this should have been researched by the appellant's counsel for the benefit of the learned magistrate, there was no similar legislation in existence in 1932. The Native Land Trust Ordinance was not enacted until 1940. But as I have said this was a sub-lease. The sub-lessor was a person called Bayly and there is nothing to indicate when his head lease came into existence.

Just when the block of flats were built is not revealed in any evidence by the appellant. If they were built prior to 1940, then they would not have been subject to section 12 of the Native Land Trust Ordinance. The certificate of title shows the existence of a mortgage in 1934 and on some date thereafter (not legible) there was another mortgage at a later date and yet another mortgage in June 1951 and a further mortgage to the Bank of New Zealand in July 1954. I would not expect mortgages to exist in relation to a lease of a mere half acre, unless it was being developed by the construction of some building. The lease itself has been transferred from time to time until it finally came into the hands of ARMOGAM, the father of the appellant, in October, 1969.

On the face of it a building of some kind could have been on the land for almost 47 years. Whether it has always been the same kind of building, there is no way of knowing on the evidence. The sub-lease which is a tattered document does not indicate any restrictions imposed on the sub-lessee as to the user of the land. If any restrictions were imposed it is upon the appellant to indicate them and anyway they could not refer to the powers of the Native Land Trust Board because it was not then in existence.

Clearly the granting of a mere half acre to the original sub-~~lease~~ lessee in 1932 is not likely to have been for agricultural, grazing or such like purposes. The sub-lease gives no indication of the use to which the half acre was to be put. Nevertheless it is unlikely that four flats were erected for letting purposes without the sanction of whatever authority was required. It is to be presumed that whoever constructed the flats for letting purposes,

he was not acting illegally. Having regard to the number of mortgages, one would expect the mortgagees to protect their investment by appropriate inquiries in that respect.

Under the Native Land Trust Regulations, leases are classified and Class B covers residential leases. Under Regulation 26 are set out special conditions applicable to residential leases: certain specifications have to be complied with, and only one dwelling house can be built thereon unless the Native Land Trust Board otherwise permits. If the flats were built after 1940 presumably the Native Land Trust Board sanctioned their erection and the Native Land Trust Board would be aware of the fact that the sub-lessee was to be engaged in the business of letting flats and the Native Land Trust Board must have sanctioned a business of that nature. Alternatively, even if the flats were built after 1940, the consent of the Native Land Trust Board would not be required because restrictions cannot fairly and justly be implied in a contract subsequent to its making. If the Native Land Trust Ordinance is to apply to lettings created prior to its enactment so as to restrict the use to which the land is to be put then the Ordinance should include an express provision to that effect. There is no such provision.

At law there is a presumption that what was done was done lawfully - unless of course illegality is apparent on the face of it. There is no evidence from the appellant rebutting that presumption. It is therefore presumed that one of the appellant's predecessors was lawfully permitted to built his four flats for letting purposes. Whatever lawful consent was necessary to permit the business of letting flats it necessarily includes the comings and goings of tenants whose sojourn may last for weeks, months or years. In any event permission to construct the flats necessarily implies permission to let the flats as and when need be. Any new tenancy is not, in that sense, a fresh dealing with the land for which consent is necessary.

Supposing the appellant applied to put a tenant into flat 2 which had become vacant and the Native Land Trust Board purported to refuse consent, and made similar refusals in relation to the other flats as they became vacant the appellant's investment would be defeated. The appellant himself would have no use of four bathrooms, four toilets, four kitchens and four living rooms; he would not require four electric meters, four water meters and so forth. The appellant could successfully contend that the Native Land Trust Board or whatever authority existed when the sub-lease was created and/or when the flats were erected, having allowed him to go to the expense of building four flats would be estopped from claiming that they have the right to refuse a letting of any or all of the flats. The situation is very

different from that of a lease of say 10 acres of land in 1930 for agricultural purposes only. Application to such a lease of the Native Land Trust Ordinance would not restrict the lessee's user of the land for agricultural purposes.'

In the circumstances, I take the view that it is lawful for the appellant to carry on with the business of letting his four flats from time to time without seeking consent of the Native Land Trust Board to each and every letting. Of course if he wishes to part with the land on which the flats are built by selling the half acre lease No. 38/317 to a third-party, that would, I think, be a dealing with the land which may require consent of the Native Land Trust Board. The transfer would have to be registered with the Registrar of Titles; no such steps are required when the tenant of one of the flats goes into occupation.

It follows that the lettings are not void under section 12(1) of the Native Land Trust Ordinance. There was a lawful letting and any intention to increase the rent should be notified accordingly to the Prices and Incomes Board.

The appeal is dismissed.

The appellant will pay the respondent's costs which I fix at $80.00

J. T. Williams

(J. T. Williams)

Judge

LAUTOKA,

November, 1981