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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
A T L A U T O K A
Civil Jurisdiction
Action No. 226 of 1981

BETWEEN : RAMESH f/n Samji Jadavji Plaintiff
A N D : MANJI JADAVJI & ORS. Defendants

Mr. S. M. Koya Counsel for the Plaintiff
Mr. B. C. Patel Counsel for the Defendants

J U D G M E N T

This action concerns commercial property in the main street of Nadi township.

The plaintiff, Ramesh Samji, the registered proprietor of lots 23 and 24 Vodawa, being N.L. 7190 claims that he acquired the registered title on 30/11/65 following which he leased the premises to the defendants, without the consent of the NLTB and he alleges that the lease is accordingly unlawful under section 12 of the NLTA and in consequence the defendants are trespassers.

Notice to quit was served upon the defendants on 21/4/81 but they are still in occupation.

The statement of defence claims that the tenancy began in 1932 and has continued to date and that NL.7190 was issued subject to the tenancy; accordingly the sub-tenancy is not affected by section 12 of the NLTA Act.

On 15/12/76 the plaintiff and the firm Jadavji & Company (which I will refer to as "the firm") entered into a written tenancy agreement of NL.7190 for 10 years from 1/1/77. To date no consent of the NLTB has been obtained to that lease.

The defence allege that the written tenancy agreement which is Ex.P.7 is valid and that they occupy under it as sub-tenants.

By way of counter-claim they state that the plaintiff in breach of the written lease has not only failed to obtain consent of the NLTB to the lease but has requested the NLTB not to give consent. They ask that the plaintiff be directed to obtain consent of the NLTB and alternatively damages for breach of the agreement.

By way of reply to the defence and counter-claim the plaintiff states that NL.7190 was registered in May 1946 and that the firm's sub-tenancy ceased to exist on 30th June 1941 when NL.7190 came into effect, - (it should read 5th July)-1941 or on 12th May, 1946 when the said Native Lease 7190 was registered. It states that the firm's sub-lease had expired on 11th September, 1939 when the native sub-lease 39/9A, from which the firm's sub-lease was granted, expired. Following the expiry of the sub-lease 39/9A on 11.9.39 it was necessary, so the reply alleges, to obtain the consent of the NMTB to any sub-lease held by the firm.

At the hearing the statement of defence was amended in paragraphs 3 & 8 to plead alternatively that the defendant firm still occupies as a yearly tenant.

The hearing proceeded as if it were a claim for possession as against the firm although the firm had not been mentioned in the title to the proceedings.

There is really no dispute as to facts and a number of documents relating to ownership and leasing of the land were exhibited by consent.

The disputed portion of land came into existence when one M. N. Naidu who held a native lease Ex.P.1 for 21 years as from 11th September, 1918 comprising several acres divided, it into sub-leases creating the portion now in dispute and A. K. Pillay became the sub-lessee under the sub-lease 39/9A, Ex.P.2, as from 11.9.22 for a period of 17 years. The plan annexed to the sub-lease Ex.P.2 refers to Development Plan 281 under which it was created. It was transferred to SAMJI JADAVJI the plaintiff's father on 3/3/33 as recorded in "The Form of Transfer" Ex.P.3. M. N. Naidu's head lease Ex.P.1 was due to expire on 10/9/39 and the sub-lease Ex.P.2 held by Samji Jadavji would also expire on 10/9/39 along with the headlease if it were not extended in some way.

The (defendant) firm came into existence in 1932 and it is common ground that from then on it was the sub-tenant of Samji Jadavji occupying a shop and living accommodation. The latter was a partner and the firm adopted his name - Samji Jadavji & Company.

There is no evidence as to what occurred on 10/9/39 when the head lease Ex.P.1 of M. N. Naidu expired but the evidence of Samji Jadavji (post) shows that Samji Jadavji remained in possession of the land covered by his sublease Ex.P.2 and his firm continued to use the shop as sub-tenants.

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The plaintiff called no witnesses. MANJI JADAVJI one of the partners in the firm gave evidence for the defence. He revealed that from about 1932 up to the present time the firm has been Samji Jadavji's sub-tenant at an annual rent which has increased over the years. I believe him and find that there was such a verbal sub-lease.

On 5/7/41 the NLTB, which had just come into existence in June 1940, under the newly enacted Native Land Trust Act, agreed to grant to SAMJI JADAVJI a direct lease of the portion of land of which he had been sub-lessee under Ex.P.2. The new lease Ex.P.4 was granted under the provisions of the Native Land (Leases & Licences) Regulations 1940 as governed by the newly enacted Native Land Trust Ordinance 1940. He became a direct tenant for 75 years as from 1st July, 1941. It was re-designated as N.L.7190 and was registered on 12th May, 1946.

The firm of Samji Jadavji & Company continued as annual ^{sub. of Samji} tenants in possession of the premises carrying on the partnership business.

On the 30th November 1965 SAMJI JADAVJI transferred his lease to his son Ramesh, the plaintiff in this action. The firm Samji Jadavji & Co. continued to occupy as tenants at an annual rent. Ex.D.17, a declaration filed under the Regulation of Business Names Act shows that Samji Jadavji had retired from the firm on 10/3/64.

On 15th December, 1976 the firm entered into a written agreement Ex.P.7 with the new leaseholder Ramesh, (plaintiff), for a 10 years lease of the shop at \$4,000 per annum, commencing on 1st January, 1977, the rent to be paid on 31/12/77 and thereafter on 31st December each year i.e. in arrears. With regard to an office and residence on the first floor the rent is \$200.00 per month payable at the end of each month the first payment to be on 31st December, 1977.

The property is described in a schedule to the lease as ground floor (business premises) and first floor (residential and office premises).

The agreement Ex.P.7 was not presented to the NLTB for their consent and the plaintiff contends that the lease is therefore an unlawful dealing in the land under section 12 of the Native Land Trust Ordinance. Section 12 has been the subject of ceaseless litigation in our Supreme Court and of endless appeals in the F.C.A. and its provisions need not be set out in full. It enacts that it is unlawful for a lessee of Native Land to alienate or deal with his lease by sale, transfer or sub-lease without the Board's consent, in the absence of consent any such dealing is null and void.

The foregoing outline of facts reveals the bareness of the allegations in paragraphs 3 and 4 of the Statement of Claim that the plaintiff having become registered proprietor of the lease on 30th November 1965 he leased it to "the firm" on 31/12/78.

The draftsman avoided revealing that the firm was already in occupation at a yearly rent when the written lease Ex.P.7 was executed and that the firm had been in occupation since 1932 as is revealed in the evidence of MANJI. No reference was made to the 44 years that "the firm" had been in occupation prior to the 1976 agreement Ex.P.7.

Mr. Koya argued that even if the sub-lease held by the firm from Samji from 1932 to 1939 was lawful there is no evidence as to what happened on 10/9/39 when M. N. Naidu's head lease Ex.P.1 expired. The plaintiff is asserting illegality and trespass and he should plead and prove facts in support.

It appears that Samji continued to hold the land without objection or hindrance from the native owners and from the NLTB between 11.9.39 and 5.7.41 when the NLTB approved the grant to him of a direct lease from the NLTB of the same land. One cannot assume that Samji's possession during that period ^{11.9.39 to 5.7.41} was unlawful. The evidence of Manji which is not challenged shows that at all times the firm continued to pay rent to Samji as annual sub-tenants. On the face of ^{it} the firm's possession, would be no less lawful than that of Samji.

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SAMJI's lease Ex.P.4 replacing his sub-lease Ex.P.2 describes the land as lots 23 and 24 in Vodawa sub-division whereas the sublease Ex.P.2 was one lot although it is clearly the same piece of land. As shown in development plan Ex.P.6 NLTB were developing the area including the land formerly held by M. N. Naidu under his lease Ex.P.1. Ex.P.6 is a plan of the NLTB sub-division and lots 16 to 38 thereon occupy the same site in Queen's Road as M. N. Naidu's old lease in Ex.P.1 being carved out of a piece of land which is identical in shape as that in the plan annexed to Ex.P.1. It is the heart of the commercial/shopping centre of Nadi township.

It is apparent that on termination of the head-lease Ex.P.1 in September 1939 Samji as a sub-lessee of Ex.P.2 was allowed to remain in possession by the native owners and that his occupation continued whilst the NLTB's development plan was being considered.

In June 1940, all native land passed into the care and management of the NLTB who became trustees thereof. The NLTB when contemplating the sub-division shown in Ex.P.6 must have been aware that persons such as Samji had already developed plots in that part of Nadi.

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They must have discussed the project with those occupiers and allowed them to remain in possession of the plots they had developed and promised to grant fresh leases. Thus the lease Ex.P.4 states in the preamble that on 5/7/41 the NLTB had approved the lease; therefore as I have indicated, they must have had some discussion with Samji prior to 5.7.41 and he must have remained in possession of the land whilst negotiating the present lease of it with the NLTB. Thus his continued possession following the expiration of his sub-lease Ex.P.2 on 11th September, 1939 was known and approved by the NLTB and a tenancy must be implied. His occupancy did not terminate with the expiry of the head-lease on 11.9.39 and it continued until he received the 75 year lease, Ex.P.4 on 5.7.41.

Mr. Koya for the plaintiff has contended that following the enactment of the N.L.T.A. 1940, the sub-tenancy must have become illegal by virtue of section 13. ^{It appears to me that there was nothing unlawful in his holding over after 11.9.39 when the head lease expired, no matter how tenuous his implied tenancy with the native owners may have been. Since Samji's implied tenancy was lawful when the N.L.T.A. (1940) came into force and since the Act was not retrospective (see Subramani v Prices & Incomes Board, Cr. App. 70/81, F.C.A. 1982 Volume p.4) Samji's implied tenancy did not become illegal in 1940 for lack of the NLTB's consent.}

The firm's sub-tenancy from Samji was in my view no less lawful.

Samji's existing implied tenancy would terminate by operation of law on the grant of the 75 year term Ex.P.4 on 5/7/41.

How would the grant of the new lease Ex.P.4 to Samji affect "the firm" as sub-lessee of Samji? Hill and Redman 14th Edn. para 388 states that surrender of the principal term does not affect the rights of under lessees, and the surrender operates only as a grant subject to their rights and the lessee's original term is treated as continuing so far as is required for the preservation of such rights. The learned authors state that where a principal lease is duly surrendered in order to be re-newed, and a new lease granted the rights and liabilities of the under lessees are regulated as though the original lease still continued. It appears therefore that creation of the 75 year lease Ex.P.4 in favour of Samji although operating as a surrender of his implied tenancy it would not affect the yearly sub-tenancy enjoyed by the firm which would continue as it had done under the implied tenancy of Samji. Since the NLTA 1940 did not operate retrospectively consent of the NLTB was not requisite for continuance of the firm's sub-tenancy. Subsequent legislation has not altered that state of affairs.

The plaintiff asserts that any ^{sub-}tenancy that the firm held was terminated by operation of law i.e. by way of surrender when they accepted the 10 years ^{sub-} lease Ex.P. 7. Mr. Koya further contended that since the ^{sub-} lease Ex.P.7 is illegal for lack of NLTB consent the firm gets no rights under it and having surrendered their yearly ^{sub-}tenancy, if they had one, they now have no rights. However, according to Hill & Redman (supra) p.385 there is no implied surrender of an existing valid lease by the acceptance of a lease which is void. Therefore, if Mr. Koya is correct in his assertion that the ^{sub-} lease Ex.P.7 is illegal it can have no effect to terminate the existing annual ^{sub-}tenancy. If I am right in holding that the firm's annual sub-tenancy was legal then the agreement Ex.P.7 not having received the approval of the NLTB is not effective to terminate that sub-tenancy.

The firm had been in occupation as annual sub-tenants for 45 years up to entering the fresh lease Ex.P.7 in 1976. The law will not presume that such occupation was unlawful and it is for the plaintiff who alleges illegality to plead and prove facts in support of the allegation.

The present position as I find it is that the firm was a lawful sub-tenant of the plaintiff's predecessor from 1932 to 1965 and of the plaintiff from 1965 until the creation of the lease agreement Ex.P.7 in 1976. The agreement Ex.P.7 is not unlawful in itself and would only become unlawful under section 12 of the current N.L.T.A. if the plaintiff acted under it so as to confer tenant's rights upon the defendant e.g. letting the defendant into possession. However, the defendant was not let into possession under Ex.P.7; he was already in possession and there is no evidence of any other act arising under the agreement Ex.P.7 which comes within the transactions prohibited under section 12. Payment of a different ^{for the premises} rent is not a prohibited dealing; rent was paid for 32 years and a change in the rent is not a fresh dealing in the land. Substitution of a fixed term of 10 years instead of an annual tenancy did not change possession. The NLTB only had to approve a change in the term meanwhile the status quo continued until such consent was given - Imman Hussein v Shiu Narayan Civ. App. 16/78 F.C.A.

I think the firm's annual sub-tenancy is extant until the lease Ex.P.7 is presented to the NLTB for approval. If it is disapproved the sub-tenancy continues from year to year as it has done for over 32 years. If it is approved then the 10 year lease supercedes the current annual tenancy.

It may be as well to point out that attempts in 1978 to obtain NLTB approval were met with the Board's statement (document exhibited by the defendant) that the application would have to be shelved pending a re-organisation of the Board's affairs.

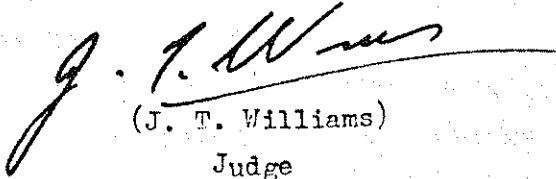
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Since then the plaintiff has refused to apply for consent. In my view he should apply for it.

The plaintiff's claim for possession is dismissed with costs to the defendant.

The defendant's counter-claim succeeds and the plaintiff is directed to apply to the NLTB for approval of the lease Ex.P.7. The plaintiff will pay the defendant's costs on the counter-claim.

LAUTOKA,
26. August, 1982


(J. T. Williams)
Judge