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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. 163 of 1980

BETWEEN : TAJIM ALI s/o Dean Mohammed — Plaintiff

A N D : THE NATIONAL INSURANCE COMPANY OF FIJI LIMITED — Defendant

Mr. C. Gordon, Counsel for the Plaintiff
Mr. Ashik for Mr. Parmanandam, Counsel for the Defendant

J U D G M E N T

The plaintiff, Tajim Ali, sues the National Insurance Company for the value of a house $15,000) and furniture $5,000 destroyed by fire at Sabeto on 6th November, 1979.

A question arises as to the nature of his interest in the house and events preceding the fire have a bearing on that issue.

Prior to the fire Tajim Ali had sued his father, Din Mohammed, in Action 275/79 on 25.9.79 complaining that he had worked his father's farm for many years without any reward because he was led to believe that his father intended to transfer or devise the farm to him. Action 275/79 alleges that his father, Din Mohammed, encouraged Tajim Ali's hopes by allowing him to build and occupy a house on the farm. It alleges that Din Mohammed retracted his promise after the house was built and Tajim Ali sought an order assigning the housing site to him or awarding him $16,000, the value of the house.

An appearance was entered for Din Mohammed on 10th October, 1979 by A. K. Sharma & Company, Solicitors of Nadi. The defence to A275/79 filed on 25/10/79 denied that Tajim Ali was misled into believing that the farm would be his and alleges that it was Din Mohammed who had built the house and that it was still incomplete, and was only worth $5,000.

Two weeks after Din Mohammed had filed his defence the house was severely damaged by fire on 6th November 1979 and Tajim Ali's claim to the insurance monies was viewed favourably. As early as 26/11/79 the insurance company's Chief Inspector informed the B.N.Z. that Tajim Ali's claim would be settled for $19,000 or thereabouts. However, Din Mohammed, was charged with arson arising from the fire and he employed A. K. Sharma who had drafted his defence in A.275/79.

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A. K. Sharma, solicitor, who gave evidence as D.W.4, explained that he had pointed out to the D.P.P. that the house was on Din Mohammed's land and belonged to him. Following the D.P.P.'s intervention it seems that the charge of arson was not pressed against Din Mohammed.

A. K. Sharma also informed the insurance company, defendants herein, that the house was not owned by Tajim Ali but by his father Din Mohammed.

The Fiji Insurance Company became reluctant to pay out and on April 30th, 1980 the plaintiff sued them for the $20,000 in the instant action.

On 13.5.80 judgment was entered against the Fiji Insurance Company in default of appearance but was set aside on 13.6.80 and a defence filed on 30.6.80. Thereafter the Fiji Insurance Company failed to make discovery and following a motion by the plaintiff to strike out the defence an order to set down for hearing was filed on 8/1/81 - 14 months after the statement of claim had been filed.

In its defence Fiji Insurance in paragraph 3 allege that the plaintiff, Tajim Ali, made a false statement in "his claim"; no doubt they meant in his proposal, but gave no particulars of untruths. During the trial I queried the absence of particulars of the alleged falsity and defence counsel made the surprising statement that the purpose of pleadings are to conceal and not to reveal the facts on which the defendant relied.

Paragraph 4 if the defence refers to A.275/81 and properly alleged that it raises matters of fundamental importance in connection with the insurance claim, namely Tajim Ali's right to ownership of the house. If a court decided that the plaintiff had a right to have the house site transferred to him it would strengthen his claim to insurance monies. A decision that the plaintiff had no right to the land would almost extinguish Tajim Ali's claim to insurance monies. The issue as to ownership of the house-site is vital to Tajim Ali's claim to insurance. Consequently the outcome of A.275/79 was most important as showing whether Tajim Ali had an insurable interest.

Whilst A.275/79 was undecided it would be difficult to adjudicate on Tajim Ali's claim to the insurance. If Tajim Ali abandoned A.275/79 a Court would have nothing to impede a hearing of the insurance action in the instant case. This case was to be heard by Dyke J. on 11th and 12th February, 1981 and on 11/2/81

Tajim Ali abandoned A.275/79.

Defence Counsel on 11/2/81 applied for an adjournment of the instant case because A.275/79 was abandoned saying that he would have to amend the defence of the insurance company and reconsider the position in view of the changed circumstances. Although the plaintiff objected the learned judge ruled that the abandoning of A.275/81 had altered the insurance company's position fundamentally and held that an adjournment was needed. Had A.275/79 not been abandoned it would have had to be adjudicated before the instant insurance claim could have been heard.

Nevertheless the 2-day hearing of the instant case was adjourned and a further 2 years elapsed before it was heard by me, with precisely the same pleadings and circumstances that existed more than 2 years before when my learned brother adjourned them. No attempt was made by the insurance company to amend its defence.

The statement of claim does not allege that Tajim Ali is the leaseholder; nor that consent of the N.L.T.B. as required by section 12 of N.L.T.A. had been granted or even requested to an arrangement whereby the plaintiff could build on Din Mohammed's land and occupy the house in his own right. In the insurance proposal form Ex. D.1 dated 20. 6.78 the plaintiff stated that the house was on leasehold land owned by his father but does not say what kind of leasehold.

The furniture was separately insured for $5,000 by a proposal Ex. D.2 dated 25.10.79. The plaintiff states in Ex. D.2 that the house stands on N.L.T.B. leasehold land.

Tajim Ali says in evidence that the arrangement with Din Mohammed was approved by the N.L.T.B. He adduced no documentary evidence saying that the N.L.T.B. approval was destroyed in the fire. He did not call any officer from the N.L.T.B. to confirm that evidence. Had N.L.T.B. consent been obtained Tajim Ali need not have brought A.275/79 for an order that he was entitled to such consent or alternatively, an order that he was entitled to receive from Din Mohammed compensation for the value of the house. A.275/79 was an attempt to establish a right to N.L.T.B. consent. The onus is on the plaintiff to prove N.L.T.B. consent. I cannot accept his bare statement. In fact I am quite sure that he is untruthful in that respect. I find that consent of the N.L.T.B. was not obtained.

I received singularly little assistance from defence counsel on the effect of the absence of such consent.

000004 The plaintiff did not call his father Din Mohammed but for some strange reason the defendant called him. Din Mohammed, D.W.5, now says and I believe him, that he gave Tajim Ali permission to build. He adduced no evidence to show that the N.L.T.B. had consented to such an arrangement. He stated that Tajim Ali built the house. P.W.5, Din Mohammed's evidence directly contradicts his statement of defence in the abandoned A.275/79, and he had the temerity to say that he never gave A. K. Sharma instructions to draft a defence on those lines. There is no doubt that D.W.5 is a liar in denying that he so instructed A. K. Sharma and I am at a loss to understand why defence counsel called him.

There is no evidence that the N.L.T.B. were approached for their consent to the arrangement between Din Mohammed and Tajim Ali. Under section 12 of the N.L.T. Ordinance such dealings between the lessee of native land and third parties are illegal unless consent of the N.L T.B. is first obtained. I am satisfied that the dealing between Din Mohammed and Tajim Ali was illegal under section 12 and no interest could pass to Tajim Ali. He has no right to the house he built.

In MacGillivray and Parkinson on Ins. Law, it is stated at p.3 ,

> "If the assured has no interest at the time when the event insured against occurs, it is clear that he cannot recover anything on an indemnity policy, because he has suffered no loss against which he can be imdemnified."

and at p.21 (4) referring to contracts which are unenforceable:-

> ".....the purchaser of land, for example, under an unenforceable contract has at no time any legally recognised and protected claim and he has no insurable interest in the property contracted for ..... If it is not a contract capable of being enforced at law it is nothing."

The fact that the insurance company informed the B.N.Z. that they were about to settle Tajim Ali's claim does not entitle him tc demand the money. Had the insurance money been paid out the insurance company may have found they had no legal right to claim it back. The contract of insurance is voidable and not void where the assured has not an insurable interest. In this case the company chooses to resist the claim for the value of the house and in my view Tajim Ali's claim fails to that extent.

There is of course the policy covering the furniture which was destroyed in the fire and which the plaintiff values at $5,000. The statement of defence does not challenge the allegation that the house was furnished.

It concentrates on Tajim Ali's ownership of the land. Tajim Ali says that he supplied the insurance company with a list of the furniture when he insured it. He has tendered what purports to be a copy of that list, namely Ex. P.4. He was not cross-examined on its accuracy. The insurance company were prepared to pay out on the furniture as well as the house as is evidenced by their letter to the B.N.Z. Their resistance to the claim arose when doubts occurred as to whether the plaintiff had a right to the land. The company's objections were obviously not directed to the value of the house or the furniture, and they were obviously reasonably satisfied that the house and the furniture were worth the sums for which they were insured.

At the close of the evidence on both sides neither counsel made any submission regarding the destruction of the furniture.

I accept the plaintiff's evidence that he had furniture in the house which he insured, that it was destroyed and that he is entitled to the $5,000 for which it was insured.

Part of the plaintiff's claim, namely $15,000 for his house is dismissed, but that portion relating to the furniture worth $5,000 succeeds.

There would normally be judgment for the plaintiff for $5,000. However, this case has dragged on for more than 4 years due entirely to the defendant's dilatoriness and an unnecessary adjournment at the instance of the defendant. I consider that the plaintiff is entitled to interest on his $5,000 from the date he filed his claim. I think that 8% per annum would be justified for 4 years bringing the amount due to the plaintiff to $5,400.

With regard to costs the plaintiff is not entitled to the costs occasioned by his unsuccessful claim to $15,000 for the house, but the defendant would be entitled to them. The plaintiff would be entitled to receive his costs on the successful part of his claim to the $5,000 for the furniture.

I think it is probably fair that each party pay his own costs except where otherwise ordered.

Judgment for the plaintiff for $5,400. No order as to costs.

LAUTOKA,
13.1.84

J. T. Williams.
(J. T. Williams)
Judge