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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. 25 of 1984

BETWEEN : RAM CHARAN f/n Ram Padarath — Plaintiff

A N D : KHATUN d/o Khan Jaman Khan & MOHAMMED RAFIQ f/n Mohammed Hanif — 1st Defendants

A N D : FIJI SUGAR CORPORATION LTD. — 2nd Defendant

For the Plaintiff : Mr. Vijay Chand

For the 1st Defts : Dr. M. S. Sahu Khan

For the 2nd Deft : Mr. R. W. Mitchell

O R D E R

Cases referred to:

(1) Shankaran Nair v N.L.T.B. C.A. 218/1979
(2) Fels v Knowles (1907) 26 N.Z.L.R. 604
(3) Subarmani v Dharam sheela Civ. App. No. 56/1981
(4) Sutton v O'Kane (1973) N.Z.L.R. 304
(5) Maori Trustee v. Kahuroa (1956) N.Z.L.R. 713
(6) Harilal v Trikam Nominees Civ. App. No. 48/78 F.C.A.
(7) Raghwal Singh v Chabildas Civ. App. No. 42/78 F.C.A.
(8) Babu Lal v Ram Swami Reddy C.A. No. 20/79 (Ltk)
(9) American Cyanamid Co. v Ethicon (1975) 1 All E.R. 504
(10) Fellowes & Anor v Fisher (1975) 2 All E.R. 829.
(11) Phillip Morris (N.Z.) Ltd. v Ligget & Myers Tobacco Co. (N.Z.) Ltd. & Anor. (1977) 2 N.Z.L.R. 35
(12) N.W.L. Ltd. v Woods (1979) 3 All E.R. 614
(13) Manganex Ltd. v Southwell & Akhil Holdings Ltd. Civ. App. No. 13/76 F.C.A.
(14) Fiji Poultry Ltd. v F.E.A. Civ. App. No. 26/1978 F.C.A.

The plaintiff and first defendant are adjoining land owners. The plaintiff issued a writ of summons against the defendants claiming that the first defendants wrongfully obstructed his access to a public road running through the first defendants' property, right up to the boundary with the plaintiff's property, thus preventing him from harvesting his 1983 sugar cane crop, occasioning loss. The writ inter alia claims damages and also a final injunction. The present application is for an inter-locutory injunction against the first defendants, entailing the removal of any obstruction to the public road and ensuring free access until the trial of this matter.

There is no dispute that the plaintiff is the holder of a Protected Lease, that is, Crown Lease No. 4337, in respect of 27 acres, being Lot 20 on Plan N1616, Nauwai No. 2. Similarly, there is no dispute that the first defendants, as executors of the estate of the deceased Mohammed Hanif, are the holders of a Protected Lease, that is, Crown Lease No. 4242, in respect of 19 acres and 2 roods, being Lot 39 on Plan N1615, Nawaicoba Subdivision. Both Lots adjoin each other. The plaintiff deposes that a public road known as Tunalia Road runs right through the first defendants' land, right up to the boundary with his land; public transport runs right up to that boundary; he has used that road as access to his property for the last 12 years; in March, 1983 the first defendants ploughed and fenced along their boundary, across Tunalia Road, denying him access thereto; he removed the fence in October 1983 to take two truck loads of cane to the Fiji Sugar Corporation mill; the fence was however re-erected by the first defendants; on the 8th October, 1983 14 acres of his sugar cane crop were burnt during the night; on 12th October he obtained an injunction in the magistrates' court at Nadi, as his estimated damages at that stage would not have exceeded $2,000; he removed the fence on 13th October in the presence of the police; it was re-erected later that day when two security guards were seen to guard it; the next day the police warned the security guards against intervening in the matter, the guards left the scene and the plaintiff removed the fence; that same day however the second-named first defendant, Mohammed Rafiq, hired a digger and had a trench excavated in place of the fence, measuring 6 feet deep, 8 feet wide and a chain long; the plaintiff was thereafter unable to harvest 120 tons of burnt cane and 50 tons of green cane, the sugar mill closing on 25th October 1983; the plaintiff was thereafter advised that as the loss of 70 tons of sugar cane would exceed $2000 in damages, he should discontinue proceedings in the magistrates' court and institute proceedings in the Supreme Court.

As matters stand, the plaintiff claims that he has no access to Tunalia Road by foot or vehicle; he has access to a main road on foot, along a track through a neighbour's land, across a creek which floods during the rainy season and becomes impassable; he has no vehicular access to any road however, and as a result he is unable to transport domestic and agricultural necessities to his farm, or to transport vegetables which he has grown to the market; neither will he be able to transport his sugar cane crop when harvested this year to the sugar mill; furthermore, he suffers from a heart disease and may require urgent vehicular transport.

The first-named first defendant is apparently now in Canada. Mohammed Rafiq has filed an affidavit in opposition. He denies that the public road known as Tunalia Road runs through the first defendants' land; the

registered lease for the land bears no memorial in respect thereof; he is not aware of any intention of the Department of Lands to acquire any of the first defendants' land for the purposes of road building, and even if such was the case that would not confer on the plaintiff the right of access along such road; he deposed that the plaintiff was previously allowed "to use our land to get onto Tunalia Road as a matter of grace and licence"; this licence was withdrawn in March, 1983 owing to the plaintiff's behaviour (which is not detailed); in any event the plaintiff had access from his land onto another public road, Nawaicoba Road; indeed representatives of the Fiji Sugar Corporation Board carried out an investigation at the scene and gave the plaintiff no assistance, as he had access to another public road from his land; as to the injunction issued by the magistrates' court at Nadi, Mohammed Rafiq observed that it was granted ex parte; he allowed the plaintiff access thereupon but the latter "ploughed up my cassava plantation and did damages", and it was then that he posted security guards, the trench being "dug around my land for the benefit of the land in question"; Mohammed Rafiq further observed that, in any event, the action in the magistrate's court has been discontinued.

In a further affidavit the plaintiff denied the aspect of licence; he claimed that before the Government built Tunalia Road the local residents each contributed $40 towards the cost of levelling the road reserve and building a temporary road right up to the plaintiff's boundary; he denied any access to Nawaicoba Road: indeed he exhibited to his first affidavit a letter from the General Manager of the Lautoka Mill of the Fiji Sugar Corporation, dated 10th November, 1983 estimating "that 120 tonnes of burnt cane and 50 tonnes of green cane was not harvested in the 1983 season" from the plaintiff's land: further the plaintiff denied any decision by Fiji Sugar Corporation in the matter, pointing to the loss of his harvest as being clear evidence of non-access elsewhere; as to the allegation of ploughing up the first defendants' cassava plantation, the plaintiff claims that cassava was planted across his access to the road but a few days after the magisterial injunction, and he was obliged to drive through it; again, he claims that the trench was dug with the sole purpose of obstructing his access to Tunalia Road.

The plaintiff exhibited to his first affidavit a letter from the Divisional Surveyor Western, Department of Lands and Survey at Lautoka, dated 12th October 1983, addressed to his solicitors, which reads as follows:

"Dear Sirs,

Acquisition of Land for Extension of Tunalia Road

I refer to your discussion of this morning and confirm that approximately 1 acre 0 rood 16

> perches of land was acquired for road purposes on 10th March, 1972 from Lot 39 on Plan N1615 held by Mohammed Hanif s/o Subardar under Crown Lease No. 4242.
>
> I forward herewith a copy of plan showing the area acquired".

Attached to the letter is a plan showing some two miles or more of Tunalia Road, extending through various farms, running right through the middle and full length of the first defendants' farm, entering upon and terminating in the plaintiff's adjoining farm: the plan indicates that 1 acre 0 rood and 16 perches of the first defendants' land and 1 rood and 8 perches of the plaintiff's land was thus utilised.

The learned Counsel for the first defendants Dr. Sahu Khan in his submissions equates the above letter to "a worthless piece of paper", to use the words of Dyke J. in Shankaran Nair v N.L.T.B. (1). He submits that there could have been no parting with possession of any portion of the first defendants' land, without the consent of the Director of Lands, and that such consent has not been established. Dr. Sahu Khan submits that the first defendants' title is paramount, and that any easement claimed by the plaintiff must be registered. He refers to particula dicta in the judgment of the Court of Appeal of New Zealand in the case of Fels v Knowles (2) at p.620, quoted with approval by the Fiji Court of Appeal in Subarmani v Dharamsheela (3) at p.5,

> "the cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

Dr. Sahu Khan has referred me to a number of other authorities such as Sutton v O'Kane (4), Maori Trustee v. Kahuroa (5), Harilal v Trikam Nominees (6), Raghwal Singh v Chabildas (7) and Babu Lal v Ram Swami Reddy (8) All of those cases however concern the indefeasibility of registered title and the ineffectuality of unregistered interests, such as leases and easements, and the aspect of the consent of the Director of Lands to any dealing in the land. The learned Counsel for the plaintiff Mr. Chand submits that we are not here concerned with any dealing with the first defendant's land as between the parties to the action: we are here concerned with the respective rights of adjoining land owners, through whose land a public road allegedly runs, and because a public road is involved the first defendants may not deny the plaintiff access thereto, without infringing his legal rights.

Dr. Sahu Khan submits nonetheless that any such right of way must be registered, indeed that the plan showing Tunalia Road running through the first defendants' land has no effect unless the relevant portion thereof forms part of the memorials to the lease. Mr. Chand, however points to a clause in the first defendants' lease which reserves to the lessor, the Director of Lands, the right to resume without compensation not more than one twentieth of the lands leased, for the purpose of e.g. road making. Mr. Chand submits that the consent of the Director cannot possibly be required for acquisition by the Director himself.

Dr. Sahu Khan points to the fact that the 1 acre and 16 perches of land allegedly acquired from the first defendants' land, comprising 19 acres and 2 roods, is more than one twentieth thereof. I observe however that under the lease one twentieth may be acquired without compensation. Mr. Chand submits that the deceased Mohammed Hanif or the first defendants could, despite the Mohammed Rafiq's affidavit to the contrary, have voluntarily parted with or received compensation in respect of the excess: an issue of credibility is involved which must be left to the trial.

I take judicial notice, from the subsidiary legislation to the Roads Act Cap. 175 (at p.14), of the fact that Tunalia Road (C.71) is a public road, a country road in the province of Ba, and that it commences

> "on the Queens Road at a point about 3 miles south of the Nadi Post Office; thence following a general southerly direction for about 1½ miles; and thence following a general westerly direction to end in a cul de sac. Distance about 3 miles."

I observe that clause 8 of the first defendants' lease requires them to give free access to any person over "any public thoroughfare intersecting or adjoining the demised land". I note that the plan of the first defendants' property (dated 28th June, 1967), forming part of the Crown Lease, shows another neighbouring property, Lot No. 38, lying along the boundary opposite to that between the first defendants' and the plaintiff's land, consisting of "13-2-00 and excl. Road" (presumably meaning "13 acres and 2 roods excluding Road"), and that there is marked right through the middle of that Lot what appears to be in fact a road: no such road is however included in the defendants Lot 39 on the plan. The lease was however registered on 26th February, 1968 and the letter from the Department of Lands indicates that land was acquired from Lot 39 on 10th March 1972.

Whilst the court cannot resolve issues of credibility at this stage, I observe nonetheless that Mohammed Rafiq in paragraph 4 of his affidavit states that "I deny that the public road known as Tunalia Road runs through my land": in paragraph 5 however, he states that "we allowed the plaintiff to use our land to get onto Tunalia Road as a matter of grace and licence". It seems therefore that Tunalia Road is nearby

but Mohammed Rafiq does not state just how near it is. On the other hand the plaintiff has exhibited some three photographs, which illustrate that an apparently gravel road, bearing at least one vehicle when the photographs were taken, seemingly well drained, banked and constructed, and bearing, I must admit, all the appearances of a public road constructed at some expense, runs apparently through the first defendants' land right up to and beyond the boundary with the plaintiff's land. Mohammed Rafiq in his affidavit made no reference to such photographs.

The plaintiff also points to the fact that both he and the first defendants hold a sugar cane contract with Fiji Sugar Corporation and that it is a standard clause of such contract that neighbouring sugar cane farmers must grant to each other and the Corporation free access across each other's farms, along a convenient route, and also to their vehicles and livestock. Dr. Sahu Khan submits that the doctrine of privity of contract applies: only Fiji Sugar can enforce such a contract. The plaintiff is not however suing the first defendants for breach of any contract: as far as this application is concerned he seeks a remedy in equity.

Mr. Chand has referred me to the decision in the case of American Cyanamid Co. v. Ethicon (9). That decision has apparently presented the courts with some difficulties - see e.g. the Court of Appeal case of Fellowes & Anor v. Fisher (10), and in particular the judgment of Denning M.R. at pp. 831/838. Those authorities were fully reviewed by White J. in the Supreme Court of New Zealand at Wellington in the case of Phillip Morris (New Zealand) Ltd. v. Ligget & Myers Tobacco Co. (New Zealand) Ltd. and Anor. (11). Since then the principles enunciated by Lord Diplock in the American Cyanamid (9) case have been extended somewhat by the House of Lords in N.W.L. Ltd. v. Woods (12). In that case the House was dealing with amending legislation, introduced shortly after the American Cyanamid (9) case, which required the court, in deciding whether or not to exercise its discretion to grant an interlocutory injunction, to consider the likelihood of the defendant succeeding in a particular statutory defence. Such statutory provisions need not concern us. Suffice it to say that Lord Diplock observed at p.625/626,

> "American Cyanamid Co. v. Ethicon Ltd. (9) which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's

interest to proceed to trial....."

> "Where ....the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other".

In my research I observe that the Fiji Court of Appeal followed the decision in the American Cyanamid (9) case and carefully applied the principles enunciated therein in the cases of Manganex Ltd. v. Southwell & Akhil Holdings Ltd. (13) and Fiji Poultry Ltd. v. F.E.A. (14). As to the decision in N.W.L. Ltd. v. Woods (11), in my view this is not the class of case where the grant or refusal of an interlocutory injunction will effectively dispose of the action, I propose therefore to apply the principles as enunciated by Lord Diplock in the American Cyanamid (9) case.

The plaintiff at the trial must prove an infringement of a legal right. He need not do so at this stage however. It is sufficient for him to establish that there is a serious question to be tried. In this respect there can be no doubt that the plaintiff has made out his case. The court cannot resolve issues of credibility at this stage nor "decide difficult questions of law which call for detailed argument and mature considerations". I do not see that the material before me fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction and I proceed therefore to consider the balance of convenience.

I am satisfied that if the plaintiff were to succeed at the trial in his claim for a permanent injunction, he could not be adequately compensated in damages if I were to refuse this application: furthermore there is no evidence before me that the first defendants would be in a financial position to pay such damages. On the other hand, apart from his claim for $500 damages in respect of his cassava crop, I do not see what loss the first defendants would suffer were I to grant an interlocutory injunction, and I am thus well satisfied that damages would be an adequate remedy under the plaintiff's undertaking as to damages; in my view any such damages would not be of a high order and in view of the plaintiff's farming activities I am satisfied that he would be in a financial position to pay any such damages.

I need go no further. The balance of convenience weighs heavily

on the side of the plaintiff and I accordingly grant the application for an interlocutory injunction.

Delivered In Chambers At Lautoka This 24th Day Of August, 1984

(B. P. Cullinan)

Judge