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IN THE SUPREME COURT OF FIJI

A T SUVA

Civil Jurisdiction

Action No. 414 of 1982

BETWEEN : VIJAY KUMAR s/o Narayan Prasad Plaintiff

A N D : ATTORNEY-GENERAL OF FIJI 1st Defendant

A N D : EVERETTE RILEY 2nd Defendant.

Mr. D. C. Maharaj Counsel for the Plaintiff

Mr. J. K. I. Maharaj Counsel for the 1st Defendant

Second Defendant in person

J U D G M E N T

On 31st December, 1978, the second defendant, Everett Riley, executed a form of transfer (Exhibit "C") of freehold land at Pacific Harbour to one Henry Grunstein. Consequently, Henry Grunstein was, on 31st October 1979, registered as the sole proprietor of the land.

On 15th September, 1980, Grunstein executed a transfer of the land (Exhibit "D") to the plaintiff, Vijay Kumar. Consequently the plaintiff was, on the following day, 16th September, 1980, registered as sole proprietor.

Exhibit "F" is a photocopy, admitted by consent, of the relevant certificate of title which is kept by the Registrar of Titles in accordance with Section 19 of the Land Transfer Act. This photocopy was obtained by the plaintiff when he caused a search to be made before the transfer from Grunstein to himself was registered. It shows that a memorial of the transfer from Riley to Grunstein was then endorsed on that certificate of title. According to that memorial, Grunstein was the sole proprietor albeit that, before he was registered as such, he had lodged two caveats "as to one undivided half share".

After the registration of the plaintiff as sole proprietor, the Registrar of Titles, acting under Section 131(1) of the act, entered a caveat on that certificate of title. Believing that Section 131(2) gave him power to do so, he also altered two memorials which were endorsed thereon: he altered the memorial of the transfer from Riley to Grunstein by adding the words "ONE UNDIVIDED HALF SHARE ONLY" and he altered the memorial of the transfer from Grunstein to the plaintiff by adding the words "AS TO ONE UNDIVIDED HALF SHARE OF H. GRUNSTEIN ONLY". All of that is revealed by the evidence of the Deputy Registrar of Titles who was called as a witness and it is confirmed by Exhibit "E",

a photocopy of that certificate of title. This photocopy was made after the transfer from Henry Grunstein to the plaintiff had been registered, and was admitted by consent.

Clearly, Grunstein was the sole registered proprietor of the land when he executed the transfer to the plaintiff and he remained the sole registered proprietor until that transfer was registered. It was after the plaintiff became registered as the sole proprietor <sup>that</sup> the Registrar made those alterations.

The second defendant, Riley, is still in occupation of the house (known as "Villa 93") which is situated on the land. He maintains that he is still the proprietor of one half share in the land by reason of the fact that the transfer he executed in Grunstein's favour (Exhibit "C") was of one undivided half share only. Certainly the words "AS TO ONE UNDIVIDED HALF SHARE" appear in that document. A suggestion, quite unsupported by evidence, was made by counsel for the plaintiff, when he was cross-examining the Deputy Registrar of Titles, that those words were typed onto the transfer after it was lodged for registration. The Deputy Registrar's answer was that this was "highly unlikely, if not impossible". I find that it is at least probable that those words were on the transfer when it was lodged. It follows that the registration of Grunstein as sole proprietor, instead of as to one undivided half share only, was incorrect.

If that is the truth of the matter, did the Registrar have power to make those alterations?

It will be convenient if I now set out several sections of our Land Transfer Act together with the corresponding sections of the New Zealand Land Transfer Act, 1952:

Fiji Section

131(2) The Registrar may, upon such evidence as shall appear to him sufficient in that behalf, correct errors in certificates of title, or in the register, or in entries made therein respectively, and may supply entries which have been omitted to be made:

Provided that in the correction of any such error he shall not erase or render illegible the original words, and shall insert the date upon which such correction was made or entry supplied, and shall affix his initials thereto, and every certificate of title so corrected and every entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted except as regards any entry made in the register prior to the actual time of correcting the error or supplying the omitted entries.

New Zealand Section

80. The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.

166. If it appears to the Registrar that any grant, certificate of title or other instrument of title has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any such instrument, or that any such instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that any such instrument is fraudulently or wrongfully retained, he may summon the person to whom such instrument has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected as the case may require .....

182(3) Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of any land subject to the provision of this Act, or any estate or interest therein, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this is whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

81. Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

183(1) Nothing in this Act shall be so interpreted as to render subject to action for recovery of damages, or for possession, or to deprivation of the estate or interest in respect of which he is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the ground that his vendor or mortgagor may have been registered as proprietor through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

It will be seen that the powers of the Registrars in Fiji and New Zealand to correct entries, without direction or authorisation from the court, are very similar.

In relation to the New Zealand Registrar's powers, Lord Wilberforce is reported as having expressed the opinion of the Privy Council in Frazer v. Walker and Others, (1967) 1 All E.R. 649, thus at pages 652 and 653:

" Section 80 and s.81 are in a different field; they deal with the powers of the registrar. Section 80 is little more than a "slip" section and not of substantive importance, but s.81 is evidently wider in scope. It applies in cases where it appears to the satisfaction of the registrar that a certificate of title has been issued in error or contains a misdescription of land or boundaries or that any grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained or is fraudulently or wrongfully retained."

and thus at page 655:

"It is clear, in any event, that s.81 must be read with and subject to s.183 with the consequence that the exercise of the registrar's powers must be limited to the period before a bona fide purchaser, or mortgagee, acquires a title under the latter section."

(The underlining is mine).

The three New Zealand sections to which Lord Wilberforce referred are set out above with the corresponding Fijian sections. It seems to me that the Fijian and New Zealand sections are so very similar that what His Lordship said in relation to the New Zealand sections must apply to their Fijian counterparts. Moreover, what he said in relation to New Zealand Section 81 must, in my view, apply a fortiori to New Zealand Section 80 and its Fijian counterpart, Section 131(2), which is the provision under which the Registrar acted in the present case.

Some 60 years previously, Lord Lindley had expressed the opinion of the Privy Council in relation to the New Zealand Registrar's powers in the following words in Assets Company Limited v. Mere Roini (1905) A.C. 176 at 194-195 in the following words:

".....he is empowered to correct errors and supply omissions, and to require certificates of title or other instruments to be delivered up to be cancelled or corrected if issued in error, or if they contain any misdescription of land or boundaries, or if fraudulently or wrongfully obtained .....Large, however, as these powers are, it has been decided that they cannot be exercised to the prejudice of a registered bona fide purchaser".

(The underlining is mine).

Paragraph 2.076 of 'Land Law', by Professors Hinde, McNorland and Sim commences:

"It has been said that: 'An unqualified power to cancel or correct the register ... could strike at the very roots of indefeasibility of title'. One of the reasons for the development of the concept of indefeasibility was to cure defects and irregularities in titles, and so the Registrar's powers of correction must necessarily be qualified in some appropriate way. The limit which has been placed upon those powers is that they cannot be exercised to the prejudice of a registered bona fide purchaser. Section 81 of the Land Transfer Act 1952 has to be read subject to s.183 of that Act, so that the Registrar's powers of correction are lost when a bona fide purchaser for value or mortgagee for valuable consideration acquires a registered title. This rule is consistent with the principle that a person who deals with Land Transfer land in good faith and for value need not enter into any investigation of his vendor's or mortgagor's title: from the moment of registration of his own title, such a person knows that the register cannot be corrected to his prejudice in respect of any matter affecting his vendor's or mortgagor's title."

That passage, I find in the light of their Lordships' dicta, expresses the position in this country in relation to the Registrar's power to correct the register without the court's authority.

It is interesting to note that the learned authors go on to express the view that Lord Lindley's and Lord Wilberforce's references to a "bona fide purchaser" should be read as references to a bona fide purchaser for value - one can "purchase" property without



(5)

giving value - and that, having regard to the apparent policy of the Land Transfer Act in regard to volunteers, the registration of a voluntary transfer does not preclude the exercise of the Registrar's power of correction: see paragraph 2.106.

However, in the present case the plaintiff's evidence that he paid Grunstein \$25,000.00 for the land was not disputed, and I accept it. He was, I find, a purchaser for value. The question remains: was he a bona fide purchaser?

It has been suggested to me that there are two good reasons for saying that it is at least doubtful that the plaintiff was in fact a bona fide purchaser. I shall now consider each of those "two good reasons" in turn.

(i) Ex. 'F', the photocopy of the certificate of title which the plaintiff obtained when he caused the search to be made before the transfer from Grunstein to himself was registered, shows that Grunstein had become registered as sole proprietor after he had lodged two caveats (one later withdrawn and the other cancelled) "as to one undivided half share".

I do not think that there is merit in the suggestion that the plaintiff, having seen the memorials of those two caveats, must have suspected, if not known, that Grunstein was the proprietor of a half share only and that Grunstein's registration as sole proprietor was incorrect. The plaintiff was entitled to assume, and I am satisfied by his evidence that he did in fact assume, that the last endorsed memorial appearing in Exhibit 'F' was correct. That memorial was, in effect, an official announcement to the world that Grunstein had, as a consequence of a duly registered transfer, become the sole proprietor of the land. In my view, the plaintiff was entitled to, and in fact did, take that memorial at its face value.

(ii) It has been suggested that the price of \$25,000 paid by the plaintiff was so low as to indicate that he must have known or suspected that the transfer to himself was improper.

I do not think that this suggestion is supported by the evidence as a whole.

In his examination-in-chief, the plaintiff said (and there was no evidence to the contrary) that, on about 12th September, 1980, Grunstein had asked him to sell the land for \$35,000 and that a few days later Grunstein had called on him and told him that he was in desperate need of money and that he would reduce his price drastically. On that occasion, according to the plaintiff's uncontradicted evidence, Grunstein had offered the land to him for \$25,000 and he had accepted that offer.

Exhibit 'H', a copy (admitted by consent) of a declaration made by Grunstein in the plaintiff's presence on 15th September, 1980, the day before the transfer from Grunstein to him was registered, was to the effect, inter alia, that Grunstein had paid \$27,500 for the land at the end of 1978. Cross-examined about this, the plaintiff said:

"Exhibit 'H' shows that Grunstein purchased for \$27,500.

As there had been a flood in the meantime I did not consider \$25,000 to be low."

(6)

It was not disputed that there had in fact been a flood at Pacific Harbour between Grunstein's purchase and the plaintiff's purchase of the land.

The second defendant, Riley, gave evidence. According to him, the value of "Villa 93" when it was sold by Grunstein to the plaintiff in September, 1980, was about \$60,000.

Riley also said that he had acquired "Villa 93" in 1976 as part of a deal in which, to the best of his recollection, a value of between \$32,000 and \$33,000 had been attributed to it. Later in his testimony, he said that the value attributed to "Villa 93" in that 1976 deal may have been as high as \$40,000. He also said that, in February 1983, he had purchased another villa, very much the same as "Villa 93" and of about the same value, for \$36,250. If the value of "Villa 93" was \$32,000 - \$40,000 in 1976 and about \$36,250 in 1983 it seems unlikely that it was as high as \$60,000 in September, 1980, when Grunstein sold it to the plaintiff.

It seems to me that the truth of the matter probably is that the plaintiff "snapped up" the property at a rather low price from a vendor who was in urgent need of money. I see no reason for saying that the plaintiff was not a bona fide purchaser for value. On the contrary I find, on the evidence considered as a whole, that he probably was a bona fide purchaser for value.

Clearly, in my view, the Registrar had no power, in the circumstances, to alter, as he did, the memorial of the transfer from Grunstein to the plaintiff.

The plaintiff seeks the following forms of relief:

- (1) A declaration "that the Registrar of Titles was not entitled to make entries on the transfer or on the Certificate of Title No. 14576 once the Plaintiff was registered as proprietor of the said Certificate of Title."

I do not see fit, in the exercise of the court's discretion, to make a declaration in such wide terms - in certain circumstances, for example if the plaintiff had fraudulently or wrongfully obtained his registration as sole proprietor, the Registrar would have been entitled to correct the register.

- (2) A declaration "that the actions of the Registrar of Titles are ultra vires the Land Transfer Act 1971."

I do not see fit to make a declaration in terms so vague that they do not specify what particular "actions" are to be declared ultra vires.

- (3) A declaration "that the Plaintiff is now and has been since the date of registration of the transfer viz. 16th September, 1980 the registered proprietor of all the land and improvements thereon comprised in Certificate of Title No. 14576."

(7)

Such a declaration would hardly be true. It would incorrectly imply, I think, that the plaintiff is the registered sole proprietor of the land whereas, in its present state, the register shows him to be the registered proprietor as to one half undivided share only.

- (4) A declaration "that the Plaintiff's title is 'indefeasible' within the meaning of the Land Transfer Act 1971 and is entitled to protection thereunder."

I decline to make a declaration in such terms because the word "indefeasible" is not used in the Land Transfer Act and no particular meaning is ascribed to it, either expressly or impliedly, by the Act.

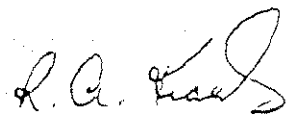
- (5) An order "that the Registrar of Titles .....restore the name of the Plaintiff on the said Certificate of Title No. 14576 as the last registered proprietor of all that land known as Lot 24 D.P.3849 comprised in the said Certificate of Title."

I do not think that such an order would be appropriate. The plaintiff is already, it seems to me, "the last registered proprietor" of the land.

What the plaintiff really needs is an order that the words "AS TO ONE UNDIVIDED HALF SHARE OF H. GRUNSTEIN ONLY" be removed from the memorial of Transfer No. 179256 which is endorsed on the relevant certificate of title, No. 14576, which, in pursuance of the provisions of Section 19 of the Land Transfer Act, is kept by the Registrar of Titles. Such an order is not specifically sought by the plaintiff. However, he does ask for "such further and other relief as this Honourable Court seems meet". I find that Section 168 of the Act gives this court power to make that order and I think that justice dictates that it should be made. Accordingly, I make it.

- (6) An order "that the Second named Defendant ..... give vacant possession of the Plaintiff's land and house to the Plaintiff forthwith".

I do not doubt that this court has power to make such an order or that it should be made. Accordingly, I order that the second defendant, Everett Riley, give up vacant possession to the plaintiff, within 30 days from the date of this judgment, of all of that piece of land being Lot 24 on Deposited Plan No. 3849 which is more particularly described in Certificate of Title No. 14576.



.....  
(R. A. Kearsley)  
JUDGE

LAITOKA,  
5th July, 1985