IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0006 OF 2021
[On Appeal from the Court of Appeal No: ABU0082/18]

BETWEEN : **DEO SAGAYAM**

Petitioner

AND : **RAJENDRA PRASAD**

Respondent

Coram : The Hon. Mr Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr. Justice William Young, Judge of the Supreme Court

Counsel: Mr K. Maisamoa for the Petitioner
Mr M. Kumar for the Respondent

Date of Hearing: 5th October, 2023

Date of Judgment: 27th October, 2023

JUDGMENT

Gates, J

[1] This petition concerns the issue of whether there had been sufficient evidence before the High Court of the Respondent's interest in the land in question in order to bring summary

proceedings for possession against the petitioner. It also enlivens the question as to whether there existed a right for the petitioner to be on the land.

Facts

[2] Basaiya had a son Nokaiya. Nokaiya died on 28th July 1980. Before he died Nokaiya had made a will, which he executed on the 13th May 1980. Nokaiya owned a Crown (now State) lease over land comprising a little over 11 acres. The will was more sophisticated than what is normally seen in court for a cane farmer. It was prepared in the office of a reputable firm of solicitors. It was more detailed in its arrangements for the distribution of property amongst the testator's immediate family than is usually seen.

[3] Nokaiya's two daughters were provided for. The balance of the estate was to be distributed to three of his sons in equal shares, absolutely. One of those sons was the respondent, the plaintiff Rajendra Prasad. The others in that gift [clause 3(d)] were Goverdhan and Ashok Kumar. This was the position at the commencement of the litigation before the Master of the High Court at Lautoka.

[4] There were two other sons who were also given an interest in the land. They were Yanteshu also known as Basaiya, and Ram Krishna. At clause 3(c) the testator made the following gift:

"(c) to allow my two sons **YANTESHU** also known as **BASAIYA** and **RAM KRISHNA** to occupy and live in their houses built on my land for the rest of their respective lives but they shall not be entitled to cultivate any part of my land nor to occupy more than is necessary as a house site."

[5] These two sons Yanteshu and Ram Krishna were allowed to reside on approximately half acre sites from within the 11 acres. Yanteshu had a daughter Nirmala Devi alias Maya Wati. She married Deo Sagayam, the petitioner. Whilst Yanteshu was alive he could

bring his family to live on that piece of land, in which he held a life interest from his father Nokaiya.

[6] But Yanteshu died in 2012. With his death the gift of the piece of land for Yanteshu's residence faded away. His life interest expired with his death. From that point on his widow and daughter could only stay on the land if the Trustees of Nokaiya's estate permitted them to stay, for the residual estate had been gifted to Nokaiya's other three sons in the will of 1980 at clause 3(d) namely Goverdhan, Ashok Kumar, and the respondent, Rajendra Prasad.

[7] Nokaiya made gifts to his children. The gifts were not all exactly the same. There may have been reasons for the different distributions of property in the will. We do not know why. But Nokaiya was entitled to dispose of his property as he did.

<u>The Master's Judgment</u>

[8] Five years after Yanteshu's death, proceedings were brought in the Lautoka High Court pursuant to Order 113. The respondent sought orders to deliver vacant possession for that part of the Estate land that had previously been a residence, a life interest for Yanteshu. Those proceedings were brought by Rajendra Prasad. He was the remaining Executor and Trustee of his father's estate. He exhibited three documents to his affidavit in support. They were, a copy of the probate on Nokaiya's will, together with the will itself, the Director of Lands approval notice for the lease of the land, and a notice sent by the executor's Solicitors to the petitioner for him to vacate the land. In a supplementary affidavit Rajendra exhibited a consent letter from the Lands Department for him to institute these proceedings to take possession of the land previously occupied by Yanteshu.

[9] Order 113 is framed to provide a summary and speedy procedure for the recovery of land. It reads:

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

[10] Master Azhar wrote a careful and detailed judgment covering the issues raised in the case.

[11] The plaintiff averred in his affidavit that the estate of the late Nokaiya owned a Crown Lease. He, Rajendra, was both a beneficiary of the estate and also the sole surviving Trustee of the estate. He stated the defendant Deo Sagayam, without any colour of right whatsoever, was occupying the estate property in spite of having been served a notice to deliver vacant possession. The plaintiff moved therefore for an order to the defendant to deliver immediate vacant possession.

[12] The defendant filed an affidavit in opposition. In it he admitted that the plaintiff was the trustee of the estate of Nokaiya. His claim was that his father-in-law Yanteshu was also one of the beneficiaries of the estate and that Yanteshu lived with the petitioner's family on that particular property. He claimed that after Yanteshu's death he had been living with his wife on the property.

[13] The Master referred to observations made by Pathik J in **Baiju v Kumar** [1999] FJHC 20; HBC0298j.98s (31 March 1999). His Lordship had cited the White Book in interpreting Order 113 r.1 where it was noted:

"this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto."
(Emphasis is original)

[14] The Master correctly identified the two issues which had to be satisfied before the court could grant the orders for possession. First he needed to be satisfied that the plaintiff had a rightful claim to recover possession and thus, to bring proceedings. Second, he needed to be sure of the wrongful occupation of the land by the defendant.

[15] The relevant facts were not disputed here. It was proper to proceed by way of Order 113. The defendant admitted in his affidavit that the estate owned the land, and that he had received a notice from the Solicitors to vacate.

[16] The plaintiff stated that he, being a trustee of the estate, never consented to the defendant's occupation of the said land. He also added that not only Yanteshu (Rajendra's brother) had died, but also Yanteshu's wife. He said Yanteshu had no issue. This was contradicted by the defendant who produced a birth certificate for Nirmala the defendant's wife which stated Yanteshu was her father. There was some criticism for the failure of the defendant to produce the marriage certificate for his marriage to Yanteshu's daughter. This point however was irrelevant.

[17] The Master went on the consider whether Yanteshu had any transferrable right over the property. The reading of clause 3(c) of the will removes all doubt. That will is not disputed and Nokaiya had only given Yanteshu a life interest for residence purposes only (not cultivation). There was nothing for Yanteshu to pass on to anyone, to his wife or to his daughter. The Master referred to the fact that the defendant in a supplementary affidavit [at para.6] had admitted that two of Nokaiya's sons Yanteshu and Ram Krishna, had only been allowed to live on their respective lands and not to cultivate. This must have been what Yanteshu believed too since it has not been suggested that he had willed his piece of residential land to his successors.

[18] In his affidavit the plaintiff said the petitioner's wife Nirmala did not live on that land. Instead it was said she had always lived with her children in Rakiraki. The Master thought the reason for her to live in Rakiraki was perhaps because she knew that her father only

had a life interest in the land in question. This speculation can have no bearing on the decision.

[19] The Master did not take cognizance of a statement in a supplementary affidavit by the defendant that his wife had applied, after Yanteshu's death, for subdivision of the land. No confirmatory documents were exhibited to that affidavit. It is difficult to see how the Director of Lands could have entertained such an application when Nirmala had no title to the lease.

[20] The Master rejected the defence. There had been no challenge to the will, and the life interest had expired. He granted the plaintiff his relief, the order for possession. It had been five years since Yanteshu's death. Whatever interest in the residence the defendant may have maintained, it was a long time before the family moved the court to regain the residual part of the estate, to which other members were entitled.

[21] The Master rightly rejected the submission after the hearing in so far as it was an attempt to vary the defendant's sworn evidence on oath produced at the hearing.

[22] The Master found the plaintiff had proved his right to possess the land, and also had proved the absence of any consent by him or any predecessor entitling the defendant to stay on the land.

High Court

[23] I have to agree with the Court of Appeal when it said the High Court judge had embarked upon a voyage of discovery. Matters were raised by the judge for which there was no supporting evidence in the affidavits. There were two issues, which I have mentioned at the commencement of this judgment. First, was the evidence of the respondent's interest in the land sufficient for him to seek the orders? Second, did the petitioner have any right to remain on the land?

[24] The petitioner's counsel was asked before the hearing before us what was the legal basis for the petitioner to remain on the land. He did not rely on Nokaiya's will, but he said he relied on adverse possession. In none of the three courts has this issue arisen before or been developed in argument.

[25] That line of argument cannot be accepted. His occupation of the land was not established. The Court of Appeal said he could have arranged for his wife Nirmala, though living in Rakiraki, to support this statement by swearing an affidavit. No cogent evidence was before the court.

[26] The persons occupying Yanteshu's land, with Yanteshu's permission, had a right to be on this land during his lifetime. But after Yanteshu's death, they had neither licence nor right. They were in effect trespassers. The judge was in error to state otherwise.

[27] The judge was in error on the other issue also, the sufficiency of evidence for the respondent Rajendra to demonstrate an interest in the land. The Master and the Court of Appeal were both right in their interpretation of the evidence adduced.

[28] The land was sufficiently identified as a crown lease bearing reference number No. 4/7/2015 and more particularly described as Lot 2 in plan LDSW 448, a proposed S/D of Lot 4, ND 5014. The judge had wrongly come to a conclusion that the lease had expired because of supposed breaches in the conditions of the lease embodied in the lease document. The judge, of himself, reached the conclusion that Rajendra might have failed to fulfil those conditions under which the approval had been granted, and therefore approval of the lease must be considered cancelled. Thus the Judge deduced that the respondent had lost his remaining interest in the land. He further "*rushed to the conclusion*" at the time of bringing summary proceedings under order 113 that the respondent no longer had an interest in the land.

Court of Appeal

[29] The Court of Appeal disposed of two further points by saying:

"[12] The Learned High Court Judge had ruled on an issue which had never been raised in any of the affidavits nor contested by Deo Sagayam. He had referred to the relevant lease document only as file number and not a lease. However, it is pertinent to mention as pointed out by the Counsel for Rajendra Prasad, that the Director of Lands would not have given him approval to take steps for eviction under Or.113 if Rajendra Prasad had breached the conditions of the lease. I hold the view that had there been any breach, it fell within the ambit of the Director of Lands to take cognizance of such breach and take appropriate action."

[30] And on the same issue of the point raised by the judge, not as matters put forward by the parties:

"[13] The Learned High Court Judge had set aside the order of the Master mainly on the wrong premise that Rajendra Prasad had not complied with the five conditions enumerated in paragraph 10 (supra) above of this judgment. Granting of approval for the institution of proceedings for eviction itself is ample proof that Rajendra Prasad was not in breach of the conditions of the lease. As this issue was never raised in the course of the proceedings before the learned High Court Judge, I find that he had misdirected himself by adverting to this fact and holding that Rajendra Prasad is not entitled to possess the land."

[31] The position was that there was no evidence of a breach of condition or of such a grant having led to the cancellation of the lease. This was all surmise and not matters contained within the affidavit of the petitioner.

Conclusion

[32] As I have said, the Master had arrived at a correct answer. The judge had not paid sufficient heed to the evidence before the Master and himself, or correctly interpreted its

total effect. As a result a straight forward case has been prolonged in the court system and the respondent's trustee kept from his and his family's remedy.

[33] The petitioner has not been able to establish that his petition comes within any of the criteria for the grant for special leave. It must be refused and the petition dismissed.

[34] There will be costs summarily assessed of $5000.00.

Keith, J

[35] I agree entirely with the judgment of Gates J. There is nothing I can usefully add.

Young, J

[36] I agree.

Orders:

1) *Special leave refused.*
2) *Petition dismissed.*
3) *Judgment of the Court of Appeal affirmed.*
4) *Costs for the respondent in this court of $5000.00.*

The Hon Mr Justice Anthony Gates
JUDGE OF THE SUPREME COURT

The Hon Mr Justice Brian Keith
JUDGE OF THE SUPREME COURT

Hon Mr Justice William Young
JUDGE OF THE SUPREME COURT