KALLU LABBU RAMKHELAWAN *v.* MOHANLAL

[Civil Jurisdiction (Carew, P.J.) December 14th, 1950]

Crown Protected Lease—s. 15 of the Crown Lands Ordinance—null and void transfer—whether monies paid recoverable.

The plaintiff agreed to purchase the transfer of a Crown lease from the defendant and paid him a portion of the agreed amount. The plaintiff then erected a house on the land.

The lease was a protected lease and after some correspondence with the Director of Lands, the defendant withdrew his application for the Director's consent to the transfer.

The defendant then took possession of the building.

The plaintiff then claimed from the defendant the return of part of the purchase price paid for the Crown lease and the cost of building the house.

Judgment in the resulting action in the Supreme Court was as follows:—

HELD.—The transfer being an illegal one, the monies paid were not recoverable.

Cases referred to:—
Anderson, Ltd. v. Daniel [1924] 1 K.B. 138.
Bloxsome v. Williams 3 B. & C. 232.
Cope v. Rowlands 2 M. & W. 149.
Harry Parker Ltd. v. Mason [1940] 2 K.B. 510.
Mahmoud v. Ispahani [1921] 2 K.B. 716.
Parkinson v. College of Ambulance, Lim 93 L.J. 1066.

S. Hasan for the plaintiff.

A. I. N. Deoki for the defendant.

CAREW, P.J.—The plaintiff claims the sum of £78 4s. 9d. paid by him to the defendant towards the purchase price of Crown Lease No. 1569 which the defendant agreed to transfer to the plaintiff; and he claims special damages amounting to £2,801 11s. 9d. for expenses incurred by him in erecting a residential building on the said Crown Lease, or alternatively, a sum of £2,801 11s. 9d. being the expenditure incurred by the plaintiff in erecting the building at the request of the defendant.

The facts are as follows. The defendant is the holder of Crown (Protected) Lease No. 1569 at Samabula, Suva. The plaintiff discussed the purchase of this lease with Ramdulari, a brother-in-law of the defendant, who handed the lease document to the plaintiff. The plaintiff retained this document. About the 11th April, 1949, the plaintiff verbally agreed with the defendant to purchase the Crown Lease for the sum of £80; it was agreed that something should be put in writing, but in the meantime, as the plaintiff wishes to build, he was informed by the defendant that he could have plans made and begin building.

A few days later the plaintiff instructed Messrs. Bidesi & Sons to prepare plans and on the 21st May, 1949, the plaintiff began collecting building materials. On the 17th June, 1949, a document was signed by the plaintiff and the defendant by which the defendant agreed to sell his Crown Lease to the plaintiff for £80 and to transfer the lease to the plaintiff on the completion of the building. Early in August, 1949, the plaintiff began erecting the building.

On the 12th September, 1949, the defendant asked the plaintiff to let him have £25 out of the purchase price of £80. The defendant agreed, and on the 13th September, 1949, the sum of £25 was paid and a receipt was given by the defendant to the plaintiff. In October, 1949, the defendant was sued by the Director of Lands for the recovery of six months' rent due on Crown Lease No. 1569. At the request of the defendant the plaintiff paid this sum, together with costs, making a total of £3 4s. 9d., and it was agreed that this sum should be deducted from the balance due on the purchase price of £80.

On or about the 17th December, 1949, the defendant asked the plaintiff to pay him £50 out of the balance due on the purchase price of £80. As the Crown Lease had not yet been transferred to the plaintiff, the plaintiff was reluctant to make further payment. It was arranged between the parties that instead of executing the transfer in the name of the plaintiff the defendant should execute a transfer in the name of the plaintiff's son, Prahalad. In consequence of this arrangement the defendant paid the sum of £50 to the plaintiff on the 22nd December, 1949. and signed an application for the consent of the Director of Lands to a transfer of the lease. Prahalad was studying at Melbourne and the application was sent to Melbourne for his signature. The application was signed and returned, and on the 12th January, 1950, it was submitted to the Director of Lands. On the 17th February, 1950, the Director of Lands informed the plaintiff through his solicitor that the defendant had informed him that he had never agreed to the proposed transfer. After some further correspondence the Director of Lands informed the plaintiff through his solicitor that on the 23rd March, 1950, the defendant had withdrawn his application for consent; he, the Director of Lands, proposed, therefore, to do nothing further in the matter.

By this time the building was almost completed, and on the 21st April, 1950, a caretaker, Ranjit Singh, was put in charge by the plaintiff. He occupied the bottom flat. A Fijian, Semi, was allowed to occupy the top flat free of rent. On 14th May, 1950, the defendant with some friends forced his way into the building and took possession.

Mr. Deoki, for the defendant, called no evidence. The facts set out are taken from the evidence of the plaintiff and his witnesses. This evidence, being unchallenged, is accepted as a true statement of the facts. Mr. Deoki submits that on these facts the plaintiff cannot succeed because his whole case is based on a contract which is not only void but illegal. He refers to section 15 of the Crown Lands Ordinance and submits that under this section the sale by the defendant is unlawful; that as the object of the Crown Lands Ordinance is for the benefit of the public, and because the Ordinance contains penalties for its infringement, a sale forbidden by section 15 is not only null and void but is illegal.

The relevant portions of section 15 of the Crown Lands Ordinance read as follows:—

" 15. (1) Whenever in any lease under this Ordinance there has been inserted the following clause—

' This lease is a protected lease under the provisions of the Crown Lands Ordinance, 1945,'

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any Court of law or under the process of any Court of Law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease. Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(4) For the purpose of this section ' lease ' includes a sublease and ' lessee ' includes a sublessee."

I think there is no doubt, and indeed it is not denied by the plaintiff, that as the consent of the Director of Lands was never obtained, the sale is null and void; the agreement between the parties is therefore destitute of all legal effect and confers no rights on either party. But is the sale illegal in the narrow sense of being forbidden by statute? In discussing this question I should like to refer to a passage from the judgment of *Bankes, L.J.* in *Anderson, Ltd. v. Daniel* [1924] 1 K.B. at p. 143. He said:—

" Upon that point I should like to refer to what *Lord Wrenbury*, then *Buckley J.*, said in one of the money lender cases: *Victorian Daylesford Syndicate v. Dott* (1905) 2 Ch. 624, 629: ' The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads, those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented on in numerous cases, including those which have been cited of *Cope v. Rowlands* (1836) 2 M. & W. 149, and *Fergusson v. Norman* (1838) 5 Bing. N.C. 76 *Parke* B. in the former case says the question to determine is whether the Act is " meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? Or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers? " If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal.' "

Scrutton, L. J. said in *Mahmoud v. Ispahani* [1921] 2 K.B., at page 728:—

> " I think the law is laid down in *Cope v. Rowlands* (2 M. & W., 157), where *Parke B.*, delivering the judgment of the Court, said ' It is perfectly settled that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: *Lord Holt, Bartlett v. Vinor.* (*Carth.* 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? ' If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract . . . and in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which *Parke B.* refers in *Cope v. Rowlands* (2 M. & W. 157, 158) where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public."

Under the provisions of section 15 of the Crown Lands Ordinance, a sale is not only null and void but is unlawful. Section 34 makes the wrongful occupation of Crown Lands an offence. This section reads:—

> " 34. Any person not claiming bona fide under a subsisting lease or licence or otherwise under any Ordinance relating to the occupation of Crown land who is found occupying any Crown land or is found residing or erecting any hut or building, depasturing stock or cutting any timber growing thereon, or clearing, digging up, enclosing or cultivating any part thereof, shall be liable to immediate eviction and shall be guilty of an offence against this Ordinance."

Section 42 deals with offences against the Ordinance and imposes a penalty. This section reads:—

> " 42. (1) Every omission or neglect to comply with, and every act done or attempted to be done, contrary to the provisions of this Ordinance or of any regulation or order made thereunder shall be deemed to be an offence against this Ordinance.
>
> (2) For every offence against this Ordinance for which no penalty is specially provided an offender shall be liable to a fine of fifty pounds or to imprisonment for six months or to both such fine and imprisonment."

Reading these provisions and the Ordinance as a whole, it would seem that the plaintiff has not only behaved in a manner prohibited by the Ordinance but that his behaviour becomes the subject of penalty.

As regards the object of the restriction in dealing with Crown lands, it is, it seems to me, imposed for the benefit of the public—it is to prevent speculation and keep land values down. Mr. Hasan urges the view that the prohibition is for the benefit of a particular person, namely, the purchaser. No doubt the purchaser will benefit; but I think it can be fairly contended that the benefit flowing from the control on unauthorized dealings in Crown lands must, and indeed is intended to, benefit the whole community. If this is a proper conclusion, then this sale which was made in breach of the provisions of the Crown Lands Ordinance would appear to be illegal.

Mr. Hasan contends that the sale is not illegal because the prohibition is not an absolute one. He submits that the plaintiff did all he could do. He applied for consent and it was solely through the default of the defendant that the consent of the Director of Lands could not be obtained. He argues that the agreement to purchase the land and to build thereon are separate transactions. His view is that the agreement which began on the 11th April, 1949, and was concluded by the written agreement of 17th June, 1949, was one transaction, but that this agreement could not be carried out because of the default of the defendant; that, although the agreement is null and void, the money advanced by the plaintiff for the purchase of the land is recoverable by the plaintiff under the agreement by way of quasi contract for failure of consideration. He refers to the remarks of *Bankes, L.J.*, in *Mahmoud v. Ispahani* (*supra*) at page 726:—

> " I desire to refer to *Bloxsome v. Williams* (3 B. & C. 232, 235) because I am not sure that I quite understand the language of *Bayley J.* If the action was for damages for breach of contract and if the contract was an illegal contract, I do not understand the language of that learned judge; it seems to me to be at variance with the established rule of law. If, on the other hand, he was treating the case as one in which the plaintiff was seeking to recover back his money on the assumption that the contract was a void contract, then it seems to me that what he said is quite intelligible, and no criticism need be directed to it. I rather gather that this latter must have been what was in his mind by the last words of his judgment: ' If the contract be void as falling within the statute, then the plaintiff, who is not a *particeps criminis,* may recover back his money because it was paid on a consideration which has failed.' "

With regard to the building, Mr. Hasan says that the plaintiff erected this with the leave and licence of the defendant on the understanding that on its completion the land would be transferred to him; and that as the defendant by his own default made the transfer impossible, and because he will have the benefit of the building, he should pay the plaintiff what it cost him.

He stresses the view that the plaintiff has not infringed section 34—he built on the land with the licence of the defendant. He submits that the word " licence " is not defined by the Crown Lands Ordinance, and that it cannot mean a licence from the Crown. He argues that the licence is the licence of the defendant. The plaintiff, he contends, has built bona fide with the licence of the defendant and is therefore not a wrongdoer: he is consequently not in conflict with section 34 nor with the Penal section 42.

In answer to the contention that the licence referred to by section 34 is the licence of the defendant, I draw attention to section 3 of the Crown Lands Ordinance which says that ". . . no Crown Land shall be sold or leased and no licence in respect of Crown land shall be granted save under and in accordance with the provisions of this Ordinance." Licences in respect of Crown lands are granted by the Director of Lands under the provisions of sections 12 and 13 of the Crown Lands Ordinance on conditions prescribed by regulations. Under these regulations the Director of Lands may grant a licence for a period not exceeding twelve months for cattle grazing, removal of sand, etc., cultivation of annual crops, or residence. But a licence for residential purposes is granted only in respect of land in a government settlement and under special conditions. The Crown Lands Ordinance and the regulations made thereunder make it clear in my opinion that the only person who can grant leases or licences in respect of Crown lands is the Director of Lands. It would, I think, be giving the word " licence " in section 34 an unnatural meaning to hold that it could mean anything other than licence from the Director of Lands.

I am unable to accept the submission that the transaction can be separated into two parts. The agreement was for the sale of the land ; part of the purchase price was paid; the plaintiff had the lease document in his possession; he had entered into possession of the land and had begun building—all before application was made for consent. Up to that time both parties had done precisely what the Ordinance says shall not be done. It is not the application for consent which is required by law; it is the consent. Unless this consent is received the parties cannot proceed with the sale, but this is what they have done. In this way they were wrong; and they were both wrong. They had both contravened the law before the defendant withdrew his application for consent. For this reason, even assuming Mr. Hasan's argument was correct and that the plaintiff had a claim by way of quasi contract for £80 for failure of consideration, the plaintiff would fail in my opinion because the parties were *in pari delicto*. The plaintiff, in making out his case, would have to rely on a transaction to which he was a party and which had all the flavour of illegality. *Parkinson v. College of Ambulance, Lim,* (1924) L.J. Vol. 93 p. 1066. The fact that the parties intended to apply for consent cannot excuse them. I would be disposed to agree with Mr. Hasan if nothing had been done other than the payment of part of the purchase money. In that event, had the failure to obtain consent been due to the default of the defendant, the plaintiff might have succeeded by way of quasi contract in an action for recovery of the money paid over. However, these are not the facts in this case.

I do not agree that the entry of the plaintiff and the erection of the building on the land had nothing to do with the agreement. This action was directly referable to the agreement. The object of the plaintiff was to buy land on which to build, and he would not have bought this land unless the defendant had agreed to transfer the lease to him on the completion of the building. In order to ascertain by what arrangement he went on to the land, one is driven back to the agreement. In my view the whole transaction is one. Under it something has been done which is unlawful and which is prohibited by statute; and in this sense the transaction is illegal.

It is said that but for the withdrawal by the defendant of his application for the consent of the Director of Lands the deal would have gone through. As a result of the transaction he received a sum of £78 and acquired on his property a valuable building; and it is suggested that he cannot benefit to this extent through his own deliberate default in frustrating the sale.

Before dealing with this point I think it is worthy of note that neither of the parties behaved with frankness in his method of applying for the consent of the Director of Lands. By the third covenant of his Crown Lease the defendant was required to erect a building within two years. In the application for consent, among the particulars required to be shown, are the improvements to the property. These were shown in the application as one house, the estimated value of which was £2,500. This was not only incorrect but was a misrepresentation. The defendant had, as tenant, effected no improvements as required under his lease. The building was in the course of erection by a stranger, for his own purpose and at his own expense, in contravention of section 34 of the Crown Lands Ordinance. In considering the conduct of the defendant it should, I think, be remembered that the plaintiff was a party to this deception; he is not blameless.

The question whether the defendant should be allowed to benefit from his default can be answered by reference to a passage in the judgment of *MacKinnon, L.J.* in *Harry Parker Ltd. v. Mason* [1940] 2 K.B. He said at page 601 in dealing with illegal contracts:—

> " The rule *ex turpi causa non oritur actio* is, of course, not a matter by way of defence. One of the earliest and clearest enunciations of it is that of *Lord Mansfield,* in *Holman v. Johnson* (1775) 1 Cowp. 343. ' The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is found on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis.*' "

and he continues:—

> " It is true that in such a case a *locus poenitentiae* has been allowed to one of the guilty parties. But to attempt to apply it to this case is to misapprehend the rule. If repentance takes place before the time for performance of the illegal purpose, the penitent may claim return of his money. But if, as here, the time

for performance has passed, the repentance of one is of no avail, and he cannot claim his money on the ground that his partner in guilt has not in fact performed his promises, but merely pocketed the money."

In my opinion neither party to this dispute should be assisted by the Court. The transaction was unlawful: the sale was carried out in a manner forbidden by the Crown Lands Ordinance, and is in this sense illegal. If, indeed, it could be said of the plaintiff that he had ever become penitent, it certainly was not at any time before the illegal purpose had been performed.

Action dismissed.