

ON APPEAL

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED LEGAL STUDIES
 16 JAN 1969
 25 R... SQUARE
 LONDON, W.C.1.

FROM THE FIJI COURT OF APPEAL
 (CIVIL JURISDICTION)

B E T W E E N :

KULAMMA, daughter of Vedisa
 Naicken (widow)
 (as Administratrix of the
 Estate of Sabhapati, son
 of Raghawan Gounden)
 (Plaintiff) Appellant

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- and -

MANADAN, son of Raghawan
 Gounden (Defendant) Respondent

CASE FOR THE RESPONDENT

Record

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1. This is an appeal from a judgment, dated the 16th July, 1965, of the Fiji Court of Appeal (Gould, Marsack and Knox-Mawer, J.J.A.), allowing with costs the appeal of the Defendant-Respondent, from a judgment dated the 9th December, 1964, of the Supreme Court of Fiji (Mills-Owens, C.J.). By the said judgment of the Supreme Court the Plaintiff-Appellant had been granted a declaration and four-fifths of her costs.

Pp.78, 106

Pp.56-74

P.75

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2. The following facts were not in dispute. The Plaintiff-Appellant was the widow and administratrix of Sabhapati, son of Raghawan Gounden, who died on the 19th November, 1958. Sabhapati, who was the brother of the Defendant-Respondent, was the holder of a sugar cane farm under a tenancy agreement from the Colonial Sugar Refining Company Limited (which, with its successor, the South Pacific Sugar Mills Limited, is hereinafter referred to as "the Company"). By a written agreement dated the 23rd May, 1957 (Exhibit B) Sabhapati and the Respondent agreed

Pp.127-129

<u>Record</u>	that thereafter the Respondent should cultivate the said farm for Sabhapati, sharing the profits from the sale of cane jointly with him. Sabhapati's half share of the profits were to be paid to one Murtuza Hussain towards the discharge of a debt owed to the latter by Sabhapati and standing at that time at £550. When the debt had been fully repaid Sabhapati was to apply to the Company and use his best endeavours to obtain the consent of the Company to the transfer of a one-half interest in the cane farm to the Respondent. The Respondent had cultivated the farm under this agreement and was so cultivating it on Sabhapati's death. In about the month of November, 1960 the Appellant had gone to live at the Respondent's house and on the 15th November, 1960 she executed an assignment (Exhibit C) in favour of the Respondent of all her interest in sugar cane growing or to be grown on the farm.	10
Pp.131-132	Under this assignment the Respondent had collected £1,086.15.7. from the Company. In addition the Company held a further £349.3.11. in respect of sugar cane supplied, which sum was claimed by the Respondent.	20
P.6 ls31-43 P.7 ls 1-6 P.10 ls 20 & 21 and ls 28 & 29	3. The Appellant alleged that the cane farm formed part of a block of native land, known as Saweni Block 11, held by the Company from the Native Land Trust Board; that the agreement of the 23rd May, 1957 constituted a dealing within the meaning of the Native Land Trust Ordinance Cap. 204, Section 12; that the necessary consent for such a dealing had not been obtained (it was admitted that no consent had been obtained to the agreement); that the Respondent had fraudulently and falsely represented to her that Sabhapati had been indebted to him in the sum of £800 and that she was responsible for the repayment of this sum; that she had been persuaded by these representations by the Respondent to execute the assignment to secure this indebtedness; and, that even if this indebtedness did exist the assignment was void as being given for past consideration or as being illegal. These allegations were denied by the Respondent. The Appellant sought: a declaration that the agreement of the 23rd May, 1957 was illegal, as being a dealing for which the necessary consent had not been obtained; an order that the assignment of the 15th November, 1960 be set aside; an order for the payment by the	30
P.4 ls 5-36 P.5 ls 29-34		40
P.6 ls 4-30		50
P.7 ls 24-31		50
P.7 ls 32-36 P.7 ls 37-39 and P.8 ls 1-8		50

Record

- Respondent of the sums collected by him from the Company under the assignment; and, an injunction restraining the Respondent from collecting any money from the Company in respect of cane sugar derived from the farm,
- 10 4. The Appellant gave evidence of the circumstances which caused her to move to the Respondent's house and of those in which she executed the assignment. In cross-examination she said that Sabhapati and the Respondent had jointly farmed the land during Sabhapati's lifetime. Sabhapati was a sick man, but with the advent of the Respondent the cane yield from the farm increased very considerably. After Sabhapati's death the Respondent paid off the remaining outstanding balance of the debt to Murtuza Hussain.
- 20 5. The Respondent gave evidence that, in addition to Sabhapati's half share of the profits going towards discharge of the debt to Murtuza Hussain, he (the Respondent) also paid over his share of the profits to the same creditor. After Sabhapati died it was found that his estate owed the Respondent £505. He took the Appellant and her children into his house and maintained them, because they had no one to look after them. He continued working the farm after Sabhapati's death, and until 1964, and he deducted one half of the Appellant's half share of the profits to cover the cost of maintenance. He also paid off other debts owed by Sabhapati. In 1960 an account was taken which showed that £780.0.4. was due to him. This was unsecured, so he took the assignment. In 1960, after Murtuza Hussain's debt had been discharged, he went with the Appellant to the Company to see about a transfer of the tenancy to him, but no transfer was made because a strike was in progress.
- 30 6. Other evidence established the following history of the farm and the practice and procedure of the Company and the Native Land Trust Board. The farm was part of an area covered by a lease made between the Buli Vuda, (a Fijian official), acting on behalf of the native Fijian owners, and the Commissioner of Lands acting on behalf of the Crown. Under this lease the land was demised to the Crown for the term of 99 years from 1st January, 1900,
- P.8 ls 9-18
- P.16 ls 8-36
Pp.17-29
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- P.44 ls 12-29
- P.4 ls 32-35
P.44 ls 41
- P.45 ls 1-15
P.45 ls 3 & 4
- P.44 ls 7 & 8
- P.45 ls 23-28
- P.32 ls 10-34
P.33 ls 1-42
P.34 ls 1-40
P.35 ls 1-35
P.36 ls 1-40
P.37 ls 1-35
P.38 ls 1-37
and P.39
ls 1-4
P.110

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P.67 ls 10-13	and this lease was still subsisting. In 1914 the Native Land Commission, acting under the Native Lands Ordinance cap.103 found the land (i.e. the reversion) to be owned by a Fijian proprietary unit. By an agreement dated the 13th November, 1901, the Crown sub-leased the land to the Company for Ten years from the 1st January, 1900, subject to statutory restrictions on alienation.	
P.119		
P.122	In September, 1910, the sub-lease was renewed for a term of Forty years from the 1st January, 1910. In 1940 the Native Land Trust Board was established under the Native Land Trust Ordinance, cap.104, and the Board was thereby extrusted with the control of and power to grant leases of native land. Some time thereafter, by informal agreement with the Commissioner of Lands, the Board took over administration of the block of land which included the farm. It was contemplated that in due course the Crown would surrender its lease. By a document dated the 29th December, 1951, the Board agreed to grant a lease of this block of land to the Company for a term of 50 years from the 1st January, 1950. A further document, in substitution for the foregoing, was issued on the 27th November, 1956 conveying the Board's decision to grant a lease to the Company for 50 years from the 1st January, 1957. The Company periodically submitted to the Board a list of changes in the occupancy of the land by the Company's tenants, and the Board issued overall approval thereof, purporting to be consent to such dealings under the Native Land Trust Ordinance, cap.104, Section 12. The Board collected the agreed rent from the Company and accounted for the net rent to the ultimate Fijian owners. Sabhapati had been on the farm since about 1942, but although he was admitted on the pleadings to have been a tenant of the Company, there was no evidence as to the nature of his tenancy.	10
P.67 ls 33-37		
P.67 ls 37-41		
P.67 ls 41-49		
P.68 ls 1-8		

7. The relevant statutory provisions are as follows.

NATIVE LAND TRUST ORDINANCE, Cap.104

"An Ordinance relating to the control and

administration of Native Land":

4. (1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the native owners.
- 10 5. (1) Native land shall not be alienated by native owners whether by sale, grant, transfer or exchange except to the Crown, and shall not be charged or encumbered by native owners, and any native Fijian to whom any land has been transferred heretofore by virtue of a native grant shall not transfer such land or any estate or interest therein or charge or encumber the same without the consent of the Board.
- 20 8. (1) Subject to the provisions of Section 9 of this Ordinance it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.
- 30 9. No native land shall be dealt with by way of lease or licence under the provisions of this Ordinance unless the Board is satisfied -
- (a) that the proposal has been brought to the notice of the District Commissioner of the district in which the land is situated and that his recommendation has been obtained thereon;
- (b) that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the native owners, and is not likely during the currency of such lease or licence to be required by the native owners for their use, maintenance or support.
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12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be

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lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

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Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the 29th day of September, 1948, to mortgage such lease.

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(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee."

P.58 ls 34 & 35

P.58 ls 35-48
and P.59 ls 1-6

8. The learned Chief Justice stated that he could place no reliance on the evidence of the Appellant. It was clear that the Respondent had not only paid off the debt owing to Murtuza Hussain but had also paid sundry other creditors of Sabhapati, had borne the expenses of cultivation of the farm after Sabhapati's death, and had maintained the Appellant and her children. All this was done with the Appellant's knowledge and concurrence. Further, she was a party to an attempt to procure the Company's consent to the transfer of a one-half interest in the farm to the Respondent, in implementation of the 1957 agreement. There was no substance in the allegation of fraud, and he held that the Respondent, on investigation of the accounts, was entitled to credit for the sums spent by him in paying Sabhapati's debts, in maintaining the Appellant and her children, and in maintaining the farm. The learned Chief Justice then dealt with a submission that the assignment was void as being given for past consideration. This he rejected. He held that the assignment was given as security, to cover not only the debt due to

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P.59 ls 17-41

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P.60 ls 1-31

the Respondent at the date thereof, but also to cover expenditure thereafter to be incurred by the Respondent in maintaining the Appellant and her children and in continuing to cultivate the farm under the agreement.

9. The learned Chief Justice then turned to the problem of whether the assignment was given for an illegal consideration. If it was, the Appellant was debarred from recovering any of the proceeds already collected by, or credited in the accounts to, the Respondent under the assignment. This the Appellant conceded. Subject to this, the questions arising were: was the farm native land; if so was the agreement a "dealing" within the meaning of the Native Land Trust Ordinance, cap.104 section 12, and thus illegal because of the admitted absence of consent; if so was the assignment tainted with the illegality; and if it was, would it be of any advantage to the Appellant to have the assignment declared void for such illegality. As to the first question the land was "native land", (this point was conceded by the Respondent on the appeal), for this expression, as used in the Ordinances, was extended to refer to the ultimate freehold title. In the course of dealing with this question the Chief Justice considered whether, on the particular facts of this case, the Company was a "lessee" (and whether anyone holding from the Company was a "sub-lessee") within the meaning of Section 12. He thought the statutory provisions presented no obstacle to his holding that this was the case. As to the second question the Chief Justice was in no doubt that the agreement was a "dealing" within Section 12. The Respondent was to enter into immediate occupation of the farm and cultivate it, sharing the expenditure and the proceeds. At least the Respondent was a licensee with an interest. The word "dealing" was deliberately chosen to embrace such situations. In all but name the Respondent was a tenant in common with Sabhapati, and after his death, with the Appellant. As to the third question, the learned Chief Justice asked himself if the assignment was tainted with the illegal agreement: "as a document collateral to it". He thought that it was. As to the fourth question, this was relevant only to the proceeds from the sale of cane still held by the Company and to any proceeds not paid over to or credited to the Respondent prior to the commencement of the

P.66 ls 15-43

P.68 ls 28-49
P.69-72
ls 1-27

P.72 ls 28-39

P.72 ls 40-47
and P.73
ls 1-16
P.73 ls 17-30

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action. The assignment was void for illegality with respect to these monies, and the Appellant was entitled to a declaration to this extent, notwithstanding that she had become a party to the illegality.

10. From this limited judgment in her favour the Appellant did not appeal. The Respondent appealed, and the only issue argued in the Fiji Court of Appeal was as to whether or not the agreement of 1957 was illegal. 10

Pp.78-99
P.80 ls 34-46

11. In the Fiji Court of Appeal the first judgment was given by Gould, J.A. The learned Justice of Appeal said that the 1957 agreement was illegal if it be shown that Sabhapati's tenancy from the Company was such as to bring him within the meaning of: "any lessee under this Ordinance" in the Native Land Trust Ordinance, cap.104, Section 12, and if it be shewn further that the 1957 agreement was an alienation or dealing within the meaning of that section. On the first of these two 20

P.84 ls 37-48

points the question was whether Sabhapati held the farm as a subtenant deriving title from the 99 year lease to the Crown, through the Company holding some kind of common law tenancy, or whether he was a subtenant of the Company holding a lease from the Native Land Trust Board. If the latter, he was a lessee within the meaning of Section 12. He had been a tenant since 1942, which was during the period when the Company undoubtedly held from the Crown, but the Company's lease from the Crown had terminated on the 31st December, 1950, so that Sabhapati's subtenancy must have come to an end on this date. There- 30

P.85 ls 4-40

after the Company had continued to treat him as a subtenant, so there must have been an implied grant of a new sub-tenancy of some kind. The power of the Company thus to grant a new subtenancy was founded in the lease granted to it by the Native Land Trust Board, and the Board's power so to lease derived from the agreement made between the Board and the Crown. In his Lordship's view this agreement empowered the 40

Board to grant a lease in equity (as they did), and such a lease was a lease within the meaning of Section 12. Hence Sabhapati's sublease was also within Section 12.

12. On the second of the two points the learned Justice of Appeal took a contrary view from that taken by the Chief Justice. The Respondent certainly had a licence to enter the land, although it was not an exclusive licence, but his Lordship could not see that this was coupled with an interest in the land. Nor was the Respondent a tenant in common in all but name, for he did not have the legal right to possession which a tenant in common would have had. A mere licence was not a "dealing" within the meaning of Section 12 and it therefore followed that the 1957 agreement was not illegal. He would allow the appeal and dismiss the Appellant's action with costs.

P.98 ls 15-46

13. Knox-Mawer J.A., who delivered the third judgment, agreed with the views expressed by Gould, J.A. Marsack, J.A., who delivered the second judgment, agreed with Gould and Knox-Mawer, JJ.A. that the 1957 agreement was not a "dealing" within Section 12, but he had reservations on the question of whether Sabhapati was a "lessee" within the meaning of the Section. He pointed out that although Sabhapati was admitted to have been a tenant, there was no evidence as to the nature of his tenancy - he might have been a tenant at will. The question, therefore, arose whether "lessee" and "tenant" were synonymous terms for the purpose of Section 12. As a dealing by a lessee without the consent of the Board involved an illegality it was necessary to construe "lessee" strictly. To do this it was necessary to know the terms of the tenancy, and as there was no evidence on this he was not able to give a judgment on the point.

P.104 ls 1-11

P.100 ls 11-21

P.100 ls 22-38

P.101 ls 1-39

P.103 ls 10 & 11

14. The Respondent respectfully submits that the Court of Appeal was correct in ruling that the 1957 agreement was not a "dealing" within Section 12, for the reasons given by their Lordships and for the following, among other additional reasons. It is submitted that "dealing" implies the movement from grantor to grantee of an interest of such nature as to be

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capable of further transmission. In the present case the agreement was in essence one of personal services to be performed by the Respondent. There was thus no right or interest in the Respondent which he could himself assign. It is submitted further that on a true interpretation of the Native Land Trust Ordinance, read as a whole, the object of the Ordinance is to protect native land, for the benefit of native Fijians, by preventing unauthorised alienation. A transaction of the type contained in the 1957 agreement was not a mischief which the Ordinance set out to prevent.

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15. It is further respectfully submitted that the majority in the Fiji Court of Appeal erred in holding that Sabhapati was a lessee within the meaning of Section 12. It is submitted that Marsack J.A. was correct in stating that "lessee" must be strictly construed. There was no evidence before the Court sufficient to enable it to rule on whether Sabhapati's tenancy made him a lessee within the meaning of the Section. It was for the Appellant, who alleged the illegality, to lead evidence of the terms of the tenancy and this she failed to do. On this ground also therefore the action falls to be dismissed.

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16. It is further respectfully submitted that if, which it is submitted is not the case, the 1957 agreement was rendered illegal by Section 12, then nevertheless the assignment remains valid. The assignment was not a document collateral to the agreement and was not tainted with any illegality that may have tainted the agreement. This point was not discussed in the Fiji Court of Appeal but it arises from a finding by the Chief Justice in the Supreme Court on the evidence before him.

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17. It is respectfully submitted that the Fiji Court of Appeal was right in allowing the appeal and dismissing the action, and that this appeal ought to be dismissed, with costs, for the following, among other

R E A S O N S

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1. BECAUSE the 1957 agreement did not constitute a dealing within the meaning of Section 12.

2. BECAUSE the Appellant failed to establish that Sabhapati was a lessee within the meaning of Section 12.

3. BECAUSE the assignment was not collateral to the agreement and was not tainted by any illegality that may have tainted the agreement.

4. BECAUSE the decision of the Fiji Court of Appeal was right and ought to be affirmed.

GERALD DAVIES

No. 7 of 1966

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FIJI COURT OF APPEAL

(CIVIL JURISDICTION)

B E T W E E N :

KULAMMA, daughter of Vedisa
Naicken (widow)
(as Administratrix of the
Estate of Sabhapati, son of
Raghawan Gounden) (Plaintiff)
Appellant

- and -

MANADAN, son of Raghawan
Gounden (Defendant)
Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
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Strand,
W.C.2.