

25/81

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

CHANDRIKA PRASAD s/o Guddulal Appellant
(Plaintiff)

- and -

- 1. GULZARA SINGH s/o Hari Singh
- 10 2. NATIVE LAND TRUST BOARD
- 3. SHIU PRASAD s/o Suchit Bhagat
- 4. BRIJ NATH s/o Hardeo
- 5. CHANDRIKA PRASAD s/o Halka Respondents
(Defendants)

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the decision of the Fiji Court of Appeal (Gould V.P. Henry J.A. and Marsack J.A.) dated the 22nd day of March, 1978, which dismissed with costs an appeal from the Judgment of Williams J., dated the 9th day of February, 1977, dismissing the claim of the Appellant to set aside the purported sale of his leasehold interest in certain agricultural land under an unregistered mortgage, and praying that certain moneylending transactions between the Appellant and the First Respondent were unenforceable, or illegal, or null and void and for consequential relief.

The chronology of events is as follows:-

- 30 (a) 16th October, 1967 A Provisional Lease was issued to the Appellant by the Second Respondent.
- (b) 16th November, 1967 The Appellant gave to the First Respondent a mortgage over the said Provisional lease in order to cover present and past indebtedness.

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pp148-154

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- pp.102-109
- (c) 22nd February, 1968: The Appellant gave to the First Respondent another contract and mortgage in similar terms to cover his indebtedness. This contract and mortgage makes no reference to the contract and mortgage of 16th November, 1967.
- (d) 10th February, 1970: The First Respondent served the Appellant with demand under unregistered mortgage of 22nd February, 1968. 10
- pp.112-113
- (e) 2nd June, 1970 Messrs. Gibson & Co. Solicitors for the Appellant wrote to the Second Respondent asking it not to give its consent to any sale under the mortgage. The Second Respondent replied to this letter, on the 24th June, 1970.
- (f) The First Respondent advertised the equitable lease of the Appellant for sale, and accepted the tender of the Third, Fourth and Fifth Respondents. Then the First Respondent drew a formal transfer, as mortgagee, exercising his powers of sale and thereby purported to transfer the Appellant's interest to the Third, Fourth and Fifth Respondents and submitted the same to the Second Respondent for its consent. 20
- pp.71-72
- (g) 8th March, 1971 The Second Respondent, after granting such consent, issued a fresh lease for the same period to the Third, Fourth and Fifth Respondents. 30
- p.1
- (h) 25th March, 1971: The Appellant issued a Writ of Summons claiming relief.
- (i) 9th February, 1977: Judgment delivered in the Supreme Court of Fiji dismissing the claim of the Appellant.
- (j) 22nd March, 1978: Judgment delivered in the Fiji Court of Appeal dismissing the appeal of the Appellant.
- (k) 14th April, 1978: Order granting the Appellant leave to appeal to Her Majesty in Council. 40
2. The main issues of this case are as follows:-
- (a) Whether the moneylending transactions between the Appellant and the First Respondent were unenforceable or illegal or null and void on

the grounds that at the time of the making of the various transactions the First Respondent was an unlicensed moneylender and/or there was no proper note or memorandum of the said transactions under the provisions of the Moneylenders Act Cap. 210 and in particular section 6 thereof;

- 10 (b) Whether or not the First Respondent as mortgagee under an unregistered mortgage had, or was entitled to exercise, any powers of sale in respect of the equitable lease of the Appellant without any order of the Court and in particular whether such power could be exercised by the First Respondent as mortgagee applying to the Second Respondent as lessor to cancel the agricultural lease of the Appellant and
- 20 issuing to the Third, Fourth and Fifth Respondents a fresh lease in respect of the same;
- (c) Whether the registration of the lease to the Third, Fourth and Fifth Respondents created an indefeasible title destroying the rights of the Appellant to an agricultural lease under the provisions of the Agricultural Landlord and Tenant Act;
- (d) Whether the Appellant was entitled to accounts against the First Respondent;
- 30 (e) Whether the Appellant was entitled to damages against the Second Respondent. The parties agreed that any quantum of damages would be dealt with as a subsequent issue.

40 3. It was common ground that the Appellant and the First Respondent entered into transactions and that the First Respondent was at all material times exercising the calling of a moneylender under the provisions of the Moneylenders Act. The Appellant alleged that the First Respondent was not duly licensed during the year 1967 and did not pay his moneylending licence under the Act for the year 1968 until the 4th day of March, 1968.

50 The First Respondent by his Defence admitted that he was a Moneylender and that he had not paid any licence for the year 1967 and stated that he paid his licence twice in 1968. He did not specifically deny that he had not paid his licence for the year 1968 until 4th March,

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p.13
ll. 36-39

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ll. 7-45
p. 57
ll 12- 5
pp 80-81

1968. It was submitted that this was a matter particularly within the knowledge of the First Respondent and that a general denial of the allegation contained in the Statement of Claim did not constitute a sufficient denial. It is respectfully submitted that the Supreme Court of Fiji and the Fiji Court of Appeal erred in not holding that paragraph 7 of the Statement of Claim was admitted by the First Respondent. It is submitted that the entire transactions between the Appellant and First Respondent were unenforceable, the First Respondent was not entitled to proceed in respect of the transaction. See Kasumu v. Baba Egbe (1956) A.C.; Cornelius v. Phillips (1918) A.C. 199 especially at page 208, and Spector v. Ageda (1973) Ch. 30 at 42 and 44. If the First Respondent as moneylender exercised his powers of sale and had been able to recover his illegal loans it is submitted that the Appellant is entitled to recover any such moneys as moneys had and received see Mayfair Trading Pty. Ltd. v. Dreyer (1958) 101 C.L.R. 428 at 449-450 per Dixon C.J.

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p. 6 ll
22-28

4. Further and/or alternatively, the Appellant says that he alleged that the mortgage deed between him and the First Respondent was made on the 16th November, 1967 and not the 22nd day of February, 1968. The First Respondent stated that a mortgage deed was made on the 16th November, 1967 but not consented to, and on the 22nd February, 1968 a fresh mortgage deed was executed. It is respectfully submitted that this second mortgage deed was given in substitution for the mortgage deed of 16th November, 1967 and this fact ought to have been recited in the note or memorandum to the mortgage deed dated 22nd February, 1968. It is therefore submitted that this second mortgage was unenforceable, and the Supreme Court and the Fiji Court of Appeal erred in not holding accordingly. Although the Appellant was generally disbelieved on his oral evidence, he was entitled to have his case considered insofar as it was supported by documentary evidence, and the Appellant relies on the case of Mahadeo Singh v Ram Chandar Singh (1970) 16 Fiji Law Reports at 159-160.

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p.81
ll 28-52

p.82
p.83 ll 1-10

Much has been written as to the position of an Appeal Court which is invited to reverse on a question of fact the Judgment of a Judge, sitting without a jury, who has had the advantage of seeing and hearing witnesses. Where he has based his opinion in whole or in part on their demeanour it is only in the rarest of cases that an appeal court will do so; Yuill v. Yuill (1945)

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10 p.15. When, however, the question at issue is the proper inference to be drawn from facts which are not in doubt the Appellate Court is in as good a position to decide as the judge at the trial; Powell v. Streatham Manor Nursing Home (1935) A.C.. 243; Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370. The first rule stated by Lord Thankerton in Watt (or Thomas) v. Thomas (1947) A.C. 484 at 487-8 is "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

20 The present case is a composite one. The evidence was partly oral and partly documentary. The trial Judge did not appear to emphasize the demeanour of the Appellant but rather disbelieved his evidence on account of its confused nature. He finally used the word 'fabricated' in regard to the allegations which the Appellant made. There was, on the other hand, documentary evidence which the trial Judge, for no stated reason, treated with scant respect. The weight to be given to this evidence, unlike the oral evidence of the Appellant, is a matter of inference, and if this Court found it to be of substantial cogency, it would, I think, be justified in giving effect to its own conviction, upon the basis that the trial judge had misdirected himself as to its weight".

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40 5. The unregistered mortgage (Exhibit Pl(0)) contains no powers of sale, either express or implied. The Fiji Court of Appeal, it is submitted, erred in stating that the First Respondent as mortgagee had such a power. p.104 pp 76-79

50 It is submitted that the statutory power of sale under Section 63 of the former Land (Transfer and Registration) Ordinance is not in terms a power which is implied in a registered mortgage but is a statutory consequence of the registration of that mortgage. Accordingly, it is submitted that any registerable mortgage that Equity would have compelled the Appellant to execute after the Second Respondent had issued a registered lease would not in terms contain an express contractual power of sale but the mortgagee would be entitled to register such mortgage and upon its registration the statutory power would become available. p. 61 11 29-38

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6. In any event, it is submitted that a mortgage under an unregistered mortgage is not entitled to exercise a power of sale. Reliance is placed on Sections 61, 62 and 63 of the Land (Transfer and Registration) Ordinance.

7. The manner in which the sale was exercised in this case was by the First Respondent as mortgagee serving a notice requiring payment of the monies under the mortgage, advertising and calling for tenders. The tenders of the Third, Fourth and Fifth Respondents being accepted, the First Respondent then submitted a transfer as mortgagee under his powers of sale to the Second Respondent as the Lessor and sought the consent of the Second Respondent to the said transaction. Subsequently, the Second Respondent as lessor issued a fresh lease to the Third, Fourth and Fifth Respondents as if they had been lessees from the date of commencement of the said lease. The equitable lease of the Appellant was not formally revoked or cancelled.

p. 147

pp 71-72

pp.114-118

pp 137-138

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8. The net result of this was that the Appellant continued to remain a tenant of the Second Respondent which by issuing the subsequent lease had purported to act as either a Registrar of Titles or a Court of law authorising sale under an equitable mortgage. No formal Order of any Court had been obtained.

It is respectfully submitted that it is never possible for a lessor to give such assistance to a mortgagee registered or otherwise and assist him in exercising his powers of sale. It is therefore submitted that notwithstanding the registration of the lease in favour of the Third, Fourth and Fifth Respondents, the interest of the Appellant as a protected tenant under the Agricultural Landlord and Tenant Act was not destroyed. See Soma Raju v. Bhajan Lal Fiji Court of Appeal Civil Appeal Number 48 of 1976.

pp 72-76

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9. It is further submitted that the lease of the Third, Fourth and Fifth Respondents did not create an indefeasible title in their hands, and the Appellant is entitled to remain as tenant for the period of his equitable lease.

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10. In any event, if the Second Respondent was not entitled to issue a concurrent lease in favour of the Third, Fourth and Fifth Respondents, and if their title is indefeasible, then it is submitted that the Appellant is entitled to an Order for damages against the First and the Second Respondents or either of them. An order is

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therefore sought that this case be remitted to the Supreme Court of Fiji for such damages to be assessed.

RECORD

11. It is respectfully submitted that notwithstanding the decisions in Shrimati Bhibabati Devi v. Kumar Roy 1946 A.C. 508 and Stool of Abinabina v. Chief Kojo Enyimadu 1953 A.C. 207 this Appeal ought to be allowed with costs, and the Appellant given judgment on his claim, for the following, among other

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R E A S O N S

1. BECAUSE the Appellant was at all times a protected tenant under the provisions of the Agricultural Landlord & Tenant Act, and his interest could not be destroyed or negated;

2. BECAUSE the First Respondent was an unlicensed moneylender at the time of the making of the various transactions and did not pay his licence for the year 1968 until 4th March, 1968 and therefore the various transactions were illegal, unenforceable, null and void;

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3. BECAUSE the unregistered mortgage, dated the 22nd February, 1968, did not contain any power of sale, nor could a power of sale be implied therein, and therefore the First Respondent was not entitled to sell the Appellant's equitable lease;

4. BECAUSE the Second Respondent as lessor had no right to cancel or supersede the interest of the Appellant in his Agricultural Lease and erred in issuing a concurrent lease over the same land for the same period to the Third, Fourth and Fifth Respondents;

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5. BECAUSE the registration to the Third, Fourth and Fifth respondents could not negate the interest of the Appellant in his protected lease;

6. BECAUSE the Appellant was in any event entitled to damages against the First and Second Respondents or either of them.

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K.C. RAMRAKHA

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Appellant
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 5. CHANDRIKA PRASAD s/o Halka
- Respondents
(Defendants)

CASE FOR THE APPELLANT

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