

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF FIJI

B E T W E E N :

CHANDRIKA PRASAD s/o GUDDU LAL Appellant

- [✓] and -

GULZARA SINGH s/o HARI SINGH First Respondent

- and -

THE NATIVE LAND TRUST BOARD Second Respondent

- and -

SHIU PRASAD s/o SUCHIT BHAGAT Third Respondent

- and -

BRIJ NATH s/o HARDEO Fourth Respondent

- and -

CHANDRIKA PRASAD s/o HALKA Fifth Respondent

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the judgment of the Court of Appeal of Fiji (Gould V-P, Henry J.A. and Marsack J.A.) dated 22nd March 1978, dismissing with costs the Appellant's appeal from the judgment of J. T. Williams J. in the Supreme Court of Fiji at Lasuba dated 9th February 1977, whereby J. T. Williams J. (inter alia) dismissed the Appellant's claim to have set aside a lease of certain land by the Second Respondents to the Third Respondent, Fourth Respondent, Fifth Respondents, and his claim for a declaration that he (the Appellant) was the tenant of the said land, and dismissed the Appellant's claim that his moneylending transactions with the First Respondent were illegal, unenforceable and/or null and void.

pp. 70-83

2. The questions for decision involve the construction and application of The Land (Transfer and Registration) Ordinance and The Moneylenders Ordinance (Cap. 210) of Fiji. The more important of the relevant statutory provisions are as follows;

(i) Section 14 of The Land (Transfer and Registration) Ordinance Cap. 136 of the 1955 laws (the "former Cap. 136") provides

"14. The instrument of title of a proprietor issued by the Registrar upon a genuine dealing shall be taken by all courts of law as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another for the prescriptive period. A duplicate or certified copy of any registered instrument signed by the Registrar and sealed with his seal of office shall be received in evidence in the same manner as an original." 10 20

(ii) Section 61 of the former Cap. 136 provides...

"61. A mortgage or an encumbrance shall, when registered as herein provided, have effect as a security but shall not operate as a transfer of the land thereby mortgaged or encumbered, and, in case default is made in payment of the principal sum, interest, annuity or rent-charge secured or any part thereof respectively or in the performance or observance of any covenant expressed in any mortgage or encumbrance or in this Ordinance declared to be implied in any mortgage, and such default is continued for one month or for such other period of time as is therein for that purpose expressly fixed, the mortgagee or encumbrancee may serve on the mortgagor or encumbrancer notice in writing to pay the money due or owing under such mortgage or encumbrance or to perform and observe 30 40

the covenants therein expressed or implied, as the case may be, by giving such notice to him or them or by leaving the same on the mortgaged or encumbered land or by sending the same through the post office by a registered letter directed to the proprietor of the land at his address appearing in the register."

(iii) Section 63 of the former Cap 136 provides

10 "63(1). If default in payment or in
performance or in observance of any
covenant continues for one month after the
service of such notice, the mortgagee or
incumbrancee may sell or concur with any
other person in selling the mortgaged or
encumbered land or any part thereof subject
to prior leases, mortgages, encumbrances
or otherwise, and either together or in lots
20 by public auction or by private contract,
and either at one or several times, subject to
such terms and conditions as the mortgagee
or incumbrancee thinks fit, with power to
vary any contract for sale and to buy in at any
auction or to vary or rescind any contract
for sale and to resell without being
responsible for any loss occasioned thereby,
with power to make such roads, streets and
passages and grant such easements of rights
of way or drainage over the same as the
30 circumstances of the use require and the
mortgagee or incumbrancee thinks fit, and
may make any of such transfers and do such
acts and things as are necessary for
effectuating any such sale.

(2) No purchaser shall be bound to see or inquire whether default has been made or has happened or has continued or whether notice has been served or otherwise into the propriety or regularity of any such sale."

40 (iv) Section 3 of the Moneylender's Ordinance (Cap. 210) provides

"3. Save as excepted in paragraphs (a), (b), (c) and (d) of the definition of moneylender in the last preceding section, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed

until the contrary be proved to be a moneylender. "

(v) Section 6 of the Moneylender's Ordinance (Cap. 210) provides

"6(1) The Registrar shall in the month of January in every year cause to be published in the Gazette a correct list of all persons licensed under this Ordinance, and additions to or alterations in the list shall be published from time to time as they are made 10

(2) Every such printed list purporting to be published as aforesaid shall be evidence in all courts that the persons therein specified are licensed according to the provisions of this Ordinance; and the absence of the name of any person from such printed list shall be evidence unless the contrary be shown that such person is not licensed according to the provisions of this Ordinance. 20

(vi) section 16 of Cap. 210 provides that

"16(1) No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent after the commencement of this Ordinance or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract or their respective agents, and unless a copy thereof authenticated by the lender or his agent be delivered to the borrower or his agent. before the money is lent and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given as the case may be. . . 30 40

(3) The note or memorandum aforesaid

shall contain all the terms of the contract and in particular shall show separately and distinctly

- (a) the date of the loan;
- (b) the principal; and
- (c) the rate of interest per centum per annum payable in respect of such loan, or, where the interest is not expressed in terms of a rate per centum per annum, the amount of such interest.

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All dates and numbers shall be written in the English language notwithstanding that they are also written in some other way.

(vii) section 26 of Moneylenders Ordinance Cap. 210 provides

"26.(1) Subject as hereinafter provided the provisions of this Ordinance shall continue to apply as respects any debt to a moneylender in respect of money lent by him after the commencement of this Ordinance or in respect of interest on money so lent or of the benefit of any agreement made or security taken in respect of any such debt or interest notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any assignee, and, except where the context otherwise requires, references in this Ordinance to a moneylender shall accordingly be construed as including any such assignee as aforesaid.

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Provided that -

- (a) notwithstanding anything in this Ordinance
 - (i) any agreement with or security taken by a moneylender in respect of money lent by him after the commencement of this Ordinance shall be valid in favour of any bona fide assignee or holder for value without notice of any defect due to the operation of this Ordinance and of any person deriving title under him; and
 - (ii) any payment or transfer of money

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or property made bona fide by any person whether acting in a fiduciary capacity or otherwise, on the faith of the validity of any such agreement or security without notice of any such defect shall, in favour of that person, be valid as it would have been if the agreement or security had been valid.

But in every such case the moneylender shall be liable to indemnify the borrower or any other person who is prejudiced by virtue of this section and nothing in this proviso shall render valid an agreement or security in favour of or apply to proceedings commenced by an assignee or holder for value who is himself a moneylender; and 10

(b) for the purposes of this Ordinance, the provisions of section 29 of the Land (Transfer and Registration) Ordinance shall apply as if the expression "purchaser" included a person making any such payment or transfer as aforesaid. 20

3. The principal issues which arise for determination upon this appeal are as follows.

(a) was the First Respondent a licensed moneylender in February 1968 when he loaned a sum of money to the Appellant? 30

(b) did the Appellant possess an interest in land which was capable of being charged to provide security for the said loan? and, if so,

(c) did the agreement between the Appellant and the First Respondent contain a power of sale of the Appellant's said interest, exercisable by the First Respondent in the event of the Appellant defaulting in making repayments due under the loan? and, if so 40

(d) did the First Respondent validly exercise that power of sale?

4. The principal facts which are relevant to this

appeal are as follows :

- (i) The First Respondent ("the moneylender") is a moneylender. The Second Respondent ("the Board") is a statutory body, vested with certain powers in respect of the leasing of native land. The Third Respondent, Fourth Respondent and Fifth Respondent ("the trustees") are the trustees for the Tabia Sanatam Dharam School. p. 70
lines 30-33
- 10 (ii) On October 16th 1967 the Board issued to the Appellant a provisional approval notice (otherwise known as an Agreement to Lease) for a lease of certain land called "Delaivuilqi" for a period of 30 years from 1st July 1965 at a rent of £8 per acre per year. The Notice provided (inter alia) that p. 71
lines 1-3
- (a) the Appellant would not receive final approval, and had no right of occupancy until he had paid the first 6 months rental, plus surveyor's fees of £52
- 20 (b) the Appellant might not transfer, sublet, mortgage or assign the lease without the written consent of the Board.
- (iii) The Appellant complied with these conditions, and was duly granted a permit to occupy the land. This was expressly stated to be non-transferable. p. 71
lines 27-29
- (iv) In fact the Appellant had been in occupation for some years prior to the issue of the permit to occupy. p. 71
lines 29-30
- 30 (v) It was the intention of the Appellant and the Board that in due course the Appellant would be granted a registerable Memorandum lease of the said land. Such a lease is capable of registration under the provisions of the Land (Transfer and Registration) Ordinance (Cap. 136). In fact, however, the Appellant was never granted such a lease. The Appellant thus became an equitable lessee. p. 71
lines 32-44
- 40 (vi) From time to time previously the Appellant had borrowed sums of money from the moneylender. p. 52
lines 12-15
- (vii) On 16th November 1967 the Appellant

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executed a mortgage ("the November mortgage") in favour of the Moneylender to secure the repayment of £904, comprising various earlier loans and a present loan of £150. The November mortgage was never forwarded to the Board for its consent, and was thus ineffective.

p. 71
lines 45-54

(viii) On 22nd February 1968 the Appellant executed a further mortgage (the "February mortgage") of his said interest over the said land in favour of the moneylender, to secure the repayment of £1397. 9. 0d., together with interest at 12% per annum thereon.

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p. 72
lines 1-2

(ix) On 21st March 1968 the Board duly granted its consent to the February mortgage.

p. 72

lines 2-11

(x) Subsequently the Appellant made default in the repayments payable under the February mortgage, and, in June 1970, exercising a power of sale purportedly arising under the mortgage, the moneylender sold the Appellant's interest to the trustees. A transfer, in the approved statutory form, was executed by the moneylender in favour of the trustees, and he executed a formal discharge of the February mortgage.

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p. 72
lines 13-17

(xi) The trustees thereby forwarded these documents to the Board and asked the Board to grant them a lease to which the Appellant was entitled under the provisional approval of 16th October 1967.

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p. 72
lines 18-25

(xii) On 23rd November 1970 the Board and the trustees executed a Memorandum of lease of the said land for a term of 30 years, and this was subsequently duly registered with the Registrar of Titles as Lease No. 13810.

pp. 4-11

5. This action is brought by the Appellant as Plaintiff against the Respondents as Defendants. The Appellant's Statement of Claim is dated 22nd August 1972; the Defences of the moneylender, the Board, and the trustees are undated, dated 18th October 1973 and dated 19th February 1973 respectively. By this Statement of Claim the Appellant sought the following relief namely

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(i) that he be declared a tenant of the said land

p. 10

(ii) that a declaration that the lease No. 13810 had been obtained by fraud, or was illegal or null and void

(iii) a declaration that the transaction (sic) between the Appellant and the moneylender was unenforceable, or illegal or null and void.

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6. The principal grounds upon which he claimed to be entitled to the above relief were as follows, namely that

pp6-9

(a) the mortgage was made on 16th November 1967, and not on 22nd February 1968

(b) the moneylender was not licensed to lend monies at the material time

(c) the Appellant had no right capable in law of being mortgaged

(d) the mortgage deed did not set out all the terms of the contract

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(e) the trustees had never been duly appointed

(f) the sale or transfer of the leasehold had not been disclosed to the Board, nor did the registration of the lease receive the consent of the Board

(g) the Appellant's rights (unspecified) under the Agricultural Landlord and Tenant Ordinance had been breached.

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7. Evidence for the Appellant was given by one Vijayendra Pershu Ram, who was the Appellant's solicitor at the material time, and remembered the transaction, and by the Appellant himself. The Appellant produced the provisional approval and permit to occupy. He dealt in outline with the moneylending transactions in paragraph 9 of the Statement of Claim, and to his counsel he denied signing the February mortgage, and denied receiving the memorandum.

pp. 29-31

p. 32 lines 15-16

p. 33 lines 2-4

p. 33 lines 19-20

In cross-examination, at first he denied receiving from his solicitors a demand for payment under the February mortgage, but after explanation

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p. 26
lines 25-30

by the interpreter he qualified this to say that he did not remember it. He thereafter admitted signing the following documents, namely

p. 35
line 29

(i) the November mortgage (Ex D4)

p. 35
line 30

(ii) the memorandum of contract of loan of 16th November 1967 (Ex D3)

p. 36
lines 10-17

(iii) application to the Board for consent to a dealing in respect of November mortgage (Ex D5) 10

(iv) instructions to his solicitor to prepare November mortgage (Ex D6)

p. 39
lines 14-16

(v) instructions to his solicitor to prepare February mortgage (Ex D9)

p. 39
line 22

(vi) application to the Board for consent to a dealing in respect of February mortgage (Ex D10) 20

p. 39
lines 25-27

(vii) memorandum of contract of loan of 22nd February 1968 (Ex D11)

p. 39
lines 32-34

but he denied that he was aware of their contents; and he maintained that he had not signed the February mortgage (Ex D12) or that, if he had, he did not know what it was. During the course of his evidence he further admitted knowing of the proposed sale by auction before it actually took place, but he said that he had no money with which to commence proceedings. Evidence for the moneylender and the trustees was given by Chandrika Prasad (sic), 30

p. 44

a clerk with the Appellant's solicitors. He had known the Appellant for 12 years, and was familiar with his signature. He personally had explained the contents of Ex D9 to the Appellant, and had typed the acknowledgment of receipt of notice dated 19th September 1969 (which, inter alia recited the details of the February mortgage), and Ex D8 which was read to the Plaintiff in Hindi before he signed it without objection. The moneylender had brought into the solicitor's 40

office his books of account when any transaction occurred, and he (the witness) had got the figure of £1397 from the "security documents".

8. No evidence was called on behalf of the Board.

9. During his closing speech counsel for the Appellant withdrew all allegations of fraud against the Respondents.

p. 56
lines 21-22

10 On 9th February 1977 Williams J. dismissed all the Plaintiff's claims, and gave judgment for the Defendant, with costs. He gave the following among other reasons for his judgment. In respect of the various moneylending transactions set out in paragraph 9 of the Statement of Claim, he rejected the Plaintiff's allegations, and he found that the moneylending transactions were fair. He found as a fact that the relevant mortgage was created in February 1968; he found that paragraph 7(a) of the Statement of Defence of the moneylender constituted a denial of the Plaintiff's allegation that the moneylender was unlicensed at the material time; and he found that the Plaintiff had adduced no evidence to substantiate this allegation.

p. 56
lines 18-20

p. 54 lines
38-39
p. 54
lines 39-45

For the reason given on p. 59, Williams J. found that the Plaintiff was in equity the lessee of a 30 year lease on the terms of the notice of approval and that therefore he possessed an interest in the land which could be mortgaged; and he further found that the memorandum of contract under the Moneylender's Ordinance (Ex Pl(n)) was sufficient to create an equitable mortgage of that interest, after the approval of the Board had been obtained (as it had been).

p. 60
lines 3-8

p. 61
lines 23-26

He found, that whilst this mortgage was not a valid security for the purposes of The Land (Transfer and Registration) Ordinance (Cap. 136) and that thus the moneylender acquired no power of sale under the Ordinance, he did hold a mortgage of an unregistered equitable lease which was not governed by the former Cap. 136; he found that the equitable lease was not capable of registration, but was capable of being mortgaged, subject to the approval of the Board.

p. 62
lines 13-18

p. 64
lines 19-25

p. 64
lines 29-40

In these circumstances the moneylender's rights depended not upon the general law of registration, but upon the terms of the February mortgage (Ex. D12) itself. Williams J. held that clauses 6 and 7 thereof contemplated that the moneylender was intended to have

p. 65
lines 13-17

RECORD

p. 65
lines 28-30

p. 65
lines 35-36

p. 65
lines 40-42

the power of sale contained in the former Cap 136, and further contained an undertaking by the moneylender to obtain the consent of the Board before exercising his power of sale (the "mortgagee's undertaking"). He therefore went on to conclude on the evidence that there was a valid sale by the moneylender as mortgagee, of an equitable lease mortgaged to him by the Plaintiff. He held that the Board was not liable to the Plaintiff in any way, and that, since all allegations of fraud against them had been withdrawn, the trustees had acquired an indefeasible title to the land the subject of the lease upon the registration of the lease.

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He therefore dismissed the Plaintiff's claims against all the Respondents.

11. The Appellant appealed to the Court of Appeal of Fiji (Gould V-P, Mersack JA and Henry JA). On 22nd March 1978 the Court of Appeal gave judgment, dismissing the Appellant's appeal with costs. The judgment of the Court of Appeal was delivered by Henry JA, who, having set out the facts, held that section 14 of Cap. 136 gave to the trustees an indefeasible title unless the Appellant could set up some over-riding right. The Appellant had claimed that the provisional approval together with the permit to occupy brought him within the provisions of the Landlord and Tenant Ordinance (Cap. 242), and that such a tenancy would prevail over the registered memorandum of Lease No. 13810. In support of this, the Appellant relied on the case of Soma Raju v. Bhagan Lal, decided by the Court of Appeal of Fiji on 26th November 1976 (number 48 of 1976). Henry JA found that the most favourable position which the Appellant could take was that he had an equitable interest which would in due course result in the execution of a Memorandum of Lease registrable under the Land Transfer Act. He held that the reasoning in Soma Raju v. Bhagan Lal (supra) did not apply to a right to have a registrable Memorandum of Lease executed, and he found that prior registration of lease No. 13810 under Cap. 136 gave the trustees priority over such a right in the Appellant, by virtue of the provisions of section 14 (supra).

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p. 75 line 49
p. 76 line 3

p. 76

Next, it was accepted before the Court of

10 Appeal that a power of sale under an unregistered mortgage had to be found in the instrument itself. Henry JA dealt with the history of the creation of the mortgage, and, having recited clause 7 of the February mortgage, and the mortgagee's undertaking, he found that the mortgage gave a power of sale to the moneylender to be exercised in the terms of sections 61 and 63 of the Cap. 136, and he further found the power of sale to have been so exercised.

lines 30-34
p. 76 line 37
p. 78 line 46
p. 79
lines 9-25

20 Counsel for the Appellant had conceded that if the mortgage contained a power of sale which had been actually exercised, then the Appellant's case must fail. Henry JA accepted this, and found that even if the mortgage was illegal by virtue of a breach of the Moneylender's Ordinance (Cap. 210), then the sale to the trustees could not be attacked on the ground of illegality and that therefore the Appellant's claims against the Trustees, and, by extension, the Board, must fail.

p. 79
lines 28-32
p. 79
lines 32-45
p. 79
lines 48-49

Henry JA, in then considering the case against the moneylender, found that the Appellant had adduced no evidence in support of the allegation that the moneylender was not registered at the time of the execution of the date of the mortgage, and he found that, upon the pleadings, paragraph 7 of the Statement of Defence constituted a sufficient ground of denial of the Appellant's allegation to this effect.

p. 80
lines 28-30
p. 81
lines 23-27

30 Henry JA then considered if the contract was unenforceable by virtue of the provisions of section 16 of Cap. 210. He then recited that Williams J. had, in rejecting the evidence of the Appellant, found that the relevant mortgage was created in February 1968. He considered the effect of the "November transaction", and he found that both the memorandum (Ex D11) and the February mortgage (Ex D12) disclosed the fact that a prior loan of £150 was included in the contract, and he therefore found that this contract for repayment of money lent was enforceable within the provisions of section 16 of The Moneylenders Ordinance Cap 210. He therefore found that the Appellant had failed on this ground, and accordingly the appeal was dismissed with costs.

p. 81
lines 28-34
p. 82
lines 5-8
p. 82
lines 46-49
p. 83
lines 8-11

40 12. On 14th April 1978 the Court of Appeal of Fiji made an order granting Final Leave to Appeal to Her Majesty in Council.

13. The Respondents and each of them submit that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE, as the Courts below have rightly held, the Applicant held an equitable lease alternatively an equitable interest, capable of being mortgaged.
2. BECAUSE, upon its true construction, the February mortgage contained a power of sale exercisable by the moneylender. 10
3. BECAUSE, in rightful exercise of the said power of sale, the moneylender duly transferred to the trustees the Appellant's said equitable interest, and the trustees, having been granted a lease of the said land by the Board, duly registered the said lease.
4. BECAUSE, the trustees, having duly registered the said lease, thereby acquired, in the circumstances of this case, an indefeasible title thereto. 20
5. BECAUSE the Appellant has failed to prove that the moneylender was not licensed to operate as a moneylender at any material time.
6. BECAUSE the judgments of both the learned trial judge and of the Court of Appeal were right.

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Lincoln's Inn,
London, W.C. 2.

CHRISTOPHER CARLING

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF FIJI

B E T W E E N :

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| CHANDRIKA PRASAD s/o GUDDU LAL | <u>Appellant</u> |
| - ^{v.} and - | |
| GULZARA SINGH s/o HARI SINGH | <u>First Respondent</u> |
| - and - | |
| THE NATIVE LAND TRUST BOARD | <u>Second Respondent</u> |
| - and - | |
| SHIU PRASAD s/o SUCHIT BHAGAT | <u>Third Respondent</u> |
| - and - | |
| BRIJ NATH s/o HARDEO | <u>Fourth Respondent</u> |
| - and - | |
| CHANDRIKA PRASAD s/o HALKA | <u>Fifth Respondent</u> |

CASE FOR THE RESPONDENTS

CHARLES RUSSELL & CO.,
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Lincoln's Inn, W.C.2.

Solicitors for the Respondents