

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 49 of 1983

Between:

AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED

Appellant

and

OLINE MAYA MAHARAJ

Respondent

A. Tikaram with R. Raniga for Appellant
R. Chandra for Respondent

Date of Hearing: 26th March, 1984

Delivery of Judgment: 26th March, 1984

JUDGMENT OF THE COURT

O'Regan J.A., (Orally)

The appellant (hereinafter referred to as "the Bank") is registered as proprietor of an estate as mortgagee in a parcel of land situate at Lautoka being Lot 1 Section 21 and all the land comprised in Certificate of Title 6554 ("the land") of which the registered proprietor is Rajendra Dutt Maharaj (father's name Ram Lal) who was, at material times, the husband of the respondent and shall hereinafter be referred to as "the husband".

On some date prior to the 1st of June, 1983 the respondent in these proceedings issued her petition out of the Supreme Court praying dissolution of her marriage

to the husband and orders for maintenance and division of property.

On some date prior to 15th April, 1983 the wife lodged a caveat against the land presumably pursuant to section 106 of the Land Transfer Act (Cap. 131) and forbidding registration of any dealing affecting the estate or interest she had claimed. The text of the application is not before us and the date on which it was entered upon the register has not been disclosed.

On 15th February, 1983 the appellant, in exercise of its power of sale under its mortgage, entered into an agreement for sale and purchase of the land. The necessary consents to the transaction were duly obtained and a memorandum of transfer was executed by the parties to the contract on 28th February, 1983.

On 15th April, 1983 the appellant, no doubt as agent for the caveatee, made application for the removal of the caveat to the Registrar of Titles who, on 2nd May, 1983, gave the wife a notice pursuant to section 110(1) of the Land Transfer Act. Section 110(1) provides :

"110(1) Except in the case of a caveat lodged by the Registrar the caveatee or his agent may make application in writing to the Registrar to remove the caveat, and thereupon the Registrar shall give twenty-one days' notice in writing to the caveator requiring that the caveat be withdrawn and, after the lapse of twenty-one days from the date of the service of such notice at the address mentioned in the caveat, the Registrar shall remove the caveat from the register by entering a memorandum that the same is discharged unless he has been previously served with an order of the court extending the time as herein provided. "

We note especially that it is after the lapse of 21 days from the date of service of the notice, not 21 days from the date it was given, that the section requires the Registrar to remove the caveat from the register.

The appellant has not filed an affidavit of service of the notice. The wife, however, has deposed that it was served upon her on 27th May, 1983 and, as matters presently stand, that is the only evidence on the topic.

In paragraph 19 of its statement of claim in its action against the wife to which reference will shortly be made, the plaintiff avers :

" As the requisite 21 days expired and the defendant did not apply to the Supreme Court for extension of time, the said caveat lapsed and on 1st June 1983 the Registrar of Titles advised the plaintiff accordingly. "

It is clear from this averment that if the respondent's evidence is correct, the appellant proceeded either on the footing that the Registrar's notice was served very shortly after it was given or under the misapprehension that the 21 days ran from the date of the notice and not the date of its service. There was no evidence before the Court below or before us as to the steps taken by the Registrar subsequent to the issue of his notice of 2nd May but we are today told from the bar, that, for reasons which will shortly appear, the memorial has not been removed from the register.

Returning to the narrative of events, the wife, on or about the 1st of June, 1983 made an exparte application to the Court praying an injunction restraining the husband (and not the appellant) from selling the land and an order that the caveat which she had lodged "should not be withdrawn".

The procedure to be availed of by a caveator served within a notice under section 110(1) and wishing to arrest or prevent the removal of the caveat is prescribed by section 110(3) :-

" The caveator may apply by summons to the court for an order extending the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application by the caveatee, and the writ, upon proof of service that the caveatee has been duly served and upon such evidence as the court may require, may make such order on the premises either exparte or otherwise as the court thinks fit."

The emphasis is ours. It highlights three matters to which no regard was had by either the applicant or by the Court.

The wife did not extract a summons. Instead she made an exparte application, in her divorce proceedings (No. 50 of 1983 in the District registry), for an injunction restraining the husband from selling the land and for an order that the caveat "should not be withdrawn". And she did not serve this summons. The orders sought were made, exparte, on 3rd June, 1983 and served at the address for service given in the section 110 notice on 10th June, 1983. The papers do not disclose whether or not the order was served on the Registrar of Titles and if so, when, but we have been informed from the bar that it was served on the Registrar and, despite the terms in which it is couched, he has regarded himself as held by it and has refrained from removing the caveat from the register.

On 24th June, 1983 the appellant issued an action against the wife in which it claimed :

- (a) an injunction restraining her, by herself, her servants or her agents from restraining or interfering in any way whatsoever with the sale of the land;
- (b) that the injunction ordered in Action No. 50 of 1983 be dissolved;
- (c) that Caveat Number 175559 be withdrawn and removed.

On 8th July, 1983 the wife filed statements of defence and counterclaim.

The appellant next applied to the Court for an interlocutory injunction in terms of the various prayers in its statement of claim. This application came on for hearing before Dyke J. on 22nd July, 1983 and was dismissed. In his reasons for judgment the learned Judge records that the caveat had lapsed prior to the grant of the interlocutory order of 1st June, 1983. With due respect, there was before him no evidence justifying that conclusion. And counsel have told us that the caveat is, in fact, still on the register. And we are obliged to note that a caveat does not lapse by mere effusion of time; it is spent only when the Registrar has removed it from the register in exercise of the discretion conferred upon him by section 110(1).

The ratio decidendi of the Judge's decision is contained in the final paragraph of his reasons for judgment in which he said :

" the plaintiff has nevertheless sought an interlocutory injunction to restrain the defendant from interfering with the mortgagee's sale, an order removing the caveat and an order removing the injunction granted previously to the defendant. What the plaintiff is claiming in this application is exactly the same as it seeks in the substantive writ. So if the interlocutory injunction and orders were granted it would settle once and for all the substantive action and pre-empt that action. "

We do not think that this ground is warrant for refusing an interim injunction. In many cases, after injunctive orders had been made, the parties accept the interlocutory ruling and the substantive action dies the death. In Fellowes v. Fisher 1975 2 All E.R. 828, an interlocutory injunction case, Lord Denning M.R., at p.833 observed :

"..... Nearly always, however, these cases do not go to trial. The parties accept the prima facie view of the court or settle the case. At any rate in 99 cases out of 100 it goes no further. "

And that has been our experience. It follows, in our view, that the Judge exercised his discretion on a wrong basis and that we, accordingly, are free to decide the matter de novo.

We first remark upon the fact that the present appellant is not a party to the proceedings in which the injunction was granted. We hold, however, that not necessarily to be a bar to his applying for discharge of the injunction. In Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd (1978) 1 W.L.R. 966 at p.978 Buckley L.J. (with whom Goff L.J. and Sir David Cairns concurred both as to result and reasons) said :

" Where an injunction has been granted in an action which affects some one who is not a party to the action, he can apply in the action to discharge that injunction without himself being made a party to the action (Bourbaud v. Bourbaud (1864) 12 W.R. 1024); Daniell's Chancery Practice 8th Ed. (1914) Vol. II p.1343 footnote 1; Kerr on Injunctions 6th Ed. (1927) p.622. Where the interest of the appellant is clear, he may make such application by motion in the action (Jones v. Roberts (1941) 12 Sim 189) and in my opinion can equally well do so by summons. "

In the present case the injunction clearly affected the applicant.

We turn to deal with the relief sought and deal with the paragraphs of the prayer of the statement of claim seriatim :

- (a) we do not think that the relief sought in this paragraph is the proper subject

matter of injunctive relief, either on an interlocutory or substantive basis. It is sought in general terms which encompass matters particularly germane to paragraphs (b) and (c). Our refusal to entertain this part of the application is of no moment to the appellant. The grant of the injunction sought in (a) would not advance his cause if the relief sought in either (b) and (c) were to be refused.

- (b) The first limb of the order of 7th June, 1983 does not affect the appellant in any way. As far as it is concerned it is "brutum fulmen". The second part poses several difficulties. First it forbids the withdrawal of the caveat, the operative words being "shall not be withdrawn". Taking them both literally and in the context of the provisions of sections 110 and 111 of the Land Transfer Act, the position is that it is only the wife herself who could "withdraw" the caveat. Despite this solecism by both the draftsman of the applicant and by the Judge, we now know that the Registrar regards himself as bound by the order and in that we think he has indeed acted prudently.

As we have demonstrated, the procedure following a notice pursuant to section 110(1) is prescribed, step by step, by the subsection, and such steps not having been taken, we are compelled to conclude that the Judge in making the order as to the caveat exceeded his jurisdiction. We accordingly hold that the appellants are entitled to the order sought under (b) on

the interlocutory application and thus the injunction made on 7th June, 1983 in the divorce proceedings is dissolved.

- (c) This part of the prayer poses a measure of difficulty. The record does not disclose whether or not the Registrar of Titles has removed the caveat from the register; and if he has the date upon which he did so. We make this latter observation because of the conflict between the plaintiff's averment in paragraph 19 of its statement of claim and the respondent's evidence that she was not served until 27th May, 1983 and the consequences which flow if the latter is correct. We today have it from the bar that the caveat has not been removed and that it has not been removed because of the injunction. Without any reflection upon learned counsel who so informed us we say that having regard to the evidence we are not disposed to reach any conclusions concerning the actions of the Registrar on such a basis and all in all, we are reluctant, in the circumstances, to adjudicate upon the matters raised by the prayer in proceedings to which the Registrar is not a party.

The order dissolving the second limb of the injunction made in the matrimonial proceedings clears the way for the Registrar of Titles to reconsider the position. We have been told that the Land Transfer Act contains no precise provisions as to the mode of service of notices and we readily see the difficulties with which the Registrar is from time to time faced. In this case, the caveator by her affidavit in the proceedings has sworn that she was served with the Registrar's notice pursuant to subsection (1) of section 10 on 27th May, 1983. And

the Registrar can surely act upon such a deposition, against interest, made in a court of record. And if he does, it seems that there is no other course for him than to remove the caveat from the register.

The course of events in the case and the conclusions we have reached and the decisions we have taken have rendered it unnecessary for us to decide the issues thrown up by the very interesting submissions which Mr. Raniga offered concerning the bases upon which a deserted wife's claim to share in matrimonial property may arise - whether by constructive trust, resulting trust or an equity arising from section 86(1) of the Matrimonial Causes Act - and if such does arise, whether or not it confers a caveatable interest in land. Those matters must need await another day for their resolution.


In the present case it remains only to say, in summary, that the relief sought under paragraphs (a) and (c) are refused but that sought in paragraph (b) is granted. And on that basis the appeal is allowed.

In the Court below and before us learned counsel for the appellant undertook on behalf of his client to pay the nett proceeds of the sale of the property into Court under the number and in the registry of the matrimonial proceedings. The order dissolving the injunction in those proceedings is subject to that being done and (a) the moneys remaining in that Court until the further order thereof and (b) liberty being reserved to the respondent and the husband to apply further thereon.

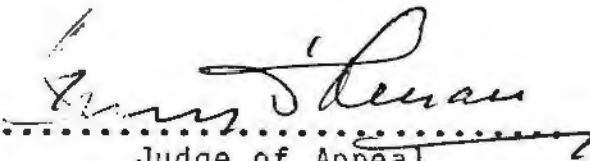
Before we take leave of the matter we wish to thank learned counsel for their concise and helpful submissions in the case.

In the result, the appeal is allowed and the respondent is ordered to pay the costs of the appellant

in this Court and the Court below. If the parties cannot reach agreement on the quantum of costs they are to be taxed by the Registrar.


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Judge of Appeal


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Judge of Appeal


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Judge of Appeal

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 55 of 1983

Between:

RAMJI LAL SHARMA
s/o Ram Narayan Sharma Appellant

- and -

REGINAM Respondent

Appellant in person
Mr. E. Leong for the Respondent

Date of Hearing: 1st November, 1984
Delivery of Judgment: 1st November, 1984

JUDGMENT OF THE COURT

Mishra, J.A. (Orally)

The appellant was convicted by the Supreme Court, Lautoka, on two counts of Act with intent to Cause Grievous Harm contrary to section 224(a) of the Penal Code and sentenced 4 and 2 years' of imprisonment respectively to be served concurrently.

He appeals against his sentences.

According to the evidence accepted by the Court one Jodha and his wife Shakuntla Devi had been living for some years on the appellant's land in a shack owned by the appellant. He wanted them to leave so that the place could be used for some other purpose. When they