IN THE FIJI COURT OF APPEAL

Civil Appeal No. 37/89 176

BEFORE THE HON JUSTICE MICHAEL M HELSHAM
PRESIDENT OF THE FIJI COURT OF APPEAL
AND THE HON JUSTICE SIR MOTI TIKARAM
RESIDENT JUDGE OF APPEAL
AND THE HON JUSTICE SIR ARNOLD AMET
JUDGE OF APPEAL

WEDNESDAY THE 10TH DAY OF JUNE 1992 AT 2.15 P.M

BETWEEN

KALYAN — APPELLANT

-and-

HARPALI — RESPONDENT

MR V P MISHRA — FOR THE APPELLANT
DR. SAHU KHAN — FOR THE RESPONDENT

O R D E R

JUSTICE HELSHAM . The Plaintiff/Appellant filed an originating summons on the 26th February 1987. He sought an order that the Defendant transfer into his name, land in a Native Lease, the particulars of which can be found in the affidavit that he swore in these proceedings and the annexures to it.

JUSTICE HELSHAM (CONTD) : February, 1989 before a Judge of the High Court. On the day before, namely, the 27th February, 1989, the defendant, mother had sworn an affidavit.
At the hearing on the 28th, the plaintiff objected to its use on various grounds.
Very sensibly the Judge cut through the legal wrangling and read it. In it, the defendant had sworn that she held an equitable interest as owner of 50% of the land as a result of an oral agreement between herself and the grandmother, which she says, was made by mutual agreement between herself, the grandmother and her son (See paragraph 12 of her affidavit - page 12 of the Record).

She claimed that the reason this was not reflected in the title, was that the Native Land Trust Board would not allow joint owners to be on the title. She claimed that her son, as a result, was making a fraudulent claim and that he had been wrongly taking the proceeds from use of the land for himself.

The relevant matter at that stage was that she claimed, and it was argued on her behalf, that the matter could not be decided on affidavit evidence but should be heard by way of oral evidence following the filing of a statement of claim and statement of defence. This was opposed at the hearing. The Judge gave a reserved decision on 31st March, 1989. He decided to treat the originating summons as a Writ of Summons and made orders for the filing of a Statement of Claim and Statement of Defence, a counter-claim, if any, within certain times. Against that order the son has appealed to this court.

JUSTICE HELSHAM (CONTD) : He also sought an injunction in effect to restrain the defendant from occupying or otherwise using the land. He supported it by an affidavit as I have said and the facts can be summarised very shortly.

At the time that these events commenced, the plaintiff's grandmother was before the 11th September, 1968 the owner of the land in question. The plaintiff was then a minor. His grandmother wished him to have the land when he was twenty-one and it was to be paid for out of the proceeds of cane farming in the meantime. The details of how it was to be paid for, do not matter.

The process adopted was to transfer the land to the plaintiff's mother, the Defendant/ Respondent in these proceedings, daughter of his grandmother, to be held in trust by her, until her son attained twenty-one, then to transfer the land to the plaintiff.

The grandmother and the defendant executed the Deed dated 11th September 1968 to give effect to this arrangement. It appears that the land was transferred to the defendant pursuant to this agreement.

About nineteen or so years later, the plaintiff commenced these proceedings seeking an order that his mother, transfer the land to him, an injunction in effect to get her off the land and an order for accounts. He commenced his action by originating summons which is a process for determination of disputes on affidavit evidence. He swore the necessary affidavit on 27th February 1987. The matter first came before the High Court on the 27th March 1987 and it was stood over by consent. Thereafter, it was adjourned six further times before it came on for hearing on the 28th

JUSTICE HELSHAM : (CONTD)

One ground is that the learned Judge should not have received the affidavit of the defendant. That was a matter for his discretion and there was no wrong exercise of it. Indeed, it was the only sensible course to be adopted in the circumstances because to do otherwise would have meant further delay with exactly the same outcome.

In the hearing before the learned Judge it was claimed that the matter should not be heard by way of oral evidence for various reasons. Once it is established that an equitable interest may exist in relation to Native Lands then that is the end of the matter. There was an allegation of fraud; there was an allegation of an oral agreement to which the plaintiff was a party - all matters that, if not admitted, could not be decided on affidavit evidence.

There were no doubt mixed questions of fact and law concerning acquiescence, the nature of any equitable interest and whether a trustee can obtain in circumstances such as that alleged here, an interest adverse to the cestui que trust.

Of course the judge was right in deciding that there were legal and factual issues to be tried. Many of the legal issues will have to be decided as the result of findings made about disputed questions of fact. Unless the plaintiff admits the allegations made by the defendant, then the matter simply could not proceed on affidavit evidence.

As a result, the appeal must be dismissed. The learned Judge made no order as to costs.

JSTICE HELSHAM : (CONTD)

Dr Khan has argued that the costs of this Appeal should not be borne by the Appellant. The Respondent really was the author of all the trouble and had the Respondent acted in the way that was reasonably prompt and accurate then a lot of this trouble would not have been caused. In the circumstances, we feel that the proper order is, that there be no order as to costs.

Appeal dismissed. We affirm the order made on 31st of March by the Judge except that the times as specified in his Lordship's order are to be read as operating from today.

No order as to costs to this appeal.

Michael Helsham

PRESIDENT
FIJI COURT OF APPEAL

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