

IN THE FIJI COURT OF APPEAL  
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0022 OF 1996S  
(High Court Civil Action No.HBC 0186 of 1994/L)

BETWEEN:

JAGDISH PRASAD S/O RAM PRASAD

APPELLANT

-and-

RAM PRASAD S/O BUDHAI  
PARAS RAM S/O RAM PRASAD

RESPONDENTS

Dr. Sahu Khan for the Appellant  
Mr. G. P. Lala for the Respondents

Date and Place of Hearing : 20 February 1997, Suva  
Date of Delivery of Judgment : 28 February 1997

JUDGMENT OF THE COURT

The first respondent is the father of the appellant and the second respondent. In 1988, as part, it would appear, of a distribution of his land to all his sons, he transferred the whole of Native Lease 10667 at Nukuloa, Ba to the appellant.

Since that time the first and second respondents have lived on a part of the land. They still do but it seems discord arose within the family and resulted in the appellant serving notice to quit on the second respondent followed, in June 1994, by blocking access and cutting off the supply of water and electricity to the second respondent's house.

By writ on 5 July 1994 in the High Court the respondents sought an injunction to restrain the appellant from interfering with their quiet enjoyment of the property. At the same time they obtained ex parte an interim injunction in those terms.

The original claim by the respondents averred that the land had been transferred to the appellant subject to an understanding that he would hold one acre in trust for the respondents and another brother. The appellant denies any such condition attached to the transfer of the lease but admits the respondents have been living on that portion of the land since the transfer.

Application to dissolve the injunction was filed by the appellant a few days later but there followed a series of adjournments on each of which the injunction was extended until, in October 1994, it was continued by consent until further order of the court. Numerous further adjournments meant the application was not heard until 10 May 1996 by Sadal J. who refused the application in a written ruling on 24 May.

This appeal is against that refusal.

Mr Shankar, through Mr Lala, for the respondents made the preliminary objection that the appellant needs leave to appeal. Section 12(1)(f) of the Court of Appeal Act provides that no appeal shall lie without leave from any interlocutory order or interlocutory judgment by a Judge of the High Court except:

*"(ii) Where an injunction....  
is granted or refused."*

The refusal by the Judge in this case was to dissolve the interim injunction and that, Mr Shankar suggests, is not part of the exception in paragraph (f) (ii).

We can deal with it shortly. We are satisfied a decision whether or not to dissolve an injunction is clearly within the terms of the exception. The learned judges' refusal to dissolve the injunction is effectively a renewal of the injunction. Had he allowed the application and dissolved the injunction, the effect would have been to refuse it. It would defy common sense to suggest that such a decision needs leave when the initial grant or refusal does not.

Turning to the appeal, Dr Sahu Khan for the appellant suggests that, on the pleadings and affidavits before Sadal J,

it is indisputable that the original agreement to withhold one acre of the leasehold was done without the consent of the Native Land Trust Board and was therefore a dealing that breached section 12 of the Native Land Trust Act.

By section 12:-

*".....it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any manner whatsoever without the consent of the Board.... first had and obtained ... and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."*

Dr Sahu Khan, with his usual diligence, cites a number of authorities to support the contention that, if a transfer subject to section 12 is made without prior consent it is unlawful. He urges the court to accept that there can be no dispute that the withholding of one acre without consent was an unlawful dealing in terms of section 12 and, as the respondents need to rely on this unlawful transaction to support their original claim, it must fail. We do not consider we can decide that question neither can we accept this is the sole determining factor of the respondents' claim.

When making application to Sadal J. the appellant had, on the same grounds, sought summary judgment on the counter claim for vacant possession. In refusing that, the learned judge said:

*"Certainly there are issues to be determined which cannot be decided on affidavit evidence. The issues, particularly the gift issue, need to be resolved by evidence."*

We agree. There are substantial areas of dispute over the original transfer of the lease. Those matters will have to be resolved by evidence before the trial judge can decide whether or not they were in breach of section 12. The statement of claim establishes an arguable case for continued quiet enjoyment and, as was also claimed, a challenge to the validity of the transfer. Disputes of fact especially where, as here, they include allegations of bad faith and possibly fraud, are rarely suitable for summary adjudication. The appellant's case for dissolving the interim injunction depends on the Court's ability to make such a decision and must also await the outcome of the trial.

Passing to the injunction, the learned judge continued:-

*"On 5th July 1994, the Court granted an injunction to maintain the status quo. I feel the*

*status quo should be maintained until the final determination of this action. I am not prepared to dissolve the injunction as sought by the defendant...."*

In this case, having found there were matters to be determined at trial, it was a clear case for maintaining the status quo. The respondents had been occupying that land since 1988. To dissolve the injunction would have made continued occupation of his home by the second respondent impossible. It would, in effect, be determining the appellant's claim for vacant possession. Should the appellant fail to obtain judgment, such a loss by the second respondent would be impossible adequately to measure in monetary terms.

The appeal against the refusal to dissolve the injunction is dismissed with costs to the respondents.

*M. G. Casey*

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Sir Maurice Casey  
Judge of Appeal

*Gordon Ward*

.....  
Mr Justice Gordon Ward  
Judge of Appeal

*Peter Hillyer*

.....  
Mr Justice Peter Hillyer  
Judge of Appeal