

IN THE FIJI COURT OF APPEAL
AT SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0038 OF 1995S
(High Court Civil Action No. 44 of 1992)

BETWEEN:

AMBIKA PRASAD F/N RAM PIYARE

APPELLANT

-AND-

SANTA WATI F/N KALICHARAN
BISSUN DEO F/N JAG DEO

RESPONDENTS

Mr R. P. Singh for the Appellant
Mr A. Sen for the Respondents

Date and Place of Hearing : 25th February 1998 at Suva
Date of Delivery of Judgement : 27th February 1998

JUDGEMENT OF THE COURT

Santa Wati and Bissun Deo are the registered proprietors (hereinafter referred to as the "respondents") of land known as Matasawalevu in the Island of Vanua Levu being Lot 3 on Plan No. 5800 and being part of the land comprised in Certificate of Title No. 27109 (hereinafter referred to as the "said land"). They were registered on 5th October 1991. In the High Court there was some dispute as to the correct Title reference but the error was corrected and there was no further dispute that the respondents are the registered proprietors

of the said land. They purchased the land from the first respondent's father Kali Charan (hereinafter referred to as the "deceased").

By summons dated 9th December 1992 the respondents sought an order for possession under s 169 of the *Land Transfer Act* (Cap 131) (hereinafter referred to as the "said Act"). This action was taken because Ambika Prasad (hereinafter referred to as the "appellant") was occupying part of the said land. A s.169 application is a summary procedure for possession decided on affidavit evidence. The onus is on the Defendant to show cause why he should not give up possession.

The appellant appeared in Court in response to the summons and sought to argue that order for immediate possession should not be made on a number of grounds. These grounds may be summarised as follows:

- (a) That he was originally brought onto the land by the deceased and that he had made a half contribution to the purchase price of the land from Matasawalevu Land Purchase Co-operative Society Limited; thereby creating an equitable interest in the said land.
- (b) That the respondents were fully aware of the appellant's equitable interest and the said land was transferred in a fraudulent manner to defeat the interest held by the appellant.

Counsel for the appellant further argued in the High Court that there was dispute as to the basis of the appellant's claim to possession and as the dispute involves allegations of fraud, the recovery of possession of land under s 169 of the said Act was not a suitable procedure and therefore these issues should be determined in a trial.

The trial judge concluded that the respondents imputed no fraud to the respondents and there were no triable issues in this regard and therefore ordered the appellant to give vacant possession to the respondents within one month of the order. The appellant has appealed against this decision. The grounds of appeal are:

1. *That the learned trial judge erred in law and in fact in holding that the Appellant ha no right to possession of the land in question.*
2. *That the learned trial judge erred in law and in fact to adequately deal with the various averments of the Appellant in his affidavit dated 23 April, 1993 particularly in his statements that he contributed towards the purchase price of the said land.*
3. *That the learned trial judge erred in law and in fact in holding that if the Appellant had a claim against Kali Charan then that claim did not pass with the title to the Respondents.*
4. *That the learned trial judge erred in law and in fact in holding that the notice of termination of occupancy given to the Appellant was valid.*

At the hearing counsel for the appellant sought to add two further grounds of appeal as follows.

- (1) *Taking all matters into account, particularly the disputed facts and complicated questions of facts, the Judge erred in law and in fact in making an order in favour of the Respondent and not holding that the matter should be decided by oral evidence in open Court.*
- (2) *The learned Judge erred in holding that the Respondent was the registered proprietor of the land in question when there was no evidentiary proof on this point.*

Counsel for the appellant withdrew the second proposed ground and conceded that the respondents are the registered proprietors. With respect to the first proposed ground of appeal both counsel agreed that this issue comes within the ambit of the existing grounds of appeal and there is no need for an amendment.

The central issue before the High Court was whether the appellant had a right to possession pursuant to s 172 of the said Act. He sought to prove this in his affidavit sworn on 23rd April 1993. He deposed, inter alia, that the land in question was originally owned by J. M. Hedstrom and was sold to the Matasawalevu Land Purchase Co-operative Society Limited. That the Society in turn sold portions of the land to different members of the Society. That the deceased was a member of the Society and bought the portion of land in question. He further deposed that he is a grandson of the deceased (therefore a nephew of respondent Santa Wati) and was invited by the deceased to come onto the land. That when the deceased negotiated the purchase of the said land from the Society for a price of \$14000, he contributed a sum of \$700; thereby creating an equitable interest in the land. That the respondent Santa Wati who has lived on the said land for most of her life was well aware of

this. That the respondents purchased the land from the deceased with full knowledge of the appellant's equitable interest and the land was transferred in a fraudulent manner to defeat the appellant's interest.

The respondents in their affidavit either disputed the facts or denied any knowledge of the facts on which the appellant based his claim.

The High Court found that the appellant failed to establish an equitable interest in the land. However, as an unregistered interest would not affect or defeat a registered title pursuant to s 39 (1) the said Act except in case of fraud, the trial judge proceeded to deal with the question of whether fraud can be attributed to the respondents in the manner the land was transferred. The argument is that if fraud could be attributed to the respondents, there would be triable issues and the matter would go to trial.

The trial judge concluded pursuant to s 40 of the said Act that notice of an unregistered interest does not of itself constitute fraud upon the party obtaining registration. He found that on the facts of this case fraud is imputed to the deceased but not to the respondents. Having come to this conclusion he held that there was no contested relevant fact to be tried and granted the order for possession of the land.

The interpretation of "fraud" in sections 39 and 40 of the said Act and application of the same are critical in this case. The trial judge set out these two provisions

in his judgement. Similar provisions can be found in the various States of Australia and in New Zealand. The trial judge referred to the relevant authorities which interpreted similar provisions in the passage quoted from the textbook *Introduction To Land Law* by Peter Butt. We consider that it is necessary to set out the proper principles. It is sufficient for our purposes to simply refer to the decision of the Privy Council in *Waimiha Sawmilling Co. v Waione Timber Co.* [1926] A.C. 101. This is an appeal from the Court of Appeal of New Zealand. After setting out the similar provisions in New Zealand on page 105, at page 106 to 107 the Privy Council went on to state:

"The first of these sections provides in plain language that, except in the case of fraud, the registered proprietor of land holds it freed from everything except what is notified on the register, subject to the three exceptions, not one of which is relevant for the present purpose; while s. 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud. Upon the first point, therefore, it is plain that unless conduct coming within the meaning of the word 'fraud' as used in these sections can be imputed to the respondents their title succeeds.

In the words of the Court of Appeal in Fels v Nowles (26 NZLR 604, 620): 'The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute.' ('By statute' would be more correct.) 'Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorised, as in the case of easements or incorporated rights, to the right registered.'

Now fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v Mere Roihi ([1905] A.C. 176, 210) states that: 'Fraud in these actions' (ie., actions seeking to effect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.'

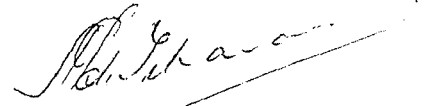
If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and the dishonesty must not be assumed solely by reason of knowledge of an unregistered interest." (underlining ours)

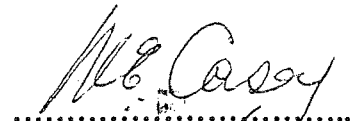
It is worth emphasising the words underlined. Whether, or not, there is fraud will be determined on the facts of each particular case. *In Waimiha Saw-milling Co. v Waione Timber Co.*, (supra) there was judgement removing a caveat on the register and the decision was appealed and was pending. In the meantime the respondent registered the land. The Privy Council held that even if the decision to remove caveat by the Court below was "wrong in the view that he took it seems to their Lordships impossible to say that people who acted upon the faith of that judgement were guilty of fraud". That is a decision based on the particular facts of the case.


In the present case the question is whether the transfer by the respondents was designed to defeat the appellant's equitable interest. The trial judge concluded that the appellant imputed fraud to the deceased and not to the respondents. While we agree that the appellant imputed fraud to the deceased, we are unable to agree that no fraud was imputed to the respondents. The appellant in his affidavit sought to show that the deceased refused to transfer the appellant's interest and in fact he purported to remove him from the said land in an action in the Magistrates Court at Labasa (Civil Action No. 711 of 1987). In paragraph 26 and in particular paragraph 30 of the affidavit sworn on 23rd April 1993, the appellant deposed that the respondents purchased the land from the deceased with full notice and knowledge of his rights and the action (that is the transfer) was designed to defeat his interest in the said land. The appellant alleged fraud on the basis that he and the first respondent are close relatives of the deceased and had competing claims to the said land. The appellant alleged that the respondents were well aware of these competing claims and the land was transferred in order to defeat his right.

Whether or not the appellant had an equitable interest and whether or not there was fraud by the respondents in the manner alleged are matters which are disputed by the respondents in their affidavits. These are clearly issues which cannot be resolved by affidavit evidence and ought to go to trial. We have concluded that the trial judge fell into error in this regard. We allow the appeal and set aside the order of possession and costs in the Court

below. We further order that this matter be set down for trial in the High Court and cost of the application in that Court be cost in cause. The appellant will have costs of this appeal.


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Sir Moti Tikaram
President, Fiji Court of Appeal


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Sir Maurice Casey
Judge of Appeal


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Sir Mari Kapi
Judge of Appeal