

5/10/08

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0018 OF 2008S
(High Court Civil Action No. HBC196 of 2002S)

BETWEEN: JAI CHAND PRASAD

Appellant

AND: REGISTRAR OF TITLES OFFICE

First Respondent

AND: ARUN CHAND AND AMI CHAND

Second Respondent

Coram: Powell, JA
 Shameem, JA
 Goundar, JA

Hearing: Tuesday, 21st October 2008, Suva

Counsel: V. Maharaj] for the Appellant
 A. Maharaj]
 No appearance for the First Respondent
 R.P. Singh] for the Second Respondent

Date of Judgment: Friday, 31st October 2008, Suva

JUDGMENT OF THE COURT

[1] Ramrajee and her husband Latchmi Dutt ("Latchmi") were the parents of the appellant Jai Chand and the second respondents Arun & Ami Chand. Latchmi owned a rice farm ("the land").

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- [2] On 5 June 1962 the Magistrates Court in Nausori made orders in terms of a settlement of a maintenance action in which Ramrajee forwent all claims for maintenance for herself and her children and Latchmi was to *"give to his wife user of the freehold land. She to have use of the land for life free of rent for life. Vacant possession to be given to wife within one month. Title to land to remain deposited in Court on Nausori Maintenance Case No. 1 of 1961. Defendant not to sell or charge the land in any way."*
- [3] Both parties were given liberty to apply. The document was prefaced by a statement that the matter had been settled on the basis that Latchmi would be *"vacating possession of freehold land and his son to take over the farm."* It is not clear which son that was but in any event Latchmi stayed on the land, apart from trips abroad, until he died nearly 40 years later in October 2000.
- [4] It appears that in the period from 1962 until 1992 Ramrajee occupied a separate dwelling on the land and may have had the use of part of the land. In 1992 she went to the United States and remained there until she died on 24 March 2000. Her son Jai Chand migrated to the United States in 1996 and it appears that several members of the family including Latchmi either lived in or made trips to and from the United States.
- [5] Ramrajee did not take any legal proceedings to enforce the 1962 orders until 1996 when she commenced proceedings in the Nausori Magistrates Court against Latchmi. On 3 July 1998 the Nausori Magistrates Court ordered Latchmi to give immediate vacant possession of the land to Ramrajee and to pay damages. It is not clear from the Court Record whether those damages had been assessed by the Court.
- [6] On 10 July 1998 a Writ of Possession was issued. The Writ of Possession referred to the Court's orders of 3 July 1998 including the order to pay damages. It

commanded Latchmi to give possession of the land to Ramrajee and to pay her the costs of issuing the Writ.

- [7] It seems that Latchmi did not comply with these orders. On 27 August 1998 he made an application to the High Court for a stay of the Nausuori Court orders of 3 July 1998 but the Stay was refused on that day. Latchmi was represented by counsel on this and, it would appear, on all subsequent court occasions.
- [8] A caveat lodged by Ramrajee over the land was registered on 7 September 1998. The interest claimed by the caveat is not on the Court Record but it was evidently based on the Nausori Court orders of 3 July 1998. At this stage at least Latchmi was aware or ought to have been aware that Ramrajee was claiming an interest in the land. No application for removal of this caveat was made until 29 November 2000.
- [9] Ramrajee also instituted High Court proceedings HBA 009 of 1997. Latchmi and Arun Chand were named as respondents. In those proceedings Byrne J, on 19 October 1998, upon reading a Notice of Motion and an affidavit of Jai Chand, ordered that *"The defendants Apologies in disobeying Court Order in Court and Court accept the apology and warn all the parties not to provoke each other and the defendants not to enter the Plaintiff's land again."*
- [10] On 2 March 2000 the orders of Byrne J of 19 October 1998 were entered. On the same day Latchmi appeared before Byrne J and apologised to the Court for disobeying the said Court orders.
- [11] As stated above Ramrajee died on 24 March 2000. Jai Chand is her executor.
- [12] On 31 March 2000 Latchmi executed a transfer of land in favour of the respondents Arun and Ami Chand. The consideration for the transfer was \$15,000. An

agreement between the same parties provided that the purchase price shall be deemed to be paid if the said sons maintained and supported their father during his lifetime.

- [13] On 22 June 2000 Jai Chand as executor of Ramrajee's estate commenced High Court proceedings HBC 260 of 2005 claiming damages from Latchmi for breach of the Court's 1962 orders. Those proceedings were heard by Byrne J on 14 May 2002 and on 22 July 2002 Bryne J awarded damages against Latchmi's estate in the sum of \$177,744, being loss of income and rent for a 14 year period from 1984 to 1999 and interest thereon. As Byrne J noted there was at trial no issue that the 1962 agreement was limited to the lifetime of Ramrajee and that it gave her no claim to possession of the land after her death.
- [14] On 19 June 2001 the land had been transmitted to the respondents as executors of Latchmi's estate, Latchmi having died on 10 October 2000. The land was the only substantial asset of Latchmi's estate, if indeed it formed part of his estate.
- [15] In High Court proceedings HBC 196 of 2002 Jai Prasad sought to enforce the 22 July 2002 judgment against the land. The defendants, Arun and Ami Prasad, argued that the land having been transferred to them on 31 March 2000, it did not form part of Latchmi's estate. Their title, they argued, was indefeasible. These proceedings were heard on 31 January 2008 and on 29 February 2008 Singh J delivered judgment.
- [16] The question the trial judge had to determine was whether the transfer of the land to the respondents on 31 March 2000 should be set aside as fraudulent, or more particularly: On 31 March 2000 did the respondents know or suspect that the transaction was in violation of the rights of another?

[17] The trial judge considered the matter under the heading *Do the defendants have indefeasible title ?* He extracted propositions from the decisions in Sawmilling Co Ltd v Waione Timber Company Ltd [1923] NZLR 1137 and Ahilya Sharma & Anor v Mahendra Pratap 2003 ABU 27. As Salmond J held in the former case:

“The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either make further enquiries before purchasing or abstain from the purchase, or to purchase subject to the claimant’s rights rather than in defiance of them.”

[18] Singh J found that at the time of Ramrajee’s death the defendants were aware *“of the Nausori Court Orders and therefore that their mother had the right to use the land during her lifetime”* but he also found that they would have been quite entitled to assume that the right of their mother to possession had extinguished with her death, that accordingly the acceptance of the transfer on 31 March 2000 could not be fraudulent in the relevant sense, and accordingly he refused to set aside the transfer of the land to the defendants.

[19] It is from this judgment that Jai Chand appeals to this Court.

[20] The trial judge seems to have assumed that the respondents had a legal interest in the land and therefore an indefeasible title. Such a title could only be defeated by knowledge of the existence of an adverse right to the land, rather than knowledge of a right against the mere former owner of the land. The adverse right has to be shown to affect the land. As Salmond J said in Wellington City Corporation v Public Trustee [1921] NZLR 423 AT 433 where *“the title is known by the purchaser to be subject to some equitable encumbrance, the fraud consists of wilful disregard of the rights to which it is known to be subject”*.

[21] However no question of indefeasibility arises in these proceedings because the transfer was not registered and it remains unregistered by reason of the 1998 caveat

lodged by Ramrajee. In any event the transfer to the respondents can be set aside if it was taken for the purpose of defeating a claim against the land.

[22] Jai Chand in proceedings before Singh J pointed to a number of matters which it was said demonstrated that the respondents knew that the transfer was being executed to defeat a claim by their mother. These included the haste in executing the transfer, being 9 days after their mother's death, and the consideration for the land, being a deferred payment of \$15,000. Singh J found neither of these matters determinative, noting that there was no evidence of the value of the land before the Court.

[23] The deferred consideration for the purchase of the land may not have been a matter of great moment given that it was a transfer from father to sons and the timing of the transfer would not of itself be a matter of great moment if there were no other matters in the minds of the respondents.

[24] However there were other matters that were necessarily in the minds of the respondents namely the litigation by their mother from 1996 onwards, most recently agitated in Court 19 days before her death. The trial judge proceeds on the assumption that the respondents were only aware of the terms of the "Nausori Court Orders". He seems to mean only the 1962 Orders, and fails to address their knowledge of the subsequent litigation (including the Nausori Court's July 1998 orders), matters which Ami Chand in cross-examination said he was aware of.

[25] Ami Chand said: *"I knew my mother wanted to use the land. I agree my father did not want to give anything to my mother. Mum and Dad used to come to court for case. I did not care much about it."*

[26] Arun Chand, who was deceased by the time the proceedings came before Singh J, was aware of the post 1996 litigation because he was a respondent in the 1997 proceedings and a subject of the Court's October 1998 orders.

[27] In light of their, and their father's, knowledge of the active litigation in relation to the breach of the 1962 Court Orders and the 1998 Court orders, the timing of the transfer and deferred consideration for the transfer, take on a different light and give support to the contention that it was done to defeat any possible claim by Ramrajee's estate. In their submissions to this Court the respondents say that the haste could equally be explained by their father's desire to transfer his land to his sons, given his advanced age and having waited nearly 40 years to be able to do so. However it can equally be said that there was no good reason to transfer the land in a hurry, particularly as the transfer could not be registered while the 1998 caveat remained in place.

[28] When all the evidence is considered it is not credible for the respondents to have believed that the litigation in the late 1990s and pursued as recently as a couple of weeks before their mother's death, was limited to a right to possession of the land during the balance of their mother's life, with no rights against the land for breach of the possession orders. If, as the trial judge found, they were aware of the terms of the Nausori Court Orders, then they were aware that those orders had been breached for 40 years and they ought to have been aware that it was likely that their mother, or her estate, would be bringing a claim against their father for breach of the 1962 orders. That however is not awareness of a claim of an equitable interest in the land that could survive Ramrajee's death. However the respondents, the evidence is clear, were also aware of the 1998 Orders which included an order that Lachmi pay damages to Ramrajee, and they were aware that those 1998 orders had been followed up by a caveat claiming an interest in the land.

[29] The trial judge has erred in failing to consider and in failing to give any weight to the matters referred to in paragraphs 5, 6, 7, 8, 9 and 10 above. If the trial judge had considered those matters he would have been impelled to the conclusion that

the transfer of 31 March 2000 was designed to defeat any claim Ramrajee had against Latchmi and any interest she was claiming in the land as a result of that claim.

[30] Moreover it is clear from the Record that during March 2008 and at the time of the transfer the respondents and their father had access to and were obtaining legal advice. That advice should have made them aware in general terms that it is the *"plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless or until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or even void."*: **Hadkinson v Hadkinson** [1952] 2 All ER 567.

[31] The appropriate course for the respondents and their father was to approach the Court and seek to have the Court Orders of 1962 and 1998 discharged. It was not for the respondents to decide that any part of the Court Orders (whether the order for possession, or the order for damages) were no longer operative.

[32] This Court finds that the respondents were guilty of fraud in the sense that they took the land transferred to them wilfully disregarding the rights of their mother to which they knew or ought to have known their father was subject, which rights included an order for damages that could only be met from the land, over which land their mother was claiming an interest . The 31 March 2000 transfer to the respondents must be set aside.

[33] The orders of the Court are:

1. Appeal allowed;
2. The transfer of 31 March 2000 is set aside;

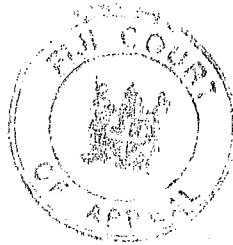
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3. That the matter be referred to the High Court for the making of orders for the sale of the land to satisfy the High Court judgment of 22 July 2002;
 4. Second respondents to pay the appellant's costs as taxed or agreed.

Lawrence Powell

Powell, JA

Shameem

Shameem, JA



Goundar

Goundar, JA

Solicitors:

M C Lawyers, Suva for the Appellant
No appearance for the First Respondent
Kohli and Singh, Suva for the Second Respondent