

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

CIVIL APPEAL NO. ABU 009 OF 2009
(Lautoka High Court Civil Action No:
HBC 176/2008)

BETWEEN: **MOHAMMED AZMAT-ULLAH KHAN**

Appellant

AND: **RK AND RK INVESTMENTS LIMITED**

Respondent

Coram: **Calanchini William D JA**
 Izaz Khan JA

Hearing: **Thursday, 16th September, 2010**

Counsel: **Dr. M.S.D. Sahu Khan for the Appellant**
 Mr. R Singh for the Respondent

Date of Judgment : Wednesday, 29th September 2010.

JUDGMENT OF THE COURT

1. The appellant, Mohammed Azmat-Ullah Khan is the registered proprietor of all the land comprised in Crown Lease Certificate of Title No. 9591 which is commercial premises in Nadi Town. ("the premises").
2. The appellant and the respondent signed a lease over the premises on 28th June 2001 for a term of 12 years commencing from 28th June 2001.
3. The respondent had purchased the appellant's supermarket business at the premises for \$40,000-00 and went into possession after the execution of the lease.
4. On the evidence of the respondent \$150,000-00 was expended in the fixtures and fittings for the operation of the business after possession was taken.
5. At the trial before his Lordship Datt J was Mohammed Azmat-Ullah Khan as plaintiff, RK and RK Investments Limited as first defendant and Ramesh Investment Ltd as second defendant. The appeal was between Mohammed Azmat-Ullah Khan as the appellant and RK and RK Investment Limited as the respondent. Ramesh Investments Limited was not joined as a party in the appeal because it was not relevant in the proceedings on appeal which primarily related to the question whether the appellant was

appellant was entitled to vacant possession of his property. Ramesh Investments Limited was only the manager of the business of RK and RK Investments Ltd by arrangement between the two.

6. The appellant initially sought, by way of summons, vacant possession of his property under the provisions of section 169 of the **Land Transfer Act [Cap 131]**. The appellant also relied on the provisions of section 13 of the **Crown Lands Act**.

7. Section 169 of the **Lands Transfer Act** provides:

The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-

a) ***The last registered proprietor of the land;***

b) ***A lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;***

c) ***A lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.***

8. The summons provided: *This application is made based under Section 169 to 172 of the Land Transfer Act and pursuant to the inherent jurisdiction of this honorable Court.* No particulars of the applicability of Section 169 were given contrary to the provisions in that section.

9. Section 13 of the *Crown Lands Act* Cap 132, in so far as is relevant to this case, provides:

(i) *Whenever in any lease under this Act there has been inserted the following clause : "This lease is a protected lease under the provisions of the Crown Lands Act. (Hereinafter called Protected Lease) – It shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Registrar of Lands first had obtained ...*

"Any sale, transfer, subleases assignment, mortgage, or other alienation or duly affected without such consent shall be null and void".

10. The trial judge dismissed the appellant's claim for possession pursuant to a reasoning which appeared to us to have been in error. He considered the fact that there were various opposing arguments on the operation of Section 13 of the *Crown Lands Act* which could not be determined while

11. Section 13 is very clear on its terms. If there is no consent of the Registrar of Lands for the alienation of land under the **Crown Lands Act** in whatever form, then such alienation is null and void.
12. In ***Phalad v. Sukh Raj*** 24 FLR 170, Henry JA dealing with a similar provision, namely, Section 12 of the **Native Land Trust Board Act** said at Page 173:
- “Section 12 places restrictions on the rights of the lessee to deal with the land comprised in the lease. Any transaction which comes within the ambit of Section 12 is declared unlawful unless the consent of the Board as lessor or head lessor is first had and obtained. The granting or withholding of consent is within the absolute discretion of the Board and in the absence of such consent, the transaction is declared to be null and void. There is thus, no right in a lessee to require the Board to grant its consent and the consent must be one first had and obtained.”***
13. In this case consent of the Director had been obtained but not at the time the lease was executed but on 13th November 2001 which is approximately 5 months from the date when the lease was executed by the parties.

14. The respondent's counsel took the court to a case which he relied on as supporting a different view. This was the case of **Ram Lochan Regan v. Satya Nand Verma (1965) 11 FLR 240** where at Justice Marsack VP stated at P. 243 as follows:

"All that we are required to decide is whether or not there was a lawful tenancy during the period of 7 months in issue.

In my view, the learned trial judge was right in holding that upon the facts as found there was a monthly tenancy as from the date of the notification of the consent of the Director of Lands, whatever may have been the position in regard to the occupation of the premises by the appellant with the approval of the respondent before that date".

15. The respondent's counsel argued that this case, was authority for the proposition that there was legality pursuant to Section 13 from the date on which consent was obtained which in this case would be the 11th of November, 2001.
16. The respondent's counsel argued that the decision in **Phalad v. Sukh Raj** is distinguishable from the present case upon the basis that the former case dealt with a sale and purchase agreement involving native lease whereas in the present case there is a landlord and tenant relationship between the parties involving land under the **Crown Lands Act**.

17. We do not think that there is any intrinsic difference in the form of title that is in issue in respect of an application of the principle which can be deduced from Section 12 of the *Native Lands Act* and Section 13 of the *Crown Lands Act* which appear to us to be aimed at achieving the same result. Therefore, we reject the submission.
18. In our view, the decision in *Phalad v. Sukh Raj* is to be preferred to the decision in *Ram Lochan Regan v. Satya Nand Verma*. This is because, in our view, the decision in *Phalad v. Sukh Raj* clearly gives the proper weight and significance to the crystal clear words of Section 13 to the effect that no transaction involving land under the *Crown Lands Act* will be valid without the Director's consent.
19. Our reading of the provisions of Section 13 does not reveal any half way measure between validity and nullity as would be the effect of the decision in *Ram Lochan Regan v. Satya Nand Verma*.
20. We think there is merit in following *Phalad v. Sukh Raj* and we re-iterate the position that if a transaction involving land under the *Crown Lands Act* does not have the Director's consent as required by Section 13 of the Act at the time the transaction is entered into the transaction is null and void and cannot be restored to validity by the obtaining of consent *ex post facto*.

21. Accordingly we make the following orders:

1. We allow the appeal.
2. We quash the orders made by the trial judge.
3. We order that the appellant have possession of all the land comprised in Crown Lease Certificate of title No. 9591 after the expiry of 21 days.
4. We order that the respondent pay the appellant's costs to be agreed or taxed.



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Hon. Justice Izaz Khan
Justice of Appeal

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Hon. Justice William Calanchini
Justice of Appeal