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RAMLINGHAM

v.

KRISHNA MISSION FIJI (TRUSTEES)

[SUPREME COURT, 1962** (MacDuff C.J.), 15th May, 13th June]

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Civil Jurisdiction

Estoppel—res judicata—previous litigation between same parties—judgment in default of appearance—issue which could have been raised, not raised or decided —no estoppel.

Native land—leasehold—declaration of trust amounting to licence to occupy and grow crops—dealing in land—Native Land Trust Ordinance (Cap. 104) s.12.

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A plea of estoppel based on an earlier judgment between the same parties in an action in which the defendant could have raised the issue in question, cannot succeed where the earlier judgment was given in default of appearance of the defendant and the particular issue was not in fact raised or decided.

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A declaration of trust of a native lease entitling the beneficiary to occupy and grow crops on the land for his lifetime is a dealing in land requiring the consent of the Native Land Trust Board under section 12 of the Native Land Trust Ordinance.

Cases referred to: *New Brunswick Railway Company v. British and French Trust Corporation Ltd* [1939] A.C. 1; [1938] 4 All E.R. 747: *Dhani Ram v. Habib Shah* (Civil Appeal No. 9 of 1957 C.A. — unreported): *Chalmers v. Pardoe** (Civil Appeal No. 17 of 1960 C.A. — unreported).

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Interpleader proceedings in the Supreme Court.

T. R. Sharma and *B. K. Pillay* for the plaintiff.

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K. C. Ramrakha for the defendants.

The facts sufficiently appear from the judgment.

MACDUFF C.J.: [13th June, 1962]—

This matter comes before the Court as a result of the Colonial Sugar Refining Co. Ltd. interpleading in respect of the sum of £1,462.15.3 representing proceeds of sugar cane harvested from the lands described as Qelemawai, Qelema and Vaileka No. 3 in the district of Raki Raki, comprised in Native Leases Numbers 4195, 4163, 1362, 31/539 and 3082, such lands being known as Farm No. 1501, prior to the death on the 24th day of January, 1961, of one

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**The appeal from this judgment to the Fiji Court of Appeal is reported at (1963) 9 F.L.R. 95.

*For appeal to the Privy Council from this judgment see [1963] 3 All E.R. 552.

Sengodan s/o Peria Karuppa Gounden. Pursuant to that interpleader the amount was paid into Court and of the two claimants thereto Ramlingham s/o Sengodan was directed to be Plaintiff and the executors of the will of Sengodan to be Defendants.

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The Plaintiff's claim is based on the fact that he is the lessee of the five Native Leases comprising Farm No. 1501 and that the sugar harvested therefrom at all material times was sold to the Colonial Sugar Refining Co. Ltd. under contract existing between the Plaintiff and that Company. The Defendants' claim is based on two grounds, first that of estoppel, to which I will refer more fully later, and second on the fact that on 21st day of December, 1956, the Plaintiff and his father Sengodan entered into a deed which provided, inter alia, that —

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> "The said Ramlingham shall hold the said leases and extensions or renewals thereof in trust for the use and benefit of the said Sengodan during his life and after his death for the use and benefit of the said Ramlingham absolutely."

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Accordingly the Defendants claim that the proceeds of cane harvested up to the date of Sengodan's death were the property of Sengodan and that in entering into the contract of sale with the Colonial Sugar Refining Co. Ltd. the plaintiff was acting as a trustee for Sengodan. The Plaintiff's reply to this claim is that the deed of 21st December, 1956, was a dealing in land, was not consented to by the Native Land Trust Board, and was null and void.

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Turning now to the first issue, which the Defendants plead in this form —

> "The defendants say that the plaintiff ought not to be admitted to say that he is entitled to the cane proceeds from Farm No. 1501 mentioned in the statement of claim because of the following facts:
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> On the 28th April, 1959, the Colonial Sugar Refining Company Limited took out Interpleader Summons in the Supreme Court of Fiji being Action No. 70 of 1959 against the Plaintiff and the Defendant Sengodan in respect of the cane proceeds from the said farm No. 1501 and in the said proceedings Sengodan was made the Plaintiff and the plaintiff Ramlingham the defendant in those proceedings wherein the judgment was given in favour of Sengodan and against the plaintiff Ramlingham and the said judgment still remains in full force and effect. The Plaintiff is now estopped from litigating the same matter because the proceedings in Action No. 70 of 1959 have already disposed of the same and the matter is res judicata."

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Civil Action No. 70 of 1959 concerned the proceeds of cane harvested from Farm No. 1501 in 1958 to which both the Plaintiff and his father, Sengodan, laid claim. In that case Sengodan was Plaintiff and the present Plaintiff was Defendant. Sengodan alleged that the Native Leases were held in trust for him by his son, the Plaintiff, that he had planted, cultivated, harvested and sent to the mill the cane from this farm and that he was the beneficial owner of the cane sold and so entitled to its proceeds. The Plaintiff, while admitting that Sengodan had grown the cane, alleged that the deed of 21st

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December was obtained by fraud or undue influence and was supposed to be a share cropping agreement. The defence he did not raise was the one at issue in the present proceedings, to wit: that the deed was null and void for the reason that it had not been consented to by the Native Land Trust Board.

At the hearing the Planitiff, then Defendant, did not appear and after the taking of formal proof judgment was given against him.

For the Defendants it was contended that it was open to the Plaintiff to allege the illegality of the deed of 21st December, 1956, in Civil Action No. 70 of 1959 and that having failed to do so he is estopped from raising that fact in a subsequent action. The question is not quite as simple as that. The Plaintiff failed to appear at the hearing and although formal proof was taken in effect judgment was given against him in default of appearance. In my view the law governing such a situation is set out in *New Brunswick Railway Company v. British and French Trust Corporation Limited* [1939] A.C. 1 where at p. 21 Lord Maugham said —

> "In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense."

Applying that principle to the present case the present issue was not raised and not decided. Accordingly I hold that the Plaintiff is not estopped from raising the question as to whether or not the deed of 21st December, 1956, is null and void.

There is, of course, another answer to this question. It is well settled law that it is a good answer to a case of estoppel that any exclusion of evidence by reason of it would result in statutory illegality.

The second issue for decision is whether or not the deed of 21st December, 1956, is illegal. The deed itself is as follows —

> "THIS DEED made the 21st day of December 1956 BETWEEN *RAMALINGAM* Father's name Sengodan of Naqoro, Raki Raki, Ra, Cultivator of the first part and *SENGODAN* Father's name Peria Karuppa Gounder of Naqoro aforesaid Cultivator of the second part.
>
> WHEREAS the said RAMALINGAM is the son of the said SENGODAN AND WHEREAS the said RAMALINGAM is the Registered proprietor of the following Native Leases: —

Title	Number	Description	Province	District	Area	Undivided Share
N.L.	4195	Qelemawai	Ra	Rakiraki	5a 1r 8p	Whole
N.L.	4163	Qalema	do	do	2 3 0	do
N.L.	1362	do	do	do	0 2 35	do
N.L.	31/539	do	do	do	1 2 31	do
N.L.	3082	Vaileka No. 3	do	do	1 0 14	do

AND WHEREAS the said Native Leases have expired and necessary applications for their renewal or extension have been lodged with the Native Land Trust Board AND WHEREAS the said RAMALINGAM and the said SENGODAN are desirous of making provision for each other.

NOW THIS DEED WITNESSETH that in consideration of the natural love and affection each of the parties bears towards the other the said parties covenant with each other as follows:—

1. The said RAMALINGAM shall hold the said leases and extensions or renewals thereof in trust for the use and benefit of the said SENGODAN during his life and after his death for the use and benefit of the said RAMALINGAM absolutely.

2. All the crops growing or to be grown on the lands comprised in the said leases shall be the property of the said SENGODAN and he shall be entitled to sell them in his own name without recourse to the said RAMALINGAM.

3. In the event of the Native Land Trust Board granting extensions or renewals of the said leases or any of them and the total area of all the extended or renewed leases being less than five acres the said SENGODAN shall provide in his will for a seventh share in all his property of whatsoever nature or kind and wheresoever situated absolutely."

It is admitted on behalf of the Defendants that the consent of the Native Land Trust Board was never obtained to this deed.

Does the deed come within the orbit of Section 12 of the Native Land Trust Ordinance (Cap. 104) which provides—

"12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the 29th day of September, 1948, to mortgage such lease.

(2) For the purposes of this section 'lease' includes a sublease and 'lessee' includes a sublessee."

For the Defendants reliance was placed on the decision in *Dhani Ram v. Habib Shah and Attwari,* Civil Appeal No. 9 of 1957 (Fiji Court of Appeal), as being authority for the proposition that a family arrangement in respect of proceeds from the sale of sugar cane does not contravene the provisions of Section 12 of the Native Land Trust

Ordinance and is therefore not illegal. It was contended that the deed of 21st December, 1956, was nothing more than such a family arrangement. In my view that decision is no such authority, the so called family arrangement not being an issue before the Court.

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The decision in *Chalmers v. Pardoe*, Civil Appeal No. 17 of 1960 (Fiji Court of Appeal), appears to be in point. In that case the respondent who was the lessee of certain native lands permitted the appellant to erect certain buildings on part of the land but at no time was application made to the Native Land Trust Board for consent to the erection of those buildings by the Appellant or his occu-
B pation of a portion of the leasehold land. It was held that this constituted a dealing in land within the meaning of Section 12 of the Native Land Trust Ordinance, that as no prior consent by the Board had been obtained to such dealing it was unlawful and that such illegality tainted any transaction between the parties.

Looking at the deed of 21st December, 1956, I don't think it can
C be construed as being anything other than a dealing in land. It is a licence to Sengodan to occupy the land, cultivate it and grow crops thereon for the period of his life time, and in my view, that comes within the scope of Section 12 of the Native Land Trust Ordinance. Since no consent was obtained such dealing was unlawful.

It would appear then that the Plaintiff has a good claim against
D the Colonial Sugar Refining Co. Ltd. for the proceeds of this cane. It was delivered to that Company in pursuance of a contract between him and the Company. Sengodan, who admittedly, in fact, delivered the cane, would not appear to have been able to claim against the Company. His claim would have been against the Plaintiff and that I have held to have been based on an illegal contract and one null and void ab initio. Any claim based on that contract must fail.

E Accordingly judgment will be for the Plaintiff with costs.

Judgment for the Plaintiff.