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IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 518 OF 1981

Between:

RAM DASS s/o Madho Singh PLAINTIFF
of Labasa, Fiji, Cultivator

- a n d -

1. JAHUR BEGG s/o Imam Begg
2. SALIM BEGG s/o Imam Begg
3. AKBAR BEGG s/o Jahur Begg
4. SHORAB BEGG s/o Salim Begg
5. JAFFAR BEGG s/o Jahur Begg
6. SAMSOOR BEGG s/o Jahur Begg
7. WAHID BEGG s/o Jahur Begg
8. HASENAR s/o Tiyamu
9. DEOKARAN s/o Ganga
10. ROOP CHAND s/o Deo Karan
11. ANIL CHAND s/o Deo Karan
12. PARDIP CHAND s/o Deo Karan
13. RAKESH CHAND s/o Deo Karan

all of Nabeikabu, Labasa Fiji, Cultivators DEFENDANTS

Mr. Hemant Patel for the plaintiff
Mr. H.K. Nagin for the defendants

J U D G M E N T

The plaintiff's claim against the 13 defendants is for damages for alleged trespass on Native Lease 12076 being Lot 22 Bucalevu Subdivision comprising 67 acres 2 roods situated in Labasa and for an injunction restraining them from entering upon the said leasehold.

An Appearance was entered for the first 8 named defendants and a Defence filed on their behalf.

The first named defendant died before the hearing of this action.

The ninth, tenth and eleventh defendants were served with (inter alia) a copy of the writ of summons but none of them have entered An Appearance.

The last two defendants do not appear to have been served with the writ of summons.

There has been a long history of trouble between the plaintiff and the first seven named defendants whom I will refer to as the Begg Family.

The parties are all cane farmers. The Begg Family live a little beyond the farm of the plaintiff. The Begg Family contend that their only access to get to their farm from the Government road is to travel on the Nabekavu Feeder Road which on the plan annexed to NL 12076 stops at the boundary of the plaintiff's land and proceed thence alongside the boundary of that lease across the land known as Lot 23 to the land of the late Jahur Begg known as Lot 24.

The Begg Family say there is no other road they can use to get from their farm to Labasa Town or to a mosque where the family worship.

The precise position of the strip of land used as a road alleged by the plaintiff to be within the boundaries of his lease is in doubt and I will refer to the evidence on this later. At this stage I can state that the strip of the road is not in the position shown by the plaintiff in the plan annexed to his Statement of Claim. The Surveyor, Mr. David East, called by the plaintiff when

shown the plan annexed to the Statement of Claim stated that the road does not run across the land.

In February 1974 the plaintiff commenced a Supreme Court Action No. 53 of 1974 against 9 defendants claiming damages for trespass. The said Jahur Begg was one of the defendants and defendants Nos. 2 to 5 inclusive in this action were four of the 9 defendants.

An order in Civil Action No. 53 of 1974 was made by consent for the action to be heard by the Magistrate Labasa. He heard the case and granted the plaintiff an injunction restraining the 9 defendants, except for the purposes provided under item 4(d) of the Denning Cane Contracts, from entering upon the land of the plaintiff's comprised in NL. 12076 and as shown on a diagram attached to the Statement of Claim and"in particular from entering upon the alleged 'access road' ".

This injunction was granted on the 30th June, 1976. Prior to this date on the 16th day of January, 1975, the Native Land Trust Board as lessor of the said land gave the plaintiff notice of its intention to resume part of the said land. The Board went into occupation of that part of the land and cut down some of the plaintiff's sugar cane. The plaintiff then commenced an action against the Board for certain declarations and damages. Judgment was given by this Court for the plaintiff.

The judgment indicates that condition 2 of NL. 12076 permitted the lessor to resume up to one twentieth of the land without compensation for making roads,etc. The area proposed to be resumed was 3 roods 16 perches and it was agreed by the parties that it was required by the Board for use as a public road.

Judgment was given against the Board because it had not taken the proper legal steps to resume the area

before it forcibly went into occupation.

The Court pointed out three means of obtaining its objective one of them merely requiring a formal instrument of resumption and registration of it under the provisions of the Land Transfer Act.

The Board has apparently done nothing since judgment was given against it although it would appear it could have put an end to the present dispute long before it came to Court by taking the proper steps to resume the area for the use of the public as a public road.

The evidence before me indicates that the strip of land has been used by the general public for many years and is now used by vehicular traffic.

On the 5th August, 1981, the plaintiff commenced the present action against 13 defendants. The day prior to issuing the writ in this action the plaintiff purported in Action 518 of 1981 to apply for leave to issue writs of attachment against five members of the Begg Family (defendants 1 to 5 inclusive).

Leave was not granted because the procedure envisaged by Order 52 of the Rules of the Supreme Court had not been followed. The application purported to be made in respect of an action which had not at that time been instituted.

The plaintiff did not make any further application for leave to issue writs of attachment against the five defendants. He applied however for an interim injunction against the 6th to 13th defendants inclusive. The plaintiff experienced difficulty in effecting service on the eight defendants. This application was never heard because an early date for trial was given. The application was dismissed a few days before the trial when the plaintiff's solicitors did not appear on an adjourned date.

The first eight defendants in their Defence denied using part of the plaintiff's land.

At the trial Mr. Nagin applied for and obtained leave to amend the Defence and to Counterclaim.

Leave was granted on the 9th June, 1983, on terms that the amended Defence and Counterclaim be filed within 14 days. It was not filed until the 12th August, 1983. The defendants were also ordered to pay $150 agreed costs within 14 days.

As at the 15th August, 1983, the $150 had not been paid and on that day Mr. Nagin undertook that it would be paid the next day.

Notwithstanding failure to comply with the terms of the order the plaintiff filed a Reply and Defence to the Counterclaim.

The main issue is whether the short strip of road about 3 chains in use by the public is on the plaintiff's leasehold.

The first witness called for the plaintiff was Mr. D.C. East a registered surveyor. His evidence in chief was surprisingly brief. He said he had seen the leasehold and he produced an aerial photo of the area. He was not asked any question about the photo but Mr. East said the road was just within the boundary of the plaintiff's land. The area he said was 35.5 perches.

Mr. East provided more information under cross-examination but it transpired that his last survey of the land was in 1974. He produced no plans. He said the aerial survey was in 1978 by the Lands Department.

No explanation was given as to the blue pencilled

marks on the aerial photo purporting to show boundaries of Lots 22, 23 and 24. If Mr. East made these marks on the photo he should have been asked about them.

The only use I can find for the photo is confirmation of Mr. East's statement that the road does not run across the plaintiff's land as the plaintiff pleaded but runs along the boundary. That however was in 1974.

The plaintiff's evidence in chief was also brief. Mr. Nagin, however, without admitting road passed through plaintiff's land admitted that his 7 clients had been and were still using the road.

The plaintiff said that he planted cane on the area where road is but that a son of Jahur Begg whom he did not name bulldozed the cane and made a road which is now metalled. He fenced his land and it was pulled down. He lost two goats which were run over but he did not see the truck that ran over them.

Under cross examination he denied that there was a road on his land before he first moved onto the land. He alleged that previously road went through his neighbour Binessari's land and when Binessari fenced his land the Begg Family used his land.

Salim Begg, the second defendant said his deceased brother, Jahur Begg, was the first Indian to take up land in that area. The witness used to visit his brother and the road he used was the one in dispute. The plaintiff was not then living on the land he now occupies but on Binessari's land. The road was the only access to his brother's land and was also used by Fijians living in four Koros in the vicinity.

About 20 years ago a committee had been formed, when the road was a feeder road to look after the road.

Plaintiff admitted he contributed to upkeep of the feeder road.

Salim Begg said the road was the only road he could use to go from his farm to Labasa and to a nearby mosque. He said he had used the road for 26 years.

He said the general public use the road and it is also used by a bus which his son drives. He said also that the Native Land Trust Board informed them that they could use the road. In cross-examination Salim Begg admitted that he was ordered by the Labasa Court not to use part of the road which went through the plaintiff's land and that it is the same portion of road which he is now using.

Mr. A.P. Maharaj, an Advisory Council Member, testified that the Road Committee maintained the whole length of road including the disputed portion of the road and that the plaintiff was aware of that situation. Mr. Maharaj said he used the road for a very long time and the plaintiff never stopped him using it. He confirmed Salim Begg's statement that the road is the only road to and from Labasa for the Begg Family.

Mr. Maharaj also confirmed that the road had been in use long before the plaintiff obtained his lease.

Under cross-examination Mr. Maharaj stated he knew the road ran through the plaintiff's land and that the plaintiff had fenced his land in 1981 and that the fence was pulled down two or three times.

Salim Begg when recalled did not admit land passed through the plaintiff's land. He said the Begg Family and the plaintiff had been on good terms prior to a dispute, which he did not specify, arising. He said also that until the dispute did arise the plaintiff did not complain about gravel being put on the land.

It has not been established by the plaintiff that the disputed strip of land runs across his land in the position he has shown it on the plan annexed to his Statement of Claim. In 1974 it ran just inside his southern boundary and parallel with it. It is a well defined strip of road wide enough for two vehicles to pass and gravelled. It is maintained by a Road Committee.

The evidence before me is that the plaintiff uses about half his 67½ acres for cane. He has not established that he grew cane on the strip of land nor that any of the defendants ran over and killed two of his goats.

The strip of road is in daily use by the general public who have used it for many years.

Mr. Nagin's admission that his clients (defendants 2 to 8 inclusive) have been and are still using the road makes it not necessary to determine where the disputed strip of road is on the plaintiff's land. There is evidence that it is on his land.

There has been no such admission by the 9th, 10th or 11th defendants who have not delivered a defence. No specific mention was made of these defendants by the plaintiff or by his counsel.

Mr. Ramrakha did allege that defendants 9 to 13 inclusive had been served but there is no record that the last two were served. I am not satisfied that the last five named defendants did trespass on the plaintiff's land. If they are cane farmers there are occasions during the cane harvesting season that they would be permitted to enter in the plaintiff's land if that was the only way they could get their cane off.

The plaintiff made no mention of the provisions of the sugar cane contract of general application and it is

not known what specified rights other cane growers have to enter upon the plaintiff's land.

The injunction granted to the plaintiff on 30th June, 1976, which affects the 2nd, 3rd, 4th and 5th defendants, excludes entry on the plaintiff's land for the purposes provided under "item 4(d) of the Denning Cane Contract". The injunction is unlimited as to time and is still in force.

I find as a fact that the 2nd to 8th defendants have been trespassing on the plaintiff's land. That is clear from their admissions and the evidence before me. I have no evidence as to the number of times they have trespassed but it was on more than one occasion. The 2nd to 4th defendants have trespassed notwithstanding the injunction affecting them.

There is not in my view any merit in the defendants defence.

They pleaded (inter alia) that the road had been dedicated as a road both by the landowners, the members of the Sauniduna Mataqali and the Native Land Trust Board.

As to the first allegation the "landowners" are not owners of the land in the legal sense and cannot purport to deal with alienated native land.

As regards the Board, there is no evidence of dedication of the road. There is evidence of an abortive attempt to resume part of the leasehold but no evidence of any other moves by the Board to provide proper access for its tenants.

The situation is a potentially explosive one which could lead to bloodshed. The plaintiff has singled out the Begg Family while apparently permitting the public generally to use the disputed strip of road. He is aware

the strip is the only access for the Begg Family and if he succeeds that access will be blocked in addition to access to their mosque.

The remedy lies in the hands of the Board. They have power to resume land for the road and should do so urgently to avoid trouble in the area escalating.

The plaintiff was not an impressive witness and I do not consider he was truthful about the origins of the road which I am satisfied was in existence long before he came on the land. Whatever the nature of the dispute he has shown he is a stubborn man and determined to enforce his legal rights come what may.

The defendants pleaded also that the road is now a public road within the provisions of the Road Act and is known as Nabekavu No. 1.

Road C134 is Nabekavu No. 1 road and it is a public road. It is described in section 3 of the Road Act as :

> "Commencing on the Delaikoro Road at a point about 2¼ miles from its junction with the Wailevu-Naduna Road; thence following a general westerly direction to end in a cul-de-sac. Distance about 1.25 miles."

I do not know where the "cul-de-sac" is. The last order made under section 3 was on 29th March, 1976. This was 3 months before the date of the injunction. It must be accepted that the Magistrate's Court was satisfied that the strip of land on the plaintiff's leasehold was not part of a public road when it made the order.

Paragraphs 9 to 12 inclusive of the Defence seek to establish that the disputed part of the road now in use is part of a public road because the plaintiff and/or the Native Land Trust Board have by their conduct dedicated

a right of passage over the land to the public and acceptance of that right by the public. "Dedicated" in this sense is not a formal dedication but the person who has capacity to dedicate has either said by so many words or so conducted himself as to lead the public to infer that he meant to say, that he was intending that the public should have the right of passage. From the moment the public have accepted the dedicated way, by user, there is a right of passage by the public.

A lessee cannot however dedicate land as a public road without the consent of the owner of the freehold (R. v. East Mark Inhabitants (1848) 11 Q.B. 877 at 883). The plaintiff as lessee could not do so. The Board is not the owner of Native land and is not empowered by the Native Land Trust Act to dedicate land for use as a public road.

The plaintiff has also raised the issue of estoppel but there is no merit in that defence. The land is Native land and section 12 of the Native Land Trust Act would invalidate any action by the plaintiff to give the public a right of way over his land without the consent of the Native Land Trust Board.

The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has on grounds of general public policy enacted it to be invalid (Kok Hoong v. Leong Kweng Mines Ltd. (1964) A.C. 993 at 1016 (1964) 1 ALL E.R. 300 at 308).

There is in my view no merit in any of the Defences raised by the defendants and it follows there is no basis laid for a declaration that the disputed land is part of a public road.

The Counterclaim is dismissed with costs to the plaintiff.

I am satisfied on the evidence before me that the above named seven defendants numbered two to eight have been and were at the time of the trial using portion of the road which was on the plaintiff's land without his permission. That constituted a trespass for which the plaintiff is entitled to damages.

I turn now to the relief claimed. The plaintiff claims general damages of $5,000 against the second to fifth defendants. This appears to be a claim for exemplary or punitive damages for disobeying the injunction.

The plaintiff instituted proceedings before he issued the writ in this action for leave to issue writs of attachment against the four defendants which was dismissed. He did not take further action to have the defendants punished for apparent breach of a Court Order but elected to sue for damages in respect of further acts of trespass. I do not consider that the facts in this case justify the award of punitive or exemplary damages. Such damages since Rookes v. Barnard [1964] A.C. 1129, apart from statute can only be awarded in two categories of cases namely -

> "oppressive, arbitrary or unconstitutional action by servants of the government and secondly cases in which the defendants conduct has been calculated by him to make a profit for himself which may well exceed the compensation payment to the plaintiff."

There has been no evidence led to indicate the dates of the acts of trespass or the number of acts of trespass but the probability is that the defendants (2 to 8) have been using the road for some considerable time. All of them would have been aware of the plaintiff's objections to their use of the road across his land and most of them were aware of the Court order.

Their conduct justifies a higher award than that fixed by the Magistrate in 1976 of $10 damages.

I award the plaintiff damages of $50 each as against each of the seven defendants (Nos. 2 to 8). I do not accept that the plaintiff suffered any other loss or damage and in particular the alleged special damages for loss of use of the land. He has not used more than half the area of his land and has clearly permitted others to use the road without protest.

The plaintiff also seeks an injunction against the defendants restraining them from entering on his land.

He already has an order against four of the defendants (Nos. 2 to 5). It is not in a form in which I would have made and could have been more clearly stated and with more detail. Not everybody has access to a copy of the "Denning Cane Contract".

There has been no request to vary this order or substitute a new order and accordingly I do not make any further order against the four defendants.

There remains the 6th, 7th and 8th defendants who admitted using the road. The plaintiff made no specific mention of them. He did not produce a copy of the Denning Cane Contract or seek to amend his prayer for relief or in any way assist the Court to make a clear enforceable order if the Court was minded to make an order.

The Court is aware that these three defendants if they are cane farmers with a need to use the plaintiff's land to harvest and transport their cane could have a right to use the road for several months. The order sought would if granted interfere with their contractual rights.

The Court is in no position to grant the injunction in the form the plaintiff seeks and declines to make the order sought.

I do not make any order restraining any of the defendants from entering on the plaintiff's land. If there

are further trespasses, which seems inevitable unless the Board moves promptly to resume the area for use as a road, the plaintiff will have to take action against four of the defendants for disobedience of a Court order and commence another action against the others in which the proper basis is laid for an injunction which can be clearly expressed and understood by those effected by it. Whether the plaintiff will succeed in obtaining orders that will stop the defendants using his land will depend on the facts at the time.

This is very much a case where, if the Board, which must accept the blame for lack of legal access to so many farmers, does not act, the plaintiff should be compensated for the use of his land. The Court may well in all the circumstances consider that it would be impracticable to grant injunctions where it appears so many farmers are forced to ignore the orders because they have no other access to their lands. Monetary compensation may be given if the plaintiff cannot be persuaded by the parties to consider the plight of those without proper legal access to their land.

The claim against the 5 defendants numbered 9 to 13 both inclusive is dismissed with no order as to costs.

The defendants numbered 2 to 8 inclusive are to pay the plaintiff's costs of this action.

R.G. Kermode

(R.G. KERMODE)

JUDGE

S U V A,

21st JUNE, 1984.