

KILARA, Plaintiff

v.

OPA, Defendant

Civil Action No. 104

Trial Division of the High Court

Truk District

February 6, 1959

Action to determine title to land on Uman Island, in which defendant claims land as proceeds from exchange whereby land was given to plaintiff for house which was wrongfully converted by plaintiff's son from defendant. The Trial Division of the High Court, Associate Justice Philip R. Toomin, held that defendant failed to establish wrongful conversion of house by clear and convincing evidence or that there was any agreement to exchange land for house, and that therefore land belonged to plaintiff.

1. Trusts—Conversion of Trust Property—Tracing

Beneficiary of trust may elect to take proceeds of wrongful conversion of trust property.

2. Trusts—Conversion of Trust Property—Tracing

If wrongful converter of house delivers house to nephew and then buys land for cash, title to land does not vest in rightful owner of converted house.

3. Trusts—Conversion of Trust Property—Tracing

If wrongful converter of house delivers house to nephew and then buys land for cash, rightful owner of house may recover damages for conversion or reclaim his property.

4. Trusts—Conversion of Trust Property—Tracing

Only if wrongful converter exchanges converted house directly for land would rightful owner of house be entitled to land as proceeds of wrongful conversion.

5. Trusts—Conversion of Trust Property

Where house is moved from one land to another, in clear view and with acquiescence of owner, evidence fails to indicate wrongful conversion of trust property.

6. Trusts—Conversion of Trust Property

Party alleging wrongful conversion of trust property has burden of establishing fraudulent conduct by evidence which is strong, clear, positive and convincing.

TOOMIN, *Associate Justice*

I. FINDINGS OF FACT

1. During middle Japanese times, plaintiff and her brother Sanemuar were the owners of title and use-rights in the land Uttapek located in Sannuk Village, Uman Island, Truk District. The land had been inherited from their mother, Kinan, and all its production was divided equally between plaintiff and Sanemuar.

2. During middle Japanese times, plaintiff and Sanemuar made a gift of Uttapek to Sanemuar's children, Taro, Tiu and Sitina. However, the use-rights were not included in the gift, so that Kilara and Sanemuar continued to receive the production until Sanemuar's death in 1934.

3. Upon Sanemuar's death, his children started to receive the production from this land, along with Kilara. This continued for a short time when it was reported to plaintiff that Sanemuar's son, Taro, was negotiating a sale of Uttapek to other persons. With plaintiff's approval, her son, Eseng, then bought Uttapek from Taro

and his sisters for 100 yen, part of which was supplied by Eseng's father-in-law.

4. After selling the land, Taro and his sisters continued to get the production. Eseng was selected village chief, and under his leadership the people of Sannuk, Sapota and Saputi Villages started the erection of a meeting hall either on or adjoining Uttapek. Defendant, Opa, whose wife was a sister of Eseng under the custom, offered him the use of a house then on Opa's land in Sannuk, and caused it to be moved and installed on Uttapek. The basis on which the house was offered and accepted was that it would be used as long as needed by Eseng and his wife, and then returned to Opa. It was contended by defendant but denied by plaintiff's witnesses, that Eseng was to pay rent of five yen per month. The court is not satisfied that the proof in this regard is adequate. While it is clear that no such rent was paid by Eseng, he did pay the tax due the village with respect to this house. He also added to the house a porch and necessary platforms.

5. During the war years, Eseng and plaintiff left Uman and settled on Tol Island where Eseng died in 1947. One year prior to leaving Uman, Eseng turned Opa's house over to Taro and his sisters for their use. They moved it from Uttapek to their land in Napolong Village. At that time the house had no roof and was otherwise in bad condition, but with some repairs was usable. There is no evidence that Opa consented to this use of his house.

6. In 1948 Opa moved onto Uttapek and erected his house there. He has been receiving its production since then except for the times when plaintiff visited Uman, at which times she received a share of the production. Since 1958 Opa has restrained plaintiff from coming on the land and taking any of its production.

7. Defendant has offered evidence that when he discovered the moving of his house from Uttapek and its

use by Taro and his sisters, he demanded its return, and settled with Taro by an exchange of the house for title to Uttapek. The evidence of this alleged bargain is not clear and convincing; moreover, at the time claimed, Taro had already sold Uttapek to Eseng and had no interest therein which could be the subject of an exchange. The court, therefore, finds the proof of this alleged transaction to be inadequate, and the alleged exchange, invalid.

II. CONCLUSIONS OF LAW

[1] It is defendant's theory in this case, that in violation of his duty to return in good condition the house rented of defendant by plaintiff's son, that person exchanged the house for the subject property; and that when defendant discovered the fraudulent action, he was able to negotiate a similar exchange with the persons in possession of the house. Defendant further theorizes that since the action of plaintiff's son was unauthorized, it amounted to a breach of trust and a conversion of defendant's property, and, therefore, defendant is entitled to recover whatever was obtained by the converter in exchange for it. This is based on the doctrine that the beneficiary of a trust may elect to take the proceeds of a wrongful conversion of trust property. 54 Am. Jur. 193, Trusts § 250.

However, for the reasons stated hereinafter, the court is of the opinion the rule on which defendant relies is inapplicable here.

It is undisputed that the land in question had been owned by plaintiff and her brother in German times, and that they had given it to the brother's children in Japanese times. After the father's death in 1934 and the consequent necessity of finding someone else to work the land, the children considered the desirability of selling the land to the leader of their father's lineage. When plaintiff heard

of this, she encouraged her son to repurchase the property for a consideration which was paid. The payment and its distribution among the three sellers was established by testimony to that effect by one of the three, and the son of another. This sale took place either shortly before or during World War II.

What happened after that is not entirely clear. For some reason not shown by the record, plaintiff's son elected to deliver defendant's house which he was obligated to return to defendant after he no longer needed it, to his cousins, to be erected by them on land they owned in an adjoining village. Defendant contends the house was delivered in exchange for the land Uttapek. The court has, however, found that the land was acquired for cash. (See Finding of Fact 3.)

[2, 3] If in fact the land had been acquired for cash, and the delivery of the house to plaintiff's nephew and nieces had not been authorized by defendant, he had the right to reclaim his property from them upon demand, or make claim for damages for the conversion. This would not operate to vest title in him to the land purchased for cash, as that title would have vested in plaintiff's son upon payment of the purchase price.

[4] It is only upon the theory that there had been an exchange of defendant's house for the land, that he could become entitled to follow the proceeds and elect to take the benefit of the exchange. Let us see whether the record is susceptible to defendant's theory.

As background against which we must view the charges and acts of the parties, it should be noted that when Eseng delivered defendant's house to plaintiff's nephew and nieces, he had occupied it for a period of three to five years. It was not new when he acquired it, as it had been occupied by defendant's son Sotem, for several years. Nor

was it new when Sotem first occupied it, as it had been acquired by his father some time before in exchange for an island.

According to Kanchi, the ex-wife of Eseng who lived in the house with him, it was in a raw state when it was erected on Uttapek, necessitating the addition of porches and platforms to make it usable. When it was delivered to Eseng's cousins by him, the roof was missing and the house was ready to fall down. This was the testimony of one of the cousins, Tiu, who said the house was given to them by Eseng to take care of for him.

[5] The house was moved openly and installed in Nepo-long Village under the supervision of Eseng who was then the village chief. Eseng and his wife then went to live in the big house erected by the three villages on land adjoining Uttapek. The moving and erection of a house formerly occupied by the chief, and his moving into a larger house, could hardly fail to be noted by everyone in a village of about eight hundred persons. And particularly must it have been apparent to defendant, as his wife and Eseng were brother and sister under the custom, and according to defendant's witness, Tinopan, the two families visited each other frequently both before as well as after the moving. Moreover, Eseng remained on Uman in the big house for at least a year after removal of defendant's house from Uttapek.

Under the circumstances above recited, it is difficult to believe that the open removal of defendant's house to another location was without his knowledge and approval. It is also difficult to believe that any wrongful act was intentionally committed by Eseng, for he stayed in the vicinity over a year before leaving during the exigencies of the war years. And when he left, it was not to travel to where he would be inaccessible, but merely to Tol Island, only a few miles away.

[6] Defendant asks this court, in essence, to impugn the memory of a dead man with a finding of breach of trust, amounting to theft. This the court would not hesitate to do if necessary to a consideration and decision of this case, and if established by clear and convincing evidence. Since this is an issue on which defendant has the burden of proof, he must establish the fraudulent conduct by evidence which is strong, clear, positive and convincing. 24 Am. Jur. 118, Fraud and Deceit, § 278.

Considering the background detailed above against which the actions of the parties must be scrutinized, the relationship and close association of the parties, and considering also that defendant did not take possession of and build his house on Uttapek until 1948 when Eseng was already dead, the court is constrained to hold that the proof falls short of establishing an exchange of defendant's house for the land Uttapek and the claimed breach of trust on Eseng's part.

III. JUDGMENT

It is, therefore, ordered, adjudged, and decreed as follows: —

1. As between the parties hereto and all persons claiming through them,

(a) The land Uttapek located in Sannuk Village, Uman Island, Truk District, and the use-rights therein, are owned by the heirs-at-law of Eseng, who are plaintiff Kilara and his brother Mornins.

(b) Defendant Opa has no right, title or interest therein, save the right to remove within a reasonable time, the house erected by him on said premises.

(c) Possession of said premises shall be delivered to plaintiff, together with the exclusive right to take production from said land, upon the service on defendant's counsel of a copy of this order, provided that defendant

shall have thirty days from the date of this order to remove his house from said premises.

2. This judgment shall not affect any rights of way over, across, or upon said parcel of land.

3. No costs are assessed in favor of or against any party.