

JAMES SHANKAR SINGH v. APARAMA RATU

17

JAMES SHANKAR SINGH

A

v.

APARAMA RATU

B

Civil Jurisdiction

[SUPREME COURT 1979 (Dyke, J.), 30th March]

Civil Jurisdiction

*Ejectment—Land Transfer Act s. 169—Unsuitable remedy in circumstances—action in open court more appropriate.* C

M. T. Khan for Applicant.

G. P. Shankar for Respondent

Applicant sought an order of ejectment against the respondent pursuant to the Land Transfer Act 1971 upon the basis that he was the last registered proprietor of the land. The court accepted that applicant had that status. D

However, the facts of the case were such that the Court considered that applicant should pursue the remedy of ejectment in “open court”, as the facts to which he referred, he said, called for full inquiry.

There was some evidence that the land in question was “native reserve”; which would make the appellant’s title void by reason of the provisions of the Native Land Trust Ordinance, Cap. 115 s. 16. E

Further, on the facts before him, the learned Judge noted that the relevant land was by survey, found to be part of land subject to an existing freehold or leasehold. Villagers had farmed the land continuously since 1972. It was this land of which applicant claimed to have been given a 10 year lease dating from 1/7/72—forming part of the land apparently leased to the villagers some seven months earlier. F

It was argued against applicant that there was a suggestion of fraud. The Court without so deciding was of the view that there were aspects of the whole transaction “requiring close scrutiny”. G

The Judge made reference to further facts which he considered pertinent.

*Held:* Summons dismissed with costs. It was not necessary in these proceedings to decide who had the better title. There were issues of importance involved which should not be avoided by seeking an order at ejectment by summons on a technical point. H

DYKE, J:

## Judgment

A

The land in question is part of a larger area owned by the Mataqali Yavusa Votua of which the respondent is a member. This is recognised in the lease granted to the applicant by the Native Land Trust Board. There is no doubt that the land is native land within the definition contained in the Native Land Trust Ordinance. According to the affidavit of Ratu Soso Katonivere the Assistant Commissioner of Native

B

Land he is of the opinion that the whole of this land is also native reserve, which if correct would make the applicant's title void, since in accordance with Section 16 of the Native Land Trust Ordinance (Cap. 115), no land in any native reserve may be leased or otherwise disposed of to anyone but a native Fijian (which the applicant is not). He referred the court to the *Fiji Royal Gazette* No. 43 of 1949, Notice No. 594. But that notice states that the Native Land Trust Board has approved the setting aside as native reserves of certain lands (including the land in question). The notice goes on,

C

"It is not practicable at the present time to demarcate the boundaries by survey on the ground, and it will not therefore be possible to proclaim the areas to be native reserves in accordance with the provisions of Section 16 of the Native Land Trust Ordinance. Until such time as the areas are so defined and proclaimed, the areas indicated above will for the purposes of administration be treated by the Board as if they were native reserves proclaimed under the Ordinance, and no part of the lands comprised therein will be leased, either as an extension of an existing lease beyond the normal date of expiry of as a new lease."

D

This was clearly a solemn declaration of intention by the Native Land Trust Board, purporting to bind it at that time. There has been no evidence before me that there has been a change of policy, and clearly the land has always been regarded as native reserve by the respondent and by the Assistant Commissioner of Native Lands.

E

Moreover in December 1971 the Board issued a lease for 30 years to Viliame Neisau for and on behalf of the Votua Village, at a stated rental, for agricultural purposes. Viliame Neisau having died the lease was re-issued to the respondent for and on behalf of the village by Approval Notice dated 7/5/76. This was merely a change of name since both Viliame and the respondent were or are trustees for the rest of the villagers. A survey fee was apparently collected both times. I note that both

F

Approval Notices have at the bottom, as an integral part of each form, the following:—

"I, being the tenant, accept this approval to lease on the terms set out therein and request that the lease be registered under the land (Transfer and Registration) Ordinance."

G

Had the Board registered the leases as requested that would have been an end of the matter. But apparently the Board did not do anything about the request.

Clause 5 of each notice says,

"In the event of it being shown by survey that the land provisionally approved for lease forms part of any land the subject of an existing freehold or leasehold title, this notice of approval of lease shall be deemed to be cancelled, without prejudice or loss to the Board."

H

But it has been shown that the land was surveyed and found to form part of land subject to an existing freehold or leasehold title—at least not when the approval notice was first issued. The villagers have farmed the land continuously since 1972. The applicant claims to have been given a 10 year lease of the land in question (which forms part of the land apparently leased to the villagers) dating from 1/7/72, i.e.

seven months after the leasehold had already been given to the villagers, at a rental which seems to be very significantly less than that paid by the villagers.

The respondent in his affidavit says that a meeting of the Mataqali sometime in 1972 agreed to a 10 year lease to the applicant of a 10-acre plot only of the land in question. He says also that at that meeting the question of dereserving the 10 acres was not agreed to. That affidavit has not been challenged. A

I note that although the applicant claims to have been granted the lease since 1972, the memorandum of lease was not drawn up and signed until 20/6/77, i.e. over 5 years later and over a year after the Board had reissued the Approval Notice to the villagers. The applicant wasted no time in having his title registered and now seeks to call in aid Section 39 of the Land Transfer Act 1971, as he is now the only person with a registered title to the land. Armed with this registration he now asks the court to evict from the land villagers who have been in occupation of it since at least the beginning of 1972 and who have farmed the land continuously, without having the whole matter thoroughly thrashed out in open court. B

Quite clearly there are issues of considerable importance involved here and to try to short circuit them by seeking an order of ejectment by summons on a rather technical point is a course that does not commend itself favourably to me. C

I note that Section 39 of the Land Transfer Act 1971, whilst giving the registered proprietor of land a paramount title makes an exception in the case of fraud. Counsel for the respondent has argued that there is at least the suggestion of fraud, and I must agree with him that there are aspects of the whole transaction that require close scrutiny. I do not necessarily imply that the applicant was responsible, but the actions of the Native Land Trust Board seem very questionable. D

Even accepting that the declaration of intention to treat the land as native reserve as indicated in the *Fiji Royal Gazette* in 1949 was not legally binding since it was not a proper proclamation, surely the Board must have been morally bound to follow its declared intention, or to make clear and public that it was no longer prepared to honour the declaration. E

In any case even if the land were not native reserve, it was clearly native land and I note that section 4 of the Native Land Trust Ordinance requires the Board to administer native land for the benefit of the Fijian owners, and section 9 of the Ordinance states as follows:— F

“No native land shall be dealt with by way of lease or licence under the provisions of this Ordinance unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.” G

Whereas, in accordance with the respondent's affidavit, a lease of 10 acres for 10 years might not have been open to objection, the grant of 35 acres is certainly questionable, particularly when the villagers had been given approval for a 30 year lease for the same land and were occupying it and farming it, and even raising loans on the security of the land. The actions of the Board are even more questionable when account is taken of the fact that the lease given to the applicant was allegedly dated 7 months after the Board gave approval for the lease to the villagers and that this H

A approval for a lease was apparently reconsidered and reissued in the name of the new trustee in May, 1976 just over a year before the memorandum for a lease to the applicant, back-dated to 1972, was executed. Add to this the fact that the rent for the lease to the applicant is very significantly less than the rental paid by the villagers, and also that it would appear that the Board has been since 1972 receiving two lots of rent for the same piece of land (at least I must presume that both parties have been paying the rent due under their leases) and I think that there are enough questionable aspects to raise at least a suspicion of fraud, sufficient to cast a doubt over the applicant's title.

B There is another point to consider. The summons for ejectment has been brought under Section 169 of the Land Transfer Act 1971 and Section 172 reads as follows:—

C “If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagor or lessor or he may make any order and impose any terms he may think fit:

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled.”

D The respondent has certainly shown that he has a genuine right to possession of the land and has shown good grounds for attacking the applicant's title. It may be that after full inquiry and hearing in open court his right may be found inferior to that of the applicant, but contrary to what counsel for the applicant has urged, I do not think that I have to decide conclusively in these proceedings who has the better title. These proceedings do not by any means exhaust the remedies of either the applicant or the respondent, as the proviso to the section shows. There would be no need for the proviso if this were so. I understand that the respondent is already in the process of taking action to attack the applicant's title.

E In view of what I have said above I dismiss this summons with costs.

*Judgment for the defendant.*