

JAI CHAND

v.

SHEILA MAHARAJ

[SUPREME COURT—Rooney J., 26 August 1983]

Civil Jurisdiction

V. H. Kalyan for Plaintiff

A. Singh for Defendant

Conduct encouraging woman with children to live with a man treating them as his family may provide a licence to remain in his house or estop him from obtaining an order for ejectment.

Application for possession of dwelling house being sublease of Lots 24 and 25 on D.P. 4107 situated at Samabula against the defendant and her elder children as second defendants.

The facts undisputed or found by the Court included that plaintiff was the legal tenant of the Housing Authority (the Authority) under the registered sublease which was for a term of 94 years commencing on 21 November 1973 but executed on 18 July 1978 and registered on 19 September 1978. The plaintiff as the registered owner of the sublease was entitled in law to the possession of the demised premises.

The defendant contended that she and her children had a right to remain in possession of the house for the rest of their lives by reason that plaintiff had granted to her an irrevocable licence; that by reason of the conduct of the plaintiff he was estopped in equity from asserting and enforcing his legal right as owner against her asserting and that this court should intervene and prevent the plaintiff from obtaining possession because it would have been inequitable to permit him to do so.

Facts which the court found included the following:

In or about 1967 the plaintiff was employed as a Foreman in a small factory at 73 Suva Street. The defendant joined the firm in 1968. She and the plaintiff became lovers and their association had continued until October 1980, during which period their relationship was stable and had the appearance of permanence.

The defendant became the defacto wife of the plaintiff and a child was born to them on 29 April 1970. In the early period of their relationship the parties lived at her brother's house at Samabula. In 1973 the defendant moved to a flat at Navua. Although plaintiff denied that he lived there with her on a permanent basis, but the court accepted that the parties lived there as man and wife until they moved to the new house in Kinoya.

A Although plaintiff denied that he lived there with her on a permanent basis, but the court accepted that the parties lived there as man and wife until they moved to the new house in Kinoya.

The plaintiff showed an apparent anxiety to play down the nature of his association with the defendant.

B Defendant's earnings in employment were modest. She said she gave her wages to the plaintiff for household expenses. The plaintiff told her that he was paying for the new house instalments. She was unaware of the loan arrangements made by the plaintiff in connection with the house. For a time the couple maintained a joint account in the A.N.Z. Bank Suva. The plaintiff denied that defendant gave him her wages but did admit that sometimes she contributed to the family expenses.

C The court was satisfied that the defendant as a working housewife, used her earnings for the support of the family as a whole and the plaintiff financed the purchase of the land and construction of the house from his own savings and money borrowed from his employers.

D On 29 October 1973 the plaintiff submitted a tender to the Authority for various lots available under a scheme called the Kinoya Stage Housing Authority 7 Plan B. In the tender he gave his wife's name as Sheila Maharaj and his residential address as Samabula 3 miles. The tender contained the following declarations:

"I hereby declare that I am married and that I or my wife own no other house or land or share or interest in a household land within Fiji"

E It is not in dispute that the Housing Authority plan provided for the allocation of the land for which tenders were required to married couples only. The plaintiff as a single man (his legal status) could not have obtained a sublease; his tender would not have been considered by the authorities if he disclosed he was not married.

F The tender was accepted. The plaintiff completed a formal application for land in which the defendant was named as wife of the applicant, the couple again being described as married with 2 children.

G Though it was not so found, the impression of the learned trial judge was that the names of both the plaintiff and defendant were signed by the same person. Apart from a letter of 14 November 1973 addressed by the Authority to the plaintiff and defendant jointly all further business relating to the land and the construction of a house was carried on by the plaintiff.

Evidence supported that the policy of the Authority had been that the applicant's wishes in regard to whose name a lease was to be granted would be acceded to by the Authority.

H Defendant's evidence in relation to the acquisition of house was consistent with the above facts. She said that the plaintiff told her that the property would be for both of them and she believed him. When she moved to the new house with the plaintiff she did so because their relationship was permanent and she expected to remain with the plaintiff for the rest of her life.

In October 1980 plaintiff left the house whilst the defendant and her children had continued to remain in occupation. The plaintiff denied ever telling the defendant that the house would belong to her as well but did tell the Authority that the defendant was his wife.

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Evidence disclosed that he said:

"I knew that I would not get the property as a single person. I put the application in that way in both our names but I applied for myself as they were not interested to stay with me."

B

In 1981 plaintiff married again, had a child and lived with his parents.

There was no doubt, as the court found that when the plaintiff obtained the lot and later set about constructing a house he told the defendant that he was building it for what was in fact for his family at that time; in that defendant was under the impression plaintiff was providing home for her and her children. As she was uneducated, she took no steps to protect her interest.

C

Held: The defendant as a mistress did not enjoy the same rights as if she were a wife.

D

As the defendant made no contribution either to the purchase price of the land or to the cost of constructing the house no resulting trust could arise in her favour as happened in *Hussey v. Palmer* (1972) 3 All E.R. 744.

Her possession in this case depended upon whether it could be said that the conduct of the plaintiff was such that he was estopped from turning the defendant out of the house.

E

By his conduct the plaintiff gave the defendant reason to believe that she and her children had a licence to remain in the house as long as they wished to do so; it was not possible to say on the evidence that in so remaining she did not act to her detriment.

Defendant was seeking no relief in the proceedings; all that the court was concerned with was whether it was just and inequitable to give possession of the house to the plaintiff.

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It would have been inequitable for the plaintiff to take possession of the house.

A mere licence to retain in possession, if she had one, did not create any estate or interest in the property to which it related.

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The arrangements, if they could be so described, did not constitute a 'dealing' in the land within the meaning of section 12 of the Native Land Trust Act.

Cases referred to:

Burns v Burns (1984) 1 All E.R. 244.

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Pascoe v. Turner (1979) 1 W.L.R. 431.

Hussey v. Palmer (1972) 3 All E.R. 744

C.F. Greasley & Ors. v. Cooke (1980) 1 W.L.R. 1306

Chalmers v. Pardoe (1963) 1 W.L.R. 677; (1963) 3 All E.R. 552.

C.E.G. Wells v. Kingston-Upon-Hull (1875) 10 L.R. C.P. 402

ROONEY, J.:

Judgment

The plaintiff is the registered proprietor of a sublease in respect of lots 24 and 25 on D.P. 4107 situated at Samabula. In 1978 he erected a dwelling house on the land. As soon as the house was completed the plaintiff went to live there with the defendant and her children, the youngest of whom, born on the 29th April 1970, was fathered by the plaintiff.

The elder children of the defendant were joined in this action as "second defendants". An appearance was entered on their behalf on 29th October, 1981 by Messrs Govind & Company, Solicitors, Suva.

It would appear that the younger of the two second defendants was born about 1967. The elder boy is a little older but it was conceded by counsel for both parties that when these proceedings were commenced in October 1981 he was a minor and he may still be under a disability.

Order 80 Rule 2 of the Rules of the Supreme Court provides that a person under a disability may not bring any proceedings except by his next friend and may not appear in any proceedings except by his guardian ad litem. Notwithstanding this rule, no guardian ad litem was appointed either on the institution of the action or at the time that appearance was entered by the "second defendants". No action was taken by either party to repair this defect in the proceedings and the matter was continued and conducted as if the "second defendants" were of full age or that Rule 80 did not exist. The responsibility for this irregularity rests with the solicitors on both sides. All that I can do at this late stage is to make an order striking out the "second defendants" from the action and set aside the notice of appearance to the extent that it purports to be filed on their behalf. No costs may be allowed to either party which arise directly or indirectly from the omission to observe Order 80 and the solicitors concerned remain liable to pay the wasted costs personally.

The plaintiff is the legal tenant of the Housing Authority under the registered sublease which is for a term of over 94 years commencing on the 21st November, 1973. The sublease was executed on the 18th July, 1978 and registered on the 19th September following. As the registered owner of the sublease the plaintiff is entitled in law to the possession of the demised premises. However, it is contended by the defendant that she and her children have a right to remain in possession of the house for the rest of their lives by reason that the plaintiff has granted to her an irrevocable licence. In substance the defence to the claim to possession is that by reason of the conduct of the plaintiff he is estopped in equity from asserting and enforcing his legal right as owner against her and that this Court should intervene and prevent the plaintiff from obtaining possession because it would be inequitable to permit him to do so.

It is first necessary to determine the facts by reference to the evidence. The defendant is not educated and she had difficulty with dates and some details. For instance, she said she became a friend of the plaintiff in 1964 and in this I believe her to be honestly mistaken. A

In 1967 Mr Jitendra Amin (P.W.2) established a small factory at 73 Suva Street in the name of the Footwear Manufacturing Company. He employed the plaintiff as a foreman and the defendant joined the firm in 1968. Whether or not she was previously married is not material, although she had two children. She and the plaintiff became lovers and their association was to continue until October 1980. There can be no doubt that for a period of 12 years, the relationship between the parties was stable and had the appearance of permanence. The defendant became the de facto wife of the plaintiff and, as already mentioned, a child was born to the couple in 1970. B

According to the defendant, in the early period of the relationship they lived at her brother's house at Samabula. In 1973 the defendant moved to a flat at Nabua. Although the plaintiff denied that he lived with her there on a permanent basis, a witness for the defendant, Mrs Anne Wise (D.W.2), said that she was a neighbour and knew the family well. She said that the parties lived there as man and wife until they moved to the new house in Kinoya. The plaintiff in his evidence maintained that until they moved to the new house in 1978 he was only a visitor to the house of the defendant. His apparent anxiety to play down the nature of his association with the defendant was not convincing. He was in my opinion tailoring his evidence to suit his appreciation of the present case. C D

The defendant's earnings while in employment were modest. She said that she gave her wages to the plaintiff for household expenses. The plaintiff told her that he was paying for the new house in instalments. She said that she was unaware of the loan arrangements made by the plaintiff in connection with the house. For a time the couple maintained a joint account in the A.N.Z. Bank, Suva. E

The plaintiff denied that the defendant gave him her wages, but, he did admit that sometime she contributed to the family expenses. I am satisfied that the defendant, as a working housewife, used her earnings for the support of the family as a whole. I accept that the plaintiff as the breadwinner financed the purchase of the land and the construction of the house from his own savings and from money borrowed from his employers. The defendant left to her own resources could not have achieved this result. F

On the 29th October, 1973 the plaintiff submitted a tender to the Housing Authority for various intermediate lots available under a scheme called the Kinoya Stage Housing Authority 7 Plan B. In the tender he gave his wife's name as Sheila Maharaj and his residential address as Samabula 3 miles. The tender contained the following declarations "I hereby declare that I am married and that I or my wife own no other house or land or a share or interest in a house or land within the dominion of Fiji". G

It is not in dispute that the Housing Authority plan provided for the allocation of the land for which tenders were required to married couples only. The plaintiff as a single man (which was his legal status) could not have obtained a sublease and his tender would not have been considered by the Housing Authority had he disclosed that he was not married to the defendant. H

A When the tender was accepted, the plaintiff completed a formal application for land in which the defendant was named as one of the applicants. The couple were again described as married with two children aged 3 and 6 years. Above the place for the signature of the applicant on the document Ex. 1 appear both the names Jai Chand and Sheila Wati and my impression is that the same person signed both signatures. But in this I may be incorrect. Apart from a letter dated the 14th November, 1973 (Ex. 4) addressed by the Housing Authority to the plaintiff and defendant jointly, all further business relating to the land and the construction of a house was carried on between the Housing Authority and the plaintiff alone. According to Mr Rabuka (D.W.1), who is the present legal adviser to the Housing Authority, the policy is that an applicant's wishes in regard to whose name the lease is to be granted would be acceded to by the Housing Authority in normal circumstances.

C The defendant said in evidence that in 1973 she and the plaintiff decided to acquire a house of their own. She signed one document in connection with the application for the land. She said that the plaintiff told her that the property would be for both of them and she believed him when he said so. When she moved to the new house with the plaintiff, she did so because their relationship was permanent and she expected to remain with the plaintiff for the rest of her life. As it turned out, in October 1980 the plaintiff left the house while the defendant and her children remained in occupation until this day.

D The defendant agreed that she made no payments to the Housing Authority. She remembered going with the plaintiff to the Housing Authority Offices in Victoria Parade where she signed a form. In his evidence, the plaintiff denied that he ever took the defendant to the Housing Authority. He does not know anything about the signature of the defendant on Ex. 1. He went so far as to suggest that the defendant might have put her signature on this document "behind his back". He further denied ever telling the defendant the house would belong to her as well.

E He agreed that he did tell the Housing Authority that Sheila Maharaj was his wife. He also told them about the two children. He said:

F "The defendant was married to someone else. It was just because I was on visiting terms with her that I gave these details on the form. As she was married I could not marry her myself. I knew that I would not get the property as a single person. I put the application in that way in both our names but I applied for myself as they were not interested to stay with me. When I lodged the application the defendant was not interested in staying with me but if she wanted to stay she could do so at the time."

In answer to further questions the plaintiff denied that he intended to trick the defendant. He did, however, make the following statement:

G "When I got the property I got it for myself and the defendant, we talked on that line. When I obtained the lease I did not leave a part for the defendant. If she wanted she could have stayed. She was there with my consent."

And further

H "I do not know that they can stay there for the rest of their lives. In 1979 I told the defendant to stay there. No time limit was made by me."

It appears that the plaintiff's parents objected to his association with the defendant. In 1981 he married and has a child. He now lives with his parents. It is obvious that his desire to recover the house is linked to his new responsibilities.

I have no doubt that when the plaintiff obtained the land and later set about constructing a house he told the defendant that he was building it for what was in fact his family at that time. It is possible that he was entirely sincere in this purpose. I have no reason to disbelieve the defendant when she said that she was under the impression the plaintiff was providing a home for her and her children. As she is uneducated, she took no steps to protect her interest. Whether or not the Housing Authority would have granted the sublease if they had known of the true relationship between the parties, I do not know. The fact remains that the plaintiff obtained the sublease with the support of the defendant and on the premise that they and two of the defendant's children constituted a family unit eligible to receive an allocation of land.

The defendant as a mistress does not enjoy the same rights as if she were a wife. This has been reaffirmed by the Court of Appeal in England in the recent case of *Burns v. Burns* [1984] 1 All E.R. 244. A woman who had lived with a man for 19 years and who claimed a share in the house owned by him was not successful. Lord Justice Fox expressed the opinion that the unfairness of the result was not a matter which the Courts could control. It was a matter for Parliament. The judgment of Lord Justice May is reported as follows:

"As Parliament had not legislated for the unmarried couple as it had for those who had, the courts should be slow to attempt to legislate themselves.

It followed that in disputes between unmarried couples who had broken up, the courts did not have a general power to do what they thought was fair and reasonable in all the circumstances, as they had under the appropriate provisions of the Matrimonial Causes Act 1973.

His Lordship thought that the dictum of Lord Denning in *Hall v. Hall*, that the woman's contribution to the family well-being by keeping the house and looking after the children could be taken into account in assessing the extent to which a resulting trust had arisen in her favour, was wrong."

(*Hall v. Hall* is reported in 1981 3 F.L.R. (Family Law Reports) 379, 381).

As the defendant made no contribution either to the purchase price of the land or to the cost of constructing the house no resulting trust in her favour can arise as was the case in *Hussey v. Palmer* (1972) 3 All E.R. 744.

The decision in this case must depend upon whether it can be said that the conduct of the plaintiff was such that he is now stopped from turning the defendant out of the house. In *Pascoe v. Turner* (1979) 1 W.L.R. 431 the Court of Appeal in England refused to give possession to its legal owner of a house occupied by his former mistress because the plaintiff had encouraged her to believe that the property had belonged to her and acquiesced in the defendant improving the house in that belief. The Court went further to hold that the minimum equity to do justice to the defendant was to compel the plaintiff to give effect to his promise by ordering him to execute a conveyance of the property to the defendant. In the present case the defendant has brought no counterclaim and for reasons which will be mentioned later in this judgment it is unlikely that such a claim would be entertained by the Court.

A more pertinent case is that of *Greasley & Ors. v. Cooke* (1980) 1 W.L.R. 1306 which was also heard by the Court of Appeal. In his judgment Lord Denning dealt

with the onus of proof and the requirements which must exist before equitable estoppel applies. He said at page 1311:

- A "The second point is about the need for some expenditure of money—some detriment—before a person can acquire any interest in a house or any right to stay in it as long as he wishes. It so happens that in many of these cases of proprietary estoppel there has been expenditure of money. But that is not a necessary element. I see that in Snell's Principles of Equity, 27th ed. (1973), p. 565 it is said: 'A must have incurred expenditure or otherwise have prejudiced himself.' But I do not think that that is necessary. It is sufficient if the party, to whom the assurance is given, acts on the faith of it—in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it: see *Moorgate Mercantile Co. Ltd. v. Twitchings* [1976] Q.B. 225 and *Crabb v. Arun District Council* [1976] Ch. 179, 188. Applying those principles here it can be seen that the assurances given by Kenneth and Hedley to Doris
- B Cooke—leading her to believe that she would be allowed to stay in the house as long as she wished—raised an equity in her favour. There was no need for her to prove that she acted on the faith of those assurances. It is to be presumed that she did so. There is no need for her to prove that she acted to her detriment or to her prejudice. Suffice it that she stayed on the house—looking after Kenneth and Clarice—when otherwise she might have left and got a job elsewhere.
- C The equity having thus been raised in her favour, it is for the courts of equity to decide in what way that equity should be satisfied. In this case it should be by allowing her to stay on in the house as long as she wishes."
- D

In the present instance the plaintiff would not have obtained the land at all were it not for his association with the defendant and his representation that she was his wife. By his conduct the plaintiff gave the defendant reason to believe that she and her children had a licence to remain in the house as long as they wished to do so and it is not possible to say on the evidence that in so remaining she did not act to her detriment. Her present situation, in which she stands in peril of being put out on the street might never have come about if the plaintiff had made it clear to her at the relevant time that she could never have any expectation of a permanent home with him.

F The land covered by the sublease is on land which is vested in the Native Land Trust Board. It has been submitted by the plaintiff that in view of section 12 of the Native Land Trust Act the defendant cannot acquire any interest in the house without the consent of the Board. It is further contended that in terms of the section any sale or other unlawful alienation or dealing effected without the consent of the Board shall be null and void. I have been referred in this connection to the decision of the Privy Council in *Chalmers v. Pardoe* (1963) 1 W.L.R. 677.

G The defendant is seeking no relief in these proceedings and all that the Court is concerned with is whether it is just and equitable to give possession of the house to the plaintiff. This Court is prepared to prevent the plaintiff from taking possession because it believes that it would be inequitable for him to do so and it is prepared to protect the defendant against the plaintiff. In the result it may perhaps be said that the defendant has licence to remain in possession. A mere licence does not create any estate or interest in the property to which it relates; it only makes an act lawful which without it would be unlawful. (See for instance *Wells v. Kingston-Upon-Hull* (1875) 10 L.R. CP 402 at 409). I take the view that such a licence does not constitute an

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alienation of the house and is not prohibited by the Statute. I am also of the opinion that it cannot be said that the arrangements, if such they can be described, between the parties constituted a dealing in the land. No agreement was entered into between them.

A

The Court acts in this matter as between the plaintiff and the defendant to keep the one out and the other in possession. It does not by so doing confer upon the defendant any rights greater than those which she had at the time she first went to live with the plaintiff in the house. If her residence was not unlawful then it is not unlawful now. The plaintiff's departure has not changed the situation. The equity granted to the defendant is valid against the plaintiff, his heirs and assigns alone.

B

By reason of the above I dismiss this action with costs to the defendant.

Judgment for the defendant.

C

[Editor's Note: The plaintiff successfully appealed to the Court of Appeal in March 1984. The respondent then appealed to the Privy Council which set aside the decision of the Court of Appeal. The Judgment of the Privy Council is reported at [1986] A. C. 898]