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No.1 of 1972

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FIJI COURT OF APPEAL

B E T W E E N :

LAKSHMIJIT
s/o Bhai Suchit Appellant
(Defendant)

- and -

10 FAIZ MOHAMMED KHAN SHERANI
as Administrator of the
Estate of Shahbaz Khan
deceased Respondent
(Plaintiff)

CASE FOR THE APPELLANT

Record

1. This is an Appeal from the Judgment of the Fiji Court of Appeal (Gould V.P., Richmond J.A. and Marsack J.A.) of the 15th day of July 1971 which allowed with costs an appeal by the present Respondent from a Judgment and Order of the Supreme Court of Fiji (Grant J.A.) both dated the 5th day of November, 1970. p.89
p.73
p.85

2. The principal question raised in this Appeal is whether the action brought by the Plaintiff (the present Respondent) against the Defendant (the present Appellant) was barred by virtue of the provisions of the Statute of Limitations Declaration Ordinance Cap.137 Laws of Fiji 1955.

30 3. By a Writ of Summons issued in the Supreme Court of Fiji on the 23rd day of October 1967, the Plaintiff acting as Administrator of the Estate of Shahbaz Khan, deceased, sought a declaration that the Defendant's right to use certain specified lands of the deceased had been determined. He also claimed injunctions restraining such use and removing "any buildings, fences or other improvements." p.1

4. By an amended Statement of Claim, dated the 14th day of February 1968, the Plaintiff alleged that p.4

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the deceased had entered into two Agreements with the Defendant dated the 16th day of February 1948 and the 23rd day of August 1948 for the purchase of certain lands and that the Defendant was in default of payment of the purchase prices and of interest to the extent that the last payment in respect of the first Agreement was made on the 31st day of December 1960 and the last payment in respect of the second Agreement was made on the 31st day of January 1960. Demands for payment of the monies due were sent to the Defendant on 17th day of September 1960, 9th day of January 1964 and 2nd day of March 1967 and with the last demand was sent a notice requiring the Defendant either to pay the arrears or vacate the property. On the 3rd day of April 1967 the deceased gave a further written notice determining the two Agreements of 1948 and demanded possession of the lands. In this amended Statement of Claim the Plaintiff repeated the claims as set out in the endorsement of the writ but at the commencement of the hearing of the action on the 19th day of October 1970 a claim for possession of the lands was allowed by the Supreme Court to be added.

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p.158
p.162
p.172

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5. By his amended Defence dated the 9th day of September 1970 the Defendant admitted entering into the two Agreements of 1948 but referred to two further Agreements entered into between himself and others and the deceased and dated the 24th day of September 1952 and the 28th day of July 1954. The first of these Agreements is entitled "Deed of Extension of time" and the Defendant was named in it as one of several mortgagors who specifically acknowledged the payment clause on the Agreement of the 16th day of February 1948. He provided additional security and the deceased agreed not to take any steps to enforce payment of the monies payable to him for one month. The Agreement of the 28th day of July 1954 was supplemental to the Agreement of the 23rd day of ~~October~~ ^{August} 1948 and was an agreement to subdivide and sell a certain portion of the land as building sites. This supplemental deed contained the following clause:-

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p.126

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"5. NOTHING expressed or implied in this agreement shall be deemed a waiver of nor in any way to prejudice the rights powers and remedies of the vendor under or by virtue of either of the said Agreements in respect of any existing default by the purchasers thereunder which rights powers and remedies the vendor hereby expressly reserves."

6. In his amended Defence, the Defendant also referred to a letter of the 10th day of May 1961 alleged to have been written to him by the deceased in which the deceased's executor was authorised to waive all sums due under the Sale and Purchase Agreements in consideration of the Defendant's free services to him in the past. At the trial, this letter was held to be neither a will nor a deed nor a contract under seal; further, it was given for a past consideration and the Defendant failed to satisfy the Court of its authenticity. In view of these findings, this letter is not relevant to this Appeal.

7. The Judgment of the Supreme Court was delivered on the 5th day of November 1970 when Grant J.A. after referring to the various documents that had been exhibited, then considered the effect of the Statute of Limitations. The law applicable in Fiji was the same as the Real Property Limitation Act 1874 which the learned Judge summarized as follows:-

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20 ".....no person can bring an action to recover any land except within 12 years next after the time at which the right to bring such action has first accrued to some person through whom he claims; and an administrator claiming an estate or interest is deemed to claim as if there had been no interval of time between the death and the grant of the letters of administration.

30 Where the person claiming the land or the person through whom he claims has become entitled by reason of any forfeiture or breach of condition the right is deemed to have first accrued when the forfeiture occurred or the condition broken."

8. There was no dispute that the Defendant was in breach of the conditions of both of the Agreements of 1948 and the latest written acknowledgements of the deceased's title were, in respect of the Agreement of the 23rd day of August 1948, the Deed of Extension of Time of the 24th day of September 1952 and in respect of the Agreement of the 16th day of February 1948, ~~the Supplemental Agreement of the 16th day of February 1948,~~ the Supplemental Agreement of the 28th day of July 1954. By virtue of the 1952 Agreement, the deceased was entitled to re-enter and take possession of the land referred to from one month later "and it is from that date that the right to bring an action for the recovery of that land first accrued".

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p.1
p.17,1.12

As far as the 1954 Agreement was concerned, the deceased was entitled to take possession of the land referred to, immediately after its execution. The action was not however commenced until the writ was issued on the 23rd day of October 1967 and the claim for possession was not made until the 19th day of October 1970.

9. The learned Judge held that it was thus statute barred and gave Judgment for the Defendant upon the claim with costs. As the Counterclaim was only concerned with relief against forfeiture that was also dismissed with costs. It is respectfully submitted that the said Judgment and reasoning upon which it was based were correct in law. 10

p.87

10. On the 26th day of November 1970, the Plaintiff filed a Notice of Appeal in the Fiji Court of Appeal which set out among the Grounds of Appeal, that the learned trial Judge had erred in law in holding that the Plaintiff's claim was statute-barred and also that even if the Limitation Acts did apply, the learned trial Judge had misdirected himself in rejecting evidence that the Defendant had admitted and acknowledged the title of the deceased. 20

p.89

11. The Appeal was heard on the 23rd day of April 1971 and the Judgment of the Court was given on the 15th day of July 1971. The principal Judgment was delivered by Richmond J.A. who referred to the similar provisions of the 1948 Agreements and in particular to those which set out the rights of the vendor should the purchaser be in default which were as follows:- 30

"in any such case the vendor without prejudice to his other rights and remedies hereunder may at his option exercise any of the following remedies namely:-

- (a) May enforce this present contract in which case the whole of the purchase money and interest then unpaid shall become due and at once payable or
- (b) May rescind this contract of sale and thereupon all moneys theretofore paid shall be forfeited to the vendor as liquidated damages and
 - (i) may re-enter and take possession

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of the said land hereby agreed to be sold and all improvements thereon without the necessity of giving any notice or making any formal demand and

(ii) may at the option of the Vendor re-sell the said land and improvements either by public auction or private contract subject to such stipulations as he may think fit and any deficiency in price which may result on and all expenses attending a re-sale or attempted re-sale shall be made good by the purchasers and shall be recoverable by the vendor as liquidated damages the purchasers receiving credit for any payment made in reduction of the purchase moneys. Any increase in price on re-sale after deduction of expenses shall belong to the vendor."

12. The learned Judge of Appeal stated that there had been continuous possession since 1948 and it was common ground that whilst various demands for payment were made, the deceased in his lifetime did not rescind either Agreement. This was only done by the Plaintiff. It was also common ground that the letter of the 3rd day of April 1967 was an effective rescission of both Agreements. He referred to the Statute of Limitations Ordinance of Fiji by which the provisions of the Imperial Act of 1833 were in force as well as the Act of 1874 and he quoted the relevant sections in full. It was not, however, suggested that the learned trial Judge had been inaccurate in the summary that he gave of them.

13. The submission of law that was successfully argued before the Fiji Court of Appeal was that the learned trial Judge "erred in equating a right to rescind with a right to re-enter". In the course of his Judgment, Richmond J.A. observed that the right of entry could not "accrue" until all conditions precedent to its exercise had been fulfilled. The Agreements gave the vendor an option upon default by the purchaser and he then construed the clause in the Agreements set out in paragraph 11 above. As far as the alternative set out in (b) was concerned, he regarded the word "thereupon" as governing the automatic forfeiture of all moneys paid and

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also the optional rights of re-entry and resale.
He continued:-

p.105,
1.32

"As a matter of language therefore the exercise of the right of rescission is made a condition precedent to the accrual of the right of re-entry.

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p.106,
1.15

In my view the language and substance of the present arrangements made the right of re-entry an incident of rescission rather than an incident of default by the purchaser. The right to re-enter (and hence any right to recover the law by action) could not accrue until the vendor elected to rescind".

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It is respectfully submitted that the above reasoning is erroneous even if the construction placed upon the words used in the Agreement is correct, because the right of re-entry arose at the same time and as a result of the same breaches of the Agreements that gave rise to the right to rescind. The Statutes of Limitation apply from the time that the right of re-entry was exercisable in law and in accordance with the Agreements and not when it was in fact exercised by the Plaintiff as successor to the vendor. The purpose of the Statute of Limitation to protect de facto possession would be wholly defeated if the following passage from the Judgment were a correct proposition of law:-

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p.106,
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"Once this position is reached then it can make no difference that the time when rescission takes place depends largely on the whim of the vendor".

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In so far as the learned Judge relied on Connolly v. Leahy (1899) 2 IR.344 it is submitted that this case was wrongly decided.

14. Until this point in his Judgment, Richmond J.A., had been considering the provisions of section 1 of the Act of 1874. He then turned to the relevant provisions of section 3 of the Act of 1833 which are as follows:-

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"..... and when the person claiming such land, or the person through whom he

claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken".

10 To this provision, which by the next section of the Act, did not apply to estates or interests in reversion or remainder, the learned Judge applied his previous reasoning. He contrasted the position where a lessor or grantor could elect to enter immediately on default or breach of condition with the present case where he stated that the optional right of the vendor to re-enter "did not arise at all until (and as an incident of) the exercise of his election to rescind. It is again respectfully submitted that the suggested distinction is not a correct one and that in the present case the right to re-enter arose with the right of rescission at the time of any breach of condition.

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p.108,1.11

15. A short concurring Judgment was delivered by Gould, V.P. who considered that the words "breach of condition" in section 3 of the Limitation Act of 1833 meant such a breach as entitled the Claimant to the possession of the land. In the present case a breach gave the vendor an option to rescind and then he would acquire the right to possession. He referred to Barrett v. Richardson and Cresswell (1930) 1 K.B.686 and the reference made by Lord Wright to "the right relied on as justifying the forfeiture". Gould V.P. thus stated:

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p.89

"In my judgment, however, the "right relied on" must be an effective right entitling the claimant to immediate possession, and the word "deemed" in the section, can never have been intended, by some sort of retroactive effect, to convert an inchoate or imperfect right into a complete or perfect one."

40 It is respectfully submitted that the right of re-entry given in the present case was "an effective right entitling the claimant to immediate possession", it being ~~more~~ ^{more} the less "effective" because it was coupled in the Agreement with a right to rescind.

16. A formal concurring Judgment was delivered by Marsack J.A. and the Appeal was thus allowed with costs,

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p.114,
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the Court also indicating in the Judgment of Richmond J.A. that it would not interfere with the dismissal of the learned trial Judge of the Counter-claim for relief against forfeiture.

17. An Order granting Conditional Leave to Her Majesty in Council was made by the Fiji Court of Appeal on the 5th day of August 1971.

18. It is humbly submitted that the Judgment of the Fiji Court of Appeal, dated the 15th day of July 1971, should be reversed and that this Appeal should be allowed with costs for the following, amongst other,

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R E A S O N S

1. The learned trial Judge came to a correct conclusion in law in holding that the action brought by the Plaintiff (the present Respondent) was barred as a result of the provisions of the Statute of Limitations Declaration Ordinance Cap.137 Laws of Fiji 1955.

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2. The Fiji Court of Appeal erred in reversing the above findings of the learned trial Judge.

JOHN A. BAKER

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C A S E

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