

IN THE PRIVY COUNCIL

No. 1 of 1972

ON APPEAL
FROM THE FIJI COURT OF APPEAL

BETWEEN :

LAKSHMIJIT s/o BHAI SUCHIT (Defendant)
Appellant

- and -

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

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal, by leave of the Fiji Court of Appeal, from a Judgment of that Court dated 15th July 1971 (Gould V.P., Richmond and Marsack J.J.A.) allowing an appeal by the Respondent from an Order dated 5th November 1970 of the Supreme Court of Fiji (Grant J.) by which (1) the Respondent's action against the Appellant for possession of two areas of freehold land the subject-matter respectively of two Agreements for Sale dated 16th February 1948 and 23rd August 1948 was dismissed with costs and (2) the Appellant's Counterclaim for relief from forfeiture in respect of instalments of purchase moneys previously paid under the said Agreements was also dismissed with costs.

pp.116-117
pp. 89-115

pp. 85-86

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2. By the said Judgment of the Court of Appeal (1) the Respondent was granted possession
30 of the said lands (2) the dismissal of the

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Appellant's Counterclaim was affirmed and (3) the Respondent was awarded the costs of the appeal and of the hearing in the Court below.

3. The principal question to be determined on this appeal is whether the Respondent's action to recover possession of the said lands was barred by the statutes of limitation in force in Fiji at all material times, namely the Real Property Limitation Act 1833 as amended by the Real Property Limitation Acts 1837 and 1874 (which Acts are hereinafter referred to as the Acts of 1833, 1837 and 1874 respectively). The Supreme Court was of the opinion that the action was so barred, but the Court of Appeal was unanimously of the contrary opinion.

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p.4 1.17

4. The Respondent is the administrator with the Will annexed of the estate of one Shahbaz Khan deceased (hereinafter called "the Deceased") and the action was brought by the Respondent in that capacity.

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5. Each of the said Agreements for Sale was made between the Deceased as vendor of the one part and one Ujagir and the Appellant as purchasers of the other part.

pp.118-125

6. The said Agreement dated 16th February 1948 comprised a piece of land containing 72 acres more or less. It provided for payment of a small deposit and made provision for the estimated balance of the purchase price (£5,640) to be paid by quarterly instalments of £30 each, the first such instalment falling due on the 1st August 1948.

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pp.140-147

7. The said Agreement dated 23rd August 1948 comprised a piece of land containing 138½ acres more or less. It also provided for payment of a small deposit and for payment of the estimated balance of the purchase price (£6,752) by equal quarterly instalments of £32 each, the first of such instalments falling due on 31st August 1950.

p.120 1.4
p.141 1.41

8. Each of the said Agreements provided for the purchasers to have immediate possession of the

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land sold. Each contained provision for payment of interest so long as any instalment of purchase money remained unpaid for more than seven days. Each contained a provision that upon payment of the whole of the purchase money and interest the vendor would execute a proper transfer or other assurance of the land sold to the purchasers.

p.119 1.19
p.141 1.18

p.120 1.10
p.142 1.4

10 9. Clause 20 of the first of the said
Agreements provided that if at any time two of
the said quarterly instalments of purchase money
should be in arrear and unpaid for more than
seven days after the due date of the second of
such overdue instalments or if the purchasers
should make default in the performance or
observance of any other stipulation or agreement
on the part of the purchasers therein contained
and if such default should continue for the
20 space of twenty one days "then and 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 :-

pp.123-4

(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
30 forfeited to the vendor as liquidated damages
and

(i) may re-enter upon and take possession
of the said land hereby agreed to be sold and
all improvements thereon without the necessity
of giving 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
40 auction or private contract subject to such
stipulations as he may think fit and any
deficiency in price which may result on and all

RECORD

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 payments made in reduction of the purchase money. Any increase in price on re-sale after deduction of expenses shall belong to the vendor."

pp.146-
147

10. Clause 22 of the second of the said Agreements conferred on the vendors an option in identical terms exercisable in the event of any of the instalments therein mentioned or interest thereon being in arrear and unpaid for more than twenty one days after the due date thereof or if the purchasers should make default in the performance or observance of any other stipulation or agreement on the part of the purchasers therein contained and if such default should continue for the space of twenty one days.

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11. The Deceased died on the 29th May 1964 and letters of administration to his estate with his Will dated 27th September 1963 annexed were duly granted to the Respondent out of the Supreme Court of Fiji Probate Jurisdiction on the 5th January 1967.

pp.172-3

12. On the 3rd April 1967 the Respondent gave a notice to the Appellant which was an effective rescission of both of the said Agreements pursuant to clause 20 of the first of the said Agreements and clause 22 of the second of the said Agreements respectively.

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13. The Respondent commenced these proceedings by Writ of Summons issued on the 23rd October 1967 claiming a declaration that the Appellant's right to use any part of the said lands had been determined and certain other relief. By his

pp.4-7

Statement of Claim dated 14th February 1968 the Respondent claimed the said declaration and other relief. By an Order of Grant J. made at the trial of the action on the 19th October 1970, the prayer for relief in the said Statement of Claim was amended to include a prayer for

p.21 1.3

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possession of the said lands.

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14. By his Amended Defence and Counterclaim served on the 9th September 1970 the Appellant pleaded (inter alia) the Statute of Limitations applicable in Fiji and claimed relief from forfeiture in respect of the purchase moneys previously paid. The Respondent subsequently delivered a Reply and Defence to Counterclaim.

pp. 8 - 13

pp.14-15

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15. The trial of the action took place before Grant J. on the 19th and 20th October 1970 and judgment was reserved until 5th November 1970.

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In his Judgment the learned Judge set out seriatim certain facts which he found as such on the basis of the documentary and oral evidence. The learned Judge also stated that it was elicited from the Appellant under cross-examination that the Appellant had never made regular quarterly payments; and that from 1948 to the death of the Deceased the Appellant had made no quarterly payments and that this was common ground.

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p.81 1.18

p.82 1.21

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16. The learned Judge did not, however, refer to certain admissions which were made by the Appellant in cross-examination and confirmed in re-examination. The Appellant admitted that he made three payments of £20 each under the said Agreements in the year 1961. The Appellant also produced receipts in confirmation of these payments. The Respondent will rely on these payments and receipts (hereinafter called "the 1961 payments") at the hearing of this Appeal.

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p.53 1.5
p.67 1.5
pp.194-5

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17. Having reviewed the facts as aforesaid, the learned Judge held that, by virtue of the purchasers' defaults in payment of the said quarterly instalments of purchase moneys, the Deceased was on the 25th October 1952 at the latest entitled to rescind the second of the said Agreements and to take possession of the land comprised therein; and that he was on the 29th July 1954 likewise entitled to rescind

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RECORD

the first of the said Agreements and to take possession of the land comprised therein. He also held that, for the purposes of the Act of 1874, the Respondent's rights to bring actions to recover the said lands first accrued to the Deceased at the respective dates on which he was entitled to rescind the said two Agreements respectively as aforesaid; and that the action, having been commenced on the 23rd October 1967 at the earliest (the actual prayer for possession was not entered until the 19th October 1970), was not brought during the necessary 12-year periods after the rights of action had first accrued. He accordingly concluded that the Respondent was not entitled to any of the relief claimed and dismissed the action with costs in favour of the Appellant. 10

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18. As to the Counterclaim, the learned Judge said this of the Appellant's claim for relief from forfeiture:- "In view of the fact that the Defendant has had the use and benefit of the land in question or part thereof for a very considerable period, and in view of the Judgment hereunder, the circumstances do not warrant such relief". He accordingly dismissed the Counterclaim with costs in favour of the Respondent. 20

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19. The Respondent appealed from the said Judgment and Order of Grant J. on the grounds (inter alia) that the learned Judge had erred in law in holding that the Respondent's claim was statute barred. The hearing of the appeal took place on the 23rd April 1971 and judgment was reserved until the 15th July 1971. It was argued on behalf of the Respondent (inter alia) that the learned Judge had erred in equating a right to rescind with a right to re-enter. The Court of Appeal unanimously allowed the appeal on that ground and held that the Respondent's right to re-enter on the said lands did not arise until the said Agreements had been actually rescinded on the 3rd April 1967. 30

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p.98 1.19

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20. The principal judgment in the Court of Appeal was delivered by Richmond J.A. In relation to the ground upon which the appeal was allowed, he said that the question depended upon the combined effect of Section 1 of the Act of 1874 and Section 3 of the Act of 1833. He then considered the case, in the first instance, solely by reference to Section 1 and said that on that basis the question was whether a right of entry "accrued" to the Deceased within twelve years prior to 19th October 1970. He was unaware of any decision which directly dealt with the application of the States of Limitation to long-term agreements for the sale and purchase of land, but said that it would seem clear in principle that a right of entry cannot "accrue" until all conditions precedent to its exercise had been fulfilled; and he said that the problem seemed to be substantially the same as that which faced the Court of Appeal in Joachinson v. Swiss Bank Corporation (1921) 3 K.B. 110, where it was held that a cause of action did not accrue against a Bank for money standing to the credit of a customer on current account until fulfilment of the necessary condition precedent of a demand on the Bank by the customer. He then examined the wording of certain of the provisions of Clauses 20 and 22 of the said two Agreements and concluded that the language and substance thereof made the right of re-entry an incident of rescission rather than an incident of default by the purchaser; and he said that the right to re-enter (and thence any right to recover the land by action) could not accrue until the vendor elected to rescind. Finally on this point, Richmond J.A. considered whether the particular provisions of Section 3 of the Act of 1833 affected the conclusion at which he had so far arrived and, having considered the wording of that Section and a number of authorities, he came to the conclusion that they did not. He was accordingly of the opinion that the appeal should succeed.

pp.92-114
p.102 1.40
p.103 1.22
p.104 1.18
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p.106 1.15
p.107 1.3
p.109 1.1

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21. Richmond J.A. also dealt in his judgment with certain other arguments which had been addressed to the Court of Appeal on behalf of the Respondent and also with an argument in favour of the Respondent which had been raised by the members of the Court themselves.
- p.114 l.19 22. At the end of his judgment, Richmond J.A. said that he would allow the appeal and would enter judgment granting to the Respondent possession of the lands the subject-matter of the said Agreements. He said that no case was made out for the granting of any of the other forms of relief sought in the amended Statement of Claim. He then referred to the dismissal of the Appellant's Counterclaim for relief against forfeiture and said that it followed from what he had previously said in his judgment that no grounds had been made out requiring the Court of Appeal to interfere with that dismissal. Finally, he said that he would also allow costs to the Respondent both in the Court of Appeal and in the Court below. 10
- p.113 23. Gould V.P. delivered a judgment expressing his full agreement with the reasoning and conclusions of Richmond J.A. and adding certain observations of his own on the limitation point. Marsack J.A. agreed with the judgment of Richmond J.A. and with the reasoning upon which it was based; and stated that he had nothing to add. 20
- pp.89-91 24. On the hearing of this appeal, the Respondent will submit that the decision of the Court of Appeal was right and ought to be affirmed, both on the limitation point and in regard to the dismissal of the Appellant's Counterclaim for relief against forfeiture; and the Respondent will respectfully adopt the reasoning of that Court. Further or alternatively, the Respondent will submit that the decision on the limitation point can be supported by reference to the decision in Barratt v. Richardson and Creswell (1930) 1 K.B. 686, a question on which the Court of Appeal expressed no concluded view. 30
- p.115 40
- p.111 l.17

25. The Respondent will further submit that, if their Lordships' Board should be of the opinion that the reasons for the decision of the Court of Appeal and the submissions aforesaid on the limitation point were wrong and that the Respondent's rights to bring actions to recover the said lands would otherwise have first accrued to the Deceased at the respective dates on which he was entitled to rescind the said two Agreements respectively, then the decision of the Court of Appeal on the limitation point was right and ought to be affirmed on the following further or alternative grounds :-

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(1) The Respondent will submit that, for the purposes of the Real Property Limitation Acts, the substance and effect of the said Agreements (whereunder the Deceased acquired by operation of law the vendor's lien for all unpaid purchase moneys) was to constitute the said Ujagir and the Appellant mortgagors of the said lands in favour of the Deceased as mortgagee; that the relationship of mortgagor and mortgagee subsisted until rescission on the 3rd April 1967; and that by virtue of the proviso to Section 7 of the Act of 1833 time did not run against the Deceased or the Respondent while that relationship subsisted. Further or alternatively, the Respondent will submit that the 1961 Payments (which were accepted by Richmond J.A. in the Court of Appeal to have been made on account of principal or interest) were payments of some part or parts of the principal money or interest for the purposes and within the meaning of the Act of 1837 as amended; that by virtue thereof it was lawful for the Respondent to bring an action to recover the said lands at any time within twelve years next after the last of the 1961 Payments was made; and that the action was so brought.

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(2) Alternatively to (1) above, the Respondent will submit that, for the purposes of the said Limitation Acts, the substance and effect of the said Agreements was to constitute the said Ujagir and the Appellant cestui que trustent to

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p.110 1.6

the Deceased as trustee of the said lands; that the relationship of cestui que trust and trustee subsisted until rescission on 3rd April 1967 and that the cestui que trust were never absolutely entitled in equity to the said lands or any part thereof; and that by virtue of the proviso to the said Section 7 (which applies to constructive or implied trusts as well as to express trusts) time did not run against the Deceased or the Respondent while that relationship subsisted. (An argument to this effect was considered, and rejected, by the Court of Appeal). Further or alternatively, the Respondent will submit that the 1961 Payments and each of them constituted acknowledgments by the Appellant as cestui que trust of the Deceased's title to the said lands as trustee and that by virtue thereof it was lawful for the Respondent to bring an action to recover the said lands as mentioned in (1) above; and that the action was so brought. 10

(3) Further or alternatively to (1) and (2) above, the Respondent will submit that if the rights to bring actions to recover the said lands first accrued to the Deceased at the respective dates on which he was entitled to rescind the said two Agreements, the said Ujagir and the Appellant thereupon became tenants at will of the said lands respectively to the Deceased; that the 1961 Payments and each of them constituted acknowledgments by the Appellant of the Deceased's title to the said lands, or alternatively the determination of the existing tenancies at will and the creation of new ones; and that by virtue thereof it was lawful for the Respondent to bring an action to recover the said lands as mentioned in (1) above; and that the action was so brought. 30

26. Except as is mentioned in sub-paragraph (2) thereof, none of the submissions referred to in the preceding paragraph was made in either of the Courts below; and no substantial reliance appears to have been placed on the 1961 Payments. On the hearing of this appeal, the Respondent 40

will submit that the 1961 Payments, which were made by the Appellant and received by the Deceased, establish that at that time both the Appellant and the Deceased recognised that the said Agreements were subsisting and effectual for all purposes, including all remedies available thereunder to the Deceased in respect of any breaches thereof by the Appellant. In the premises, any period of limitation which was running prior to the first of the 1961 Payments was thereby cancelled and no further material period of limitation could have started to run until after the last of the 1961 Payments had been made.

27. The Respondent accordingly submits that the decision of the Court of Appeal ought to be affirmed for the following (among other)

R E A S O N S

(1) BECAUSE the right to re-enter on the said lands did not arise until the said Agreements had been actually rescinded on the 3rd April 1967.

(2) BECAUSE the said Agreements established the relationship of mortgagor and mortgagee and by virtue of the proviso to Section 7 of the Act of 1833 time did not run against the Deceased or the Respondent while that relationship subsisted; and, further, the 1961 Payments brought the Act of 1837 as amended into operation and enabled the Respondent to bring an action within twelve years thereafter.

(3) BECAUSE the said Agreements established the relationship of cestui que trust and trustee and by virtue of the said proviso time did not run against the Deceased or the Respondent while that relationship subsisted; and, further, the 1961 Payments were acknowledgments which enabled the Respondent to bring an action as aforesaid.

(4) BECAUSE prior to the 1961 Payments there were tenancies at will of the said lands and the 1961 Payments were acknowledgments, or

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alternatively determined the existing tenancies at will and created new ones, and enabled the Respondent to bring an action as aforesaid.

(5) BECAUSE at the time of the 1961 Payments both the Appellant and the Deceased recognised that the said Agreements were subsisting and effectual for all purposes.

(6) BECAUSE the decision of the Court of Appeal on the limitation point was right for the reasons given in the judgments of Gould V.P. and Richmond J.A.

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(7) BECAUSE the decision of the Supreme Court and the Court of Appeal on the dismissal of the Appellant's Counterclaim for relief against forfeiture was right for the reasons given in the judgments of Grant J. in the Supreme Court and Richmond J.A. in the Court of Appeal.

MARTIN NOURSE

JOHN JOPLING

No. 1 of 1972
IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

LAKSHMIJIT

-v-

SHERANI

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.
Hale Court,
21 Old Buildings,
Lincoln's Inn,
London, W.C.2.

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14 NOV 1972