Privy Council Appeal No. 33 *of* 1923.

Arthur Herbert Hallen - - - - - - - *Appellant*

v.

Frederick Benjamin Spaeth - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF FIJI.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE, 1923.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD PARMOOR.
LORD TREVETHIN.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal by the defendant in an action from a judgment of the Supreme Court of Fiji, deciding that the respondent, the plaintiff, was entitled to recover from the appellant the sum of £4,544 10*s.* and costs. The sum mentioned represents the value, as determined by the Acting Chief Justice, who tried the case, of buildings, growing crops, stock and implements, on an estate in the colony. The case of the respondent is that he became entitled to this amount under the provisions of a convenant contained in a lease of the estate dated 25th February, 1911.

By this lease, which was registered under the Transfer of Land Ordinance of 1876 of the colony, the appellant demised the estate to the respondent at a yearly rent of £800 for a period of ten years from 1st July, 1912. The lease provided that the lessee should have the option of a further lease of the premises, after the expiration of this term, for a new period of ten years, upon terms and conditions to " be agreed between the parties." In the event of failure to so agree then the lessor bound himself to

purchase " by valuation the buildings erected by the said lessee and also the growing crops, stock and implements," and also to take over the unexpired terms of the indentured immigrants working on the lands demised. If the parties could not agree on the valuation all matters in difference in relation thereto were to be referred to the arbitration of two indifferent persons, one to be appointed by each party, and every such arbitration was to be subject to the provisions relating to arbitration of the Common Law Procedure Act, 1854. The lessee bound himself not to transfer the premises demised without the consent in writing of the lessor.

The lessor gave no consent in writing to a transfer. It appears, however, that the respondent had stated his intention to sublet the estate to two gentlemen named Ragg and Holmes. This intention he carried out by a lease to them dated 4th July, 1911, for the whole of his own term of ten years from 1st July, 1912, with covenants in precisely the same terms as those in the lease to himself. The only difference was that a larger rent was payable to him, at first £1,400 and later on £1,600 per annum.

Ragg and Holmes appear to have been in occupation of the estate at the time of the lease to the respondent, and he seems to have left it to them to erect proper buildings and carry out the cultivation, and supply all necessary implements and materials This they did. Holmes died in 1918, and his executors in conjunction with Ragg subsequently gave a security over the crops to the Colonial Sugar Refining Company and also a Bill of Sale over the implements and live stock, to secure advances made to them by the Company.

In March, 1922, the respondent entered into negotiations with the appellant for a renewal of the lease in accordance with the provisions of its terms. They, however, could not agree on terms, and the title under the lease of the respondent to have a valuation was asserted by him. The appellant instructed an agent, one Costello, to take possession, and Costello intimated to the respondent that he had done so. The respondent then purported to make a valuation as provided by the lease, but he did not formally appoint an arbitrator, or call on the appellant to appoint his own arbitrator. The learned Judge who tried the action has treated as insufficient the proceeding of the respondent in this reference, and their Lordships take the same view.

The situation of the parties when the original term of the respondent's lease expired was therefore as follows. The respondent was *prima facie* entitled, agreement not having been come to about terms for renewal, to a valuation of the buildings he had erected and of crops, stock, and implements. As the valuation could not be agreed, he was entitled to go to arbitration. It is true that he had subdemised for the entirety of his term, contrary to the stipulation in his lease. But the lease conferred on the lessor no right to put an end to the term for such a breach, and his

remedy was merely in damages for breach of agreement. Their Lordships take the view that such a subdemise for the entire term of the sublessor amounted to an assignment or transfer. The reasons for treating an underlease of an entire term as an assignment were given in *Beardman* v. *Wilson* (L.R. 4 C.P. 57). No doubt the sublessor may contract with his sublessee in a fashion which is analogous to that of a demise. But so far as the property in his term is concerned he has none left after he has made what is really a transfer. The respondent was therefore liable on a contract to Ragg and Holmes' executors for the value of any buildings they had erected on the property during the term they had contracted for, and for their crops, stock, and implements. It appears that they had erected buildings and raised crops and put stock and implements on the property during the term. Probably the Colonial Sugar Company had a title to these or some of them, to the extent of their security. The case was obviously one for an arbitration, properly constituted, as provided in each of the leases.

The appellant, however, while making no claim to the stock or implements, declined to recognise in the respondent any title to a valuation of the buildings. His contention appears to have been that he was not bound to pay for any buildings which had been erected only by the sublessees as distinguished from the respondent himself, or for any buildings in which the respondent had no interest because of having parted with the whole of his proprietary title under his lease. With this contention their Lordships are unable to agree. It is true that the buildings were erected, not by the respondent personally, but by his assignees. None the less they were erected subject to a covenant in the underlease in the same terms as that in the original lease, by which the respondent bound himself to pay the value to his so-called sublessees. He had therefore a material interest in obtaining from the appellant the amount which the latter had contracted to pay to him. The contract enabled the respondent to put up the buildings, and, in the event of there being no extension of his lease, to recover their value. There is, in their Lordships' opinion, no ground for saying that the contract required the respondent to have personally erected the buildings. By the transfer to his sublessees he had at least conferred a licence to build and a contractual right to recover from himself, just as he could recover from the appellant, the amount to be ascertained through a valuation of what he himself or others acting with his authority had added to the value of the property.

The action was tried before the Acting Chief Justice. That learned Judge decided that, there having been no agreement between the appellant and the respondent as to the terms for a renewal, the appellant became liable to pay for the buildings, crops, implements, and stock. He treated the sublessees as having been the agents of the respondent in bringing these into existence, and held that the appellant was liable for the amount to be

ascertained on a valuation. So far their Lordships are in agreement with him. They agree also with his findings that Costello, his agent, had no authority to bind the appellant as to the valuation to be made, that the appellant would have been entitled to call for a reference, and that the respondent wrongfully resisted the taking of the proper course. But the learned Judge went on, after overruling the appellant's repudiation of liability, to make the valuation himself, instead of directing an arbitration to take place in accordance with the terms of the lease. Their Lordships think that he was wrong in treating the question of valuation as one which a Court had jurisdiction to try. The lease provides that the purchase is to take place on valuation, and that if the parties cannot agree on the valuation all matters in difference thereto are to be referred to arbitration, the arbitration to be subject to the provisions of the Common Law Procedure Act, 1854. Their Lordships interpret this as meaning that the amount of the valuation is to be such as may be determined in an arbitration. For then and not until then does a sum, which has to be ascertained in that fashion, become due and capable of affording a right of action. The determination of this sum is not a matter of independent right for which a claimant can go to the Courts. He is entitled only to what the arbitrators award. If this construction be the true one it brings the case within the principle of *Scott* v. *Avery* (5 H.L.C. 811), which decided that while by the Common Law parties could not contract validly to oust the Courts of their jurisdiction, they could contract that no right of action should accrue until a third person had decided the amount to which there was to be a right. This is a principle from which there is no derogation in the Common Law Procedure Act. It is, in their Lordships' view of the construction of the lease, a case to which the principle laid down in *Scott* v. *Avery* applies, and not that explained in *Dawson* v. *Fitzgerald* (L.R. 9 Ex. 7 and 1 Ex. D. 257), where as matter of construction it was held on appeal that there was an independently constituted liability enforceable in the Courts to abstain from doing a particular act, with a separable agreement to refer to arbitration the amount of compensation. The case is therefore one which must go to arbitration and the judgment, so far as it affects to dispose of it otherwise, must be varied accordingly.

The attention of their Lordships was called to the provisions of the Fiji Real Property Ordinance of 1876. It was argued for the respondent that the sublease by him could not have operated as a transfer, inasmuch as it was not in the form required by the Ordinance for a transfer. The point is not, however, of any importance, inasmuch as it is the contract between the sublessor and his sublessees, and not the estate which passed, which is the determining factor. It is accordingly unnecessary to consider the argument that as the sublease was *de facto* registered by the Registrar, whether properly or not, it must be construed as a document which the Ordinance does not preclude from being operative.

They will humbly advise His Majesty that the appeal should be allowed by setting aside the judgment for £4,544 10*s*. and costs, and directing the question of valuation to be referred to arbitration as provided by the lease. As both parties have been in a considerable measure wrong in the contentions they have set up there will be no costs either here or below.

In the Privy Council.

ARTHUR HERBERT HALLEN

v.

FREDERICK BENJAMIN SPAETH.

DELIVERED BY VISCOUNT HALDANE.

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