JUDGMENT 2, 1973

No. 4 of 1972

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

JAMES SUBBAIYA Appellant

- and -

PAUL NAGAIYA Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from a Judgment and Order of the Fiji Court of Appeal (Gould, V.P., Marsack, J.A. and Hutchinson, J.A.) dated the 7th day of November 1969, which allowed the Respondent's appeal (Gould, V.P. dissenting) from a Judgment and Order of the Supreme Court of Fiji (Thompson, Ag.J.) dated the 27th day of March 1969, whereby the said Court granted the Appellant (Plaintiff in the action and hereinafter called "the Plaintiff") pp.47-59 pp.35-43

(a) A declaration that the house and land purchased in the name of the Respondent (Defendant in the action and hereinafter called "the Defendant") and comprised and described in Certificate of Title Volume 54 Folio 5387 containing 38 perches more or less and situated in Levuka and the subsequent subdivisions thereof (hereinafter called "the property"), were and, to the extent that any subdivision has not already alienated, are still held by the Defendant as trustee for the Plaintiff, himself and his other

Record

brothers; and

(b) An injunction to restrain the Defendant, his servants or agents or any person claiming by, through or under him from ejecting or interfering with the Plaintiff's quiet use and enjoyment in respect of that part of the land on which the house stands which is at present occupied by the Defendant and the Plaintiff.

2. By a Statement of Claim dated the 17th day of
p.3 May 1968, the Plaintiff pleaded as follows:-

"1. The Plaintiff, and the Defendant, are both brothers and reside at Levuka, Ovalau in the Colony of Fiji.

2. Since about the year 1939, the plaintiff and the defendant lived communally until recently, and defendant purchased in his own name land comprised and described in Certificate of Title Volume 54 Folio 5387 containing 38 perches more or less and situate in the Town of Levuka in the Colony of Fiji but despite such purchase the defendant knew and understood, and did in fact purchase the said property either as nominee for himself, his parents, and other immediate members of his family, or as their agent or trustees.

3. Situate on the property at the time of the purchase was a wood and iron dwelling house which house was thereafter substantially improved by family labour and funds and the plaintiff himself has contributed to the said improvements.

4. The parents of the parties hereto died in 1963 and 1965 respectively, and the said land was thereafter divided into two blocks one of them being Lot 1 on Deposited Plan 2908 comprising 7.46 perches and being the whole of the land comprised in certificate of title number 11689.

5. The defendant has at all times until recently, and after the death of his parents, freely acknowledged that the said property described in paragraph 2 hereof was joint

Record

family property, but now seeks to eject the plaintiff.

6. The plaintiff presently lives in the said property on the said basis, and has never paid rent to the defendant in respect of the same.

WHEREFORE the Plaintiff claims:-

(a) A declaration that the property mentioned in paragraph 2 hereof; and any subsequent subdivisions thereof is joint family property and for consequential relief.

(b) An Injunction to restrain the defendant, his servants or agents, or any person claiming by through or under him from ejecting or interfering with the plaintiff's quiet use and enjoyment in respect of the said premises.

(c) Costs."

3. By his Defence, dated the 23rd May 1968, the Defendant denied that he bought the land as trustee or nominee and stated that he bought as beneficial owner. By way of Counterclaim, he sought (a) vacant possession of the part of the house occupied by the Plaintiff, (b) a declaration that the Plaintiff's right to use the land and house has been determined, (c) an injunction restraining the Plaintiff from occupying or dealing withthe land or house, (d) mesne profits for the period during which the Plaintiff has continued to occupy part of the house since he was told to quit, and (e) general damages. p.4 l.10 - p.6 l.10

4. Evidence for the Plaintiff was given by:-

(a) The Plaintiff himself (P.W.1.) p.7 l.13 - p.18 l.24

(b) Meli Loganimoce (P.W.2.) p.18 l.26 - p.20 l.10

(c) Ram Rattan (P.W.3.) p.20 l.14 - p.22

5. Evidence for the Defendant was given by:-

(a) The Defendant himself (D.W.1.) p.23 l.21 - p.30

(b) Shiu Prasad (D.W.2.) pp.31 - 32

Record
pp.33-34

(c) Narayan Sami (D.W.3.)

6. It was common ground that the property was bought in the Defendant's name in 1939, and that the title was registered in his name under the Land (Transfer and Registration) Ordinance, Cap. 136. The price was £125 of which £30 was paid to the vendors as a deposit and the balance by monthly instalments of £4 each, the receipts for these being in the name of the Defendant. It was also common ground that for 28 years, no claim was made by any person against the Defendant that he was not the beneficial owner of the property but held it as trustee.

7. In his Judgment, dated the 27th March 1969, the learned trial Judge, having reviewed the evidence, found that the following facts were not in dispute:-

p.39
ll.20-41

"A number of facts are not in dispute. These are that the price to be paid for the property in 1939 was £125 of which £30 was paid in a lump sum and the balance by instalments of £4 a month; that in 1939 the father of the parties had bought a Plymouth car which he operated as a taxi with a paid driver while continuing to work himself as a fisherman; that all the family lived in the house from 1939 to 1949 when the defendant went to live in another house belonging to him; that at some time between 1942 and 1952 the plaintiff and his brothers paid a substantial amount, at least £300, in respect of repairs carried out to the house; that the parents continued to occupy the house until they died and the plaintiff and other brothers also continued to occupy it; that the plaintiff carried out work to fill part of the land at his own expense in or about 1965; that the defendant sub-divided the land into two parts in 1965 and has subsequently sold to the Levuka Club a building which he put up on one of the parts, where the plaintiff had carried out the filling work."

Record

8. With regard to the conflict in the evidence, he found as follows:-

"Having seen and heard both parties and their witnesses give evidence, I am satisfied that in about 1967 the plaintiff did offer to buy the house from the defendant but they were unable to agree on a price. I find as fact also that the plaintiff did tell D.W.2 that the house belonged to him and that he was seeing if he could buy his brother out. I find that the plaintiff has not told the truth with regard to these transactions. p.39 l.43-p.41 l.19

It is clear that there have been disputes between the plaintiff, his other brothers and the defendant over a number of family matters, including the bus business run by the plaintiff and two of his other brothers, for some considerable number of years. It is not disputed that the defendant moved back into part of the house at about the time of the mother's death. I accept his evidence that from then on he told the plaintiff and the other brothers that they must leave the house. This does not necessarily conflict with the plaintiff's evidence that he was not aware until 1967 that the title to the land was in the defendant's name alone, as it is clearly not unusual for the eldest brother in an Indian family to exercise some measure of control over the way in which the family lives, or at least to try to do so.

In view of the fact that the father of the parties had bought a car and was operating it as a taxi in 1939, I do not accept the evidence of the defendant that he was not a very poor man. I consider it likely that the plaintiff, possibly due to the effluxion of years and the fact that he was a mere youth at the time, has inflated the amount of money that was in the house as savings in 1939, but I accept his evidence that there was a sum of money available, and that the defendant was given money from those savings to pay the £30 lump sum at the time when the

Record

property was bought. Thereafter, during the time when the instalments were being paid off the whole family was living in the house together and no doubt the instalments were part of the joint family expenses, although possibly paid by the defendant.

The defendant has said that he required the plaintiff and his brothers to spend the money on the house because they were living in it. Even allowing for inflation of property values between 1939 and the date when the repairs were carried out, I am satisfied that the amount spent by the plaintiff and his brothers was very large in proportion to the total value of the property. It is unlikely that they would have spent so much if they had not believed that the property belonged to them. The defendant has given no explanation why the plaintiff should have spent money on filling part of the land if he had no interest in it, or did not at least believe that he had. I accept the plaintiff's evidence, corroborated as it is by that of the labourer, that a great deal of work was done. Again I regard it as most unlikely that the plaintiff would have done that work if he had not believed that the property belonged to himself as well as to the defendant.

Having carefully weighed all the evidence and notwithstanding my finding that the plaintiff has not told the truth in denying that he offered to buy the defendant's share in the house, I am satisfied that the plaintiff's evidence that the defendant bought the house for all the brothers and made the first payment for the house with money which his parents gave him for that purpose is true. I disbelieve the defendant's evidence in this respect and also in respect of the circumstances in which the plaintiff carried out the repairs to the house and filled the land."

9. With regard to the conflict between the

Record

Statement of Claim (for a declaration that the land was joint family property) and the Plaintiff's evidence that the property was bought for "all the brothers", the learned trial Judge said:-

> "Learned defence counsel has drawn attention to the fact that the plaintiff has sought at the trial to establish that the land was bought for only the male members of the family and not for the female members but that the Statement of Claim alleges that it was purchased as joint family property and that the claim is for a declaration that it is joint family property. It is unsatisfactory that the claim should be so loosely worded; possibly the term "joint family property" has a precise meaning in Hindu family law but that was not proved and, in any case, it is a very loose term to use in pleadings. However, in view of the evidence of the plaintiff, it is clear that it was his intention that his solicitors should plead that it was the joint property only of a limited number of male members of the family. The defendant was not misled or prejudiced in any way. I have considered whether the pleadings are so defective that the plaintiff's claim must fail for that reason but have come to the conclusion that the Court can properly make orders in the terms which the plaintiff obviously intended to seek."

p.41 ll.20-40

10. In the result, the learned trial Judge gave Judgment for the Plaintiff in the terms set out in paragraph 1 herein. He dismissed the Defendant's Counterclaim and ordered him to pay to the Plaintiff his costs to be taxed if not agreed.

pp.42-43

11. By notice of Appeal, dated the 20th August 1969, the Defendant appealed to the Fiji Court of Appeal.

pp.44-45

12. By a majority Judgment (Marsack, J.A. and Hutchinson, J.A.) the appeal was allowed with costs. Gould, V.P. dissenting, after reviewing the evidence and Counsel's submissions on appeal, held as follows:-

Record
p.51 l.28-
p.52 l.19

"The question is whether the aspects of the evidence upon which counsel has relied provide a basis upon which this court should interfere with the decision of the learned Judge in the Supreme Court. It is a case in which the questions of fact had to be decided partly by inference (an area in which this Court might more readily interfere) but more by assessment of the credibility of the witnesses by the Judge based upon his observation of them and the impression he gained from their evidence as it was given. I think, after full consideration, that the challenge by counsel for the appellant to the evidence falls rather in the latter category than the former. It might be said that the matter of the date of the marriage of the defendant raises an inference in favour of the defendant but that would have to be weighed against the rest of the evidence including both inference and direct assessment of credibility. Though the learned Judge did not mention the point it cannot be assumed that he overlooked it. I have given thought to the fact that the defendant had the title in his name for a substantial period of years unchallenged, but, on the other hand, no earlier occasion for challenge appears to have arisen while the residence of the plaintiff in the suit property continued unqueried. Again, I have kept in mind that there is a substantial onus upon one seeking to establish a trust after so many years, and this I consider is the strongest point in the appellant's favour.

Nevertheless, having considered those factors, I am of opinion that the case is one in which this Court would not be justified in interfering with the judgment in the Supreme Court. There was a great deal of evidence and I take the view that the advantage enjoyed by the learned Judge of hearing and seeing the witnesses outweighs any considerations which counsel for the appellant has been able to raise by his argument."

Record

13. Marsack, J.A., started his Judgment by stressing the matters which were common ground stated in paragraph 6 above. He continued p.53

> "But if it is sought to establish that the registered proprietor is in fact holding as trustee then, in my view, there must be cogent and compelling evidence of the existence of such a trust. This evidence should prove how the trust came into existence and who are the persons on behalf of whom the property is held by the trustee. In my view the evidence falls far short of establishing these two facts with reasonable certitude." p.54 ll.1-9

He then dealt with the facts and evidence surrounding (i) the creation and existence of the alleged trust, and (ii) the beneficiaries under the alleged trust. He held, it is submitted correctly, as follows:-

> "With the greatest respect to the learned trial Judge and to the care with which he prepared his judgment, I am of opinion that the evidence was insufficient to establish in the first place that the property was purchased on terms that appellant would be a trustee only, and in the second place who were the beneficiaries under any such trust. In saying this I am mindful of the advantages the learned trial Judge had in hearing the witnesses and observing their demeanour. I am fully aware of the reluctance of an appellate tribunal to interfere with the findings of fact made in the Court below, particularly when those findings are based upon the opinion of the Court as to the credibility of the witnesses. Even so an appeal Court must sometimes do so as a matter of justice and of judicial obligation; and the Court is less reluctant to interfere when the findings, or some of them as is the case here, are inferences drawn from the accepted evidence. Keeping these principles in mind I would hold that the existence of a trust in favour of respondent and his brothers has not been established; and that therefore the title of appellant to the land is not subject to any such trust." p.56 l.42-p.57 l.20

Record

14. Hutchinson, J.A., agreeing with Marsack, J.A. said:-

p.58

> "I have had the opportunity of reading the judgments of my brethren in this case. I am aware of the caution required on the part of an appellate tribunal before it interferes with the judgment of the trial Judge on matters of fact, and I confess that, bearing that in mind, my opinion has, during my consideration of the case, swung from side to side. However, I have finally come to the view taken by Marsack, J.A. and for the reasons which he gives. I therefore agree with him that the appeal should be allowed with costs here and below."

p.60

15. On the 14th September 1971, an Order was made granting the Plaintiff final leave to appeal to the Privy Council.

16. The Respondent respectfully submits that this Appeal should be dismissed with costs and the majority Judgment and Order of the Court of Appeal should be affirmed for the following among other

R E A S O N S

1. BECAUSE the learned trial judge was wrong in finding that the Respondent held the property as trustee for the Appellant and his other brothers.

2. BECAUSE there was no evidence, alternatively, no compelling or satisfactory evidence, that there was such a trust and who were the beneficiaries under it.

3. BECAUSE this was a case where the Court of Appeal could interfere with the trial Judge's findings of fact, especially that many of them were inferences drawn from the accepted evidence.

4. BECAUSE Marsack, J.A. and Hutchinson, J.A. were right in so interfering and Gould, V.P. was wrong.

Record

5. BECAUSE Marsack, J.A. and Hutchinson, J.A. were right in holding that the evidence was insufficient to establish that the property was purchased on terms that the Respondent would be a trustee only, and who were the beneficiaries under such trust.

6. BECAUSE the Judgments of the trial Judge and of Gould, V.P. are wrong and the Judgments of Marsack, J.A. and Hutchinson, J.A. are right for the reasons stated therein.

EUGENE COTRAN

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- and -

PAUL NAGAIYA — Respondent

CASE FOR THE RESPONDENT

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