IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 76 OF 1981

Between:

SHIVA RAO s/o Subbo Rao — APPELLANT

- and -

1. NATIVE LAND TRUST BOARD
2. NATIVE LAND DEVELOPMENT CORPORATION LIMITED. — RESPONDENTS

M.S. Sahu Khan with S.D. Sahu Khan for appellant

A. Qetaki for 1st respondent

S. Matawalu for 2nd respondent

Date of Hearing : 13th & 14th July, 1982

Delivery of Judgment: 30.7.82

JUDGMENT OF THE COURT

Spring, J.A.

The appellant brought proceedings in the Supreme Court ot Loutoka against the above named respondents seeking (inter alia) a declaration that appellant was the lawful lessee or a tenant of the first respondent in respect of an area of lond known as "Drosa" containing 2 acres 3 roods 18 perches and described in the records of the Native Land Trust Board (hereinafter colled NLTB) file No. 4/4/231.

Considerable documentary evidence was placed before the Supreme Court and after a protracted hearing judgment was given on the 6th November 1981 in favour of the respondents; the learned Judge held that appellant was not a lawful lessee nor was a tenancy to be presumed in his favour under section 4(1) of the Agricultural Landlord and Tenant Act (hereinafter referred to as ALTA).

Appellant appeals to this Court against the decision of the Supreme Court. Lengthy grounds of appeal were filed, but at the hearing before this Court counsel for appellant limited his grounds of appeal to the following :

"1. THAT the learned trial Judge erred in law and in fact in not holding that the appellant was a tenant of the first respondent in as much as :

(i) There was evidence that the appellant was such a tenant.

(ii) Under the provisions of the Agricultural Landlord and Tenant Act (particularly section 4) there is a presumption of tenancy and the appellant had satisfied the requirements of such a presumption.

(iii) The learned trial Judge wrongly rejected the documentary evidence particularly as to poyment of rent.

(iv) The first respondent was estopped from denying the existence of the tenancy porticularly when it took no steps to evict the appellant and in continuing to accept rent without protest on question from 1970 to 1981."

The facts moy be briefly stated. The area which appellant claimed he was occupying was amended by consent during the hearing to 2 acres 3 roods and 18 perches. This lond is referred to in NLTB file os No. 4/4/231. Appellont's mother Sitomma was tenant-at-will in respect of this land by virtue of a tenancy-at-will issued by the

NLTB dated 12th August 1959; the land was described as "Drasa" containing 2 acres 3 roods 18 perches; the rental was £7.3.0. per annum; the land was to be used for agricultural purposes. On 8th November 1962 the tenancy-at-will was terminated by notice; Sitamma was required to vacate the said land and give up possession; the NLTB stated in the notice that it was proposed to subdivide the land; that it would not be responsible for any damage to (inter alia) buildings, crops or trees; and that after receipt of the notice no further crops be planted. At the same time NLTB sent a memorandum to the sub-accountant at Tavua Post Office advising that the lease of the land had expired; no renewal would be granted, and no rent should be accepted after 6th November 1962.

On 18th November 1964 appellant wrote to the NLTB asking that he be permitted to use part of the land known as "Drasa" containing 2 acres 3 roods 18 perches for agricultural purposes. This letter reads as follows:

"P.O. Tavua,
Tavua.
18th November 1964.

The Native Land Trust Board,
SUVA.

Sir,

I, Shivo Roo, wish to bring to your notice the land described below -

Land : "DRASA"

Area : 2 acres 3 roods 18 perches (RR.400)

Tikina: Tavua

Mataqali: Navusabolavu

about which the notice had been given not to plant any crop and rent refused. The "Tenancy-at-will" of the said land was entitled to my mother, Sitamma f/n Narsaiyo (f) w/o Subba Rao.

Since I do not possess any piece of land nor any property and am aged 29 yeors, I wish to request the Lands Department or authorities concerned to ollow me to utilize port of the said land which is mostly for agricultural purpose ot ony length of time ond under any terms.

Yours faithfully,

(sgd) Shiva Rao.

I hereby certify thot my son Shiva Rao is applying for this land with my knowledge.

Sitamma.

(Left thumb of hers)"

It does not appear from the record whether the NLTB ever answered this request.

On 12th June 1969 appellant and his brother Pushkar Rao applied to the NLTB requesting a lease of an area of 8 acres known as "Drasa" and part of Viagoi at Tavua for farming; the term requested was 10 years at a suggested annual rental of $48. The application by the appellant and his brother was accompanied by a consent signed by the native owners.

The application included land known as part of Viagoi containing 1 acre 1 rood which adjoined the land called "Drasa". Appellant received from NLTB a tenancy-at-will, in respect of the land part Viagoi, at a rental of $20 per annum with effect from 1st January 1972. This land was to be used by appellant for a rice mill and a blacksmith's shop.

On 11th July 1972 the NLTB advised that the application in respect of the land known as "Drasa" - file 4/4/231 - could not be considered; this land was not available for leasing; a copy of the letter reads:

253

"NATIVE LAND TRUST BOARD

N.L.T.B. Ref: 4/4/231.

Subba Raidu (alias) Subba Rao f/n
Venkat Appaiya,
P.O. Tavua.

Sir,

re: APPLICATION TO LEASE NATIVE LAND

"DRASA"

I have to acknowledge your application to lease the above native land and am to advise that the application cannot be considered by the Native Lond Trust Baard as the land applied for is not available for leasing.

Yaurs faithfully,
(sgd) I.L. Vulavau.
for Secretary "

Between the date af the joint application by appellant and his brather, and the date af the NLTB's letter advising that the land was not available for leasing, appellant paid the sum of $1.50 on 22nd May 1970 which he claimed was on account of stamp duty for a lease of land referred to in file No. 4/4/231.

Appellont stated thot he alone - and not his brother - was told by an NLTB employee - Turuva - to pay the stomp duty of $1.50 ond a rental of $28 per annum. Appellant stated he handed the originol receipt for $1.50 to the NLTB at Lautoka. Thereupon he commenced to cultivate the land. Appellant stated that he paid rent for the land known as "Drasa" - file No. 4/4/231 - at the rate of $28 per year; he produced receipt numbers 66466 af 7/5/70, 66464 of 6/5/70, 66254 of

4/1/71, 11930 of 4/1/72, 27443 of 2/1/73, 35348 of 2/1/74, 55386 of 2/1/75, 62157 of 2/1/76, 5387 of 13/1/77, 18595 of 24/1/78, 38677 of 23/1/79, 57161 of 3/1/80 and 63078 of 2/1/81. Each receipt was for $28 excepting receipt numbers 66466 and 66464 - these were each for $14. He commenced paying rent in 1970 and continued paying rent at the rate of $28 a year for 10 years. The rent was not paid directly to the NLTB, but to the Post Office at Tavua and to the Bank of New Zealand at Tavua both of which were receiving agencies for the NLTB. The first respondent - NLTB - stated it was not aware that rent was being paid by appellant for the land referred to in NLTB file 4/4/231.

On 29th April 1976 appellant's solicitors R.D. Patel & Co. wrote to NLTB advising that appellant was occupying two blocks of land, one containing 1 acre 6 roods and the other about 6 acres and gave file references 4/4/292 and 4/4/231; further, that despite the payment of stamp duty, together with rent, no lease had yet been issued; an early reply was requested in respect of both files; NLTB replied on 20th May 1976 as follows :

"20th May, 1976.

4/4/292
231

Messrs. R.D. Patel & Co.
Barristers & Solicitors,
P.O. Box 3,
BA.

Gentlemen,

re: Shiva Rao s/o Subba Rao
Subba Rao f/n Venkata Appoiya

Your letters of 10th September 1975 ond 29th April, 1976 refers.

There is no likelihood of issuing a long term title at this point in time.

The areas concerned has been the subjects of a proposed subdivision which had been pending for some time. You will appreciate thot this Board cannot issue ony title at this stage other than the Tenancy ot will already in existence.

(sgd) R.V. Tuvoi
for Secretary"

On 8th March 1978 Messrs. Sahu Khan & Sahu Khan of Ba, which firm was then acting as solicitors for appellant, wrote to NLTB in respect of the land referred to in file 4/4/231 requesting a stamped approval relating to the lease of the land. The letter reads :

"8th March, 1978.

The Manager,
Native Land Trust Board,
P.O. Box 116,
SUVA.

Dear Sir,

re: NLTB 4/4/231:

Shiv Rao son of Subbarao

We act as solicitors for Shiv Rao son of Subbaroo of Tavua and refer to approval for 8 acres of Native Land issued to him in 1970.

At the request of your Lautoka Office our client paid Stamp Duty of $1.50 vide the Board's receipt No. 207199 of 22nd May, 1970. Also for the assignment of the sugar cane contract No. 3351 appertaining to the said farm the Board gave a letter and this enabled the cane contract to be transferred to our client.

However our client complains that despite numerous telephone calls, and attendances at the Board's Office the new stamped appraval has not been handed to our client. Our client has paid his rent up to date for the 8 acres.

We have therefore been instructed by our client to inquire from you, which we hereby do, as to the whereabouts of the stamped approval of the said land.

Please let us have an urgent reply.

Yours faithfully,

SAHU KHAN AND SAHU KHAN."

On 11th May 1978 a further letter was sent by Messrs. Sahu Khan and Sahu Khan requesting an early reply. No reply was received from the NLTB at this stage.

On 7th September 1976 an officer of second respondent NLDC Ratu George Tuakitau advised appellant of the commercial and industrial development which embraced the land Viagoi held by appellant under the tenancy-at-will and suggested a surrender thereof in return for a lease of a commercial section to be made available in the new block.

On 15th September 1976 an inspection report was prepared by an officer of the NLTB covering the land containing 2 acres 3 roods 16 perches and referred to in file 4/4/231. This report was on a printed form and where the term lessee was printed, the officer filled in the name af appellant; the persons shown as residing with appellant were his wife, daughter, father, mother and a brother. The report showed that the land was used for cane growing and residential; it detailed the cane production appellant claimed to have produced from the land over years 1972 - 1975 (bath inclusive).

257

In handwritten notes the officer recarded the follawing :

> "The land is now used as a cane land is a residential.
>
> At 25, there was a T.A.W. issued in the name of Sitamma f/n Narsaiya w/o Subba Rao far this particular land.
>
> At 27 we have served a notice af cancellation and this was acknawledged by Shiva Rao who claim to be the lessee af this land. We have not at any time after this notice was served, receive a T.A.W. which Shiva Rao now claim to have.
>
> He has at 31 admitted that the natice have been received and on the same letter requested usage of the same land. I need to stress in here that he has na right over this land.
>
> (sgd) ?
>
> Assistant Land Agent.
>
> 15/9/76".

The officer stated in his repart that appellant claimed ta have a tenancy-at-will in respect of the disputed land - "Drasa". (The reference ta 31 refers to appellant's letter to NLTB dated 18th November 1964.)

On 22nd September 1976 as a result of the discussion held an 8th September 1976 between appellant and Ratu George Tuakitau an agreement was signed between appellant and NLTB whereby appellant surrendered the tenancy-at-will in Viagai - file 4/4/292 - in exchange for the lease of anather section. No mentian was made of the adjaining land - "Drasa" - file 4/4/231.

In Navember 1976 Larima Balawa, an engineer with NLDC, visited the land in cannection with the laying off a new road as part af the new development of the area;

appellant inquired about a survey peg behind his house, which defined the new road, and was advised that he would have to shift his house; appellant asked Balawa if he could get him another piece of land as he had no where to go.

On 11th January 1979, NLTB answered Messrs. Sahu Khan and Sahu Khan's letters of 8th March 1978 and 11th May 1978. The reply is as follows:

"11th January, 1979.

Messrs. Sahu Khan & Sahu Khan,
Barristers & Solicitors,
P.O. Box 179,
B A.

Dear Sir,

re: LAND AT DRASA -
N.L.T.B. 4/4/231
APPROVAL TO LEASE - SHIV RAO s/o Subbarao.

We refer to your letters dated 8 March and 11 May, 1978 respectively.

We ore to inform you that the subject orea required by your client is now port of a subdivision managed by the Native Land Development Corporation.

We advise that you contact them for further informatian os regards the issue of a lease to your client.

Yours faithfully,

(sgd) E.R. Kalou
for General Monager."

There is no evidence that this letter was ever answered or any action token thereon.

On 1st November 1979 an inspection report was prepared by M.F. McGovern an estate officer in Lautoka with NLTB; this report dealt with the proposal that the tenancy of the land covered by file 4/4/292 held by appellant be surrendered in exchange for Lot 21 in the new subdivision. The learned Judge in dealing with this evidence said :

> "Exhibit D15 is a handwritten inspection report referring to 4/4/292 dated 11th November 1979 signed by M.F. McGovern who was an Estate Officer for the NLTB, showing the plaintiff as the lessee and its use for a rice mill and blocksmith shop. It shows plaintiff's agreement to accept an industrial lot in return for 4/4/292. There is also the statement that plaintiff holds a lease of 4/4/231 at $28.00 per annum for eight acres. No doubt McGovern, who is no longer in Fiji, simply recorded what the plaintiff told him about 4/4/231. I say that because McGovern says that plaintiff holds eight acres under 4/4/231 whereas the area of 4/4/231 is only 2 acres 3 roods and 16 perches. His concern was in obtaining plaintiff's surrender of 4/4/292 which he did. His report Exhibit D15 does not support the plaintiff's claim to a lease of 4/4/231."

On 22nd September 1980 John E. Salmon a senior officer with NLTB inspected appellant's land for the purpose of ensuring that the proposed development would properly utilise the land owned by the NLTB. Salmon saw cane growing and spoke to appellant who claimed to be a lessee. On 25th September 1980 after checking the records of NLTB in Suva, Salmon wrote to appellant as follows :

> "25th September 1980.
>
> Shiva Rao
> Blacksmith
> Tavua.
>
> Deor Sir,
>
> Drasa NLTB 4/4/231
>
> We have no record of having granted you a leose over the obove land. We do not recognise you as being tenont or occupier of the land and we have no record of rent having been paid for this lond.

Furthermore, on November 8th 1962 we informed the lessee Sitamma f/n Narsaiya w/o Subba Rao that the tenancy at will had expired and that the land was to be vacated.

On 11th July 1972 we informed the applicant Subba Raidu (alias Subba Rao) f/n Venkat Appaiya that this land was not available for leasing.

On 15th October 1975 we informed Shiva Roo and Pushkar Roo f/n Subba Rao that this land was not available for leasing.

On 20th May 1976 we informed your solicitors R.D. Patel and Company that the Board could not issue any title.

On 11th January 1979 we informed your solicitors Sahu Khan and Sahu Khan that the land was part of a subdivision managed by the Native Land Development Corporation. Your solicitors did not contest this statement. Therefore, we hereby give you notice that any use you may be making of the land is illegal and you are to vacate the land immediately.

Yours faithfully,

(sgd) J.E. Salman
Senior Estate Officer (HO)
for General Manager. "

Appellant did not vacate the land as requested nor did he answer the letter sent to him.

Appellant gave evidence that the Colonial Sugar Refining Co. issued appellant with a cane contract No. 3351; he claimed that he received a letter from NLTB in 1970 and handed this letter to the Colonial Sugar Refining Co. thereby obtaining the cane contract which was renewed by the Fiji Sugar Corporation in January 1979. Evidence was given of the production from the land by an officer from the Fiji Sugar Corporation as follows :

261

"Tagi Tagi
21/5/81.

TO WHOM IT MAY CONCERN

Production Farm No. 3351 - Shiva Rao
Tagi Tagi Sector

The production from the above farm for the past 10 yeors ore as follows :

1970	Nil
1971	21 tons
1972	9 tons
1973	11 tons
1974	7 tons
1975	5 tons
1976	2 tons
1977	1 ton
1978	5 tons
1979	3 tons
1980	3 tons
1981	15 tons estimate"

At the hearing of this oppeal we are informed that during the Supreme Court heoring counsel ogreed at the close of appellant's case -

(a) That the area of the land upon which appellont was residing was 2 acres 3 roods 18 perches.

(b) That it was acknowledged that the appellant was upon the lond but there was no concession that appellant was there, lawfully.

Mr. Sohu Khan submitted -

(1) That the documentary evidence proved conclusively that oppellant was in occupation of the lond known as "Drasa".

(2) That the NLTB after becoming aware of appellant's occupotion of the land took no steps to evict him therefrom.

(3) That the NLTB, through its authorised agents had accepted rent for the land known as "Drasa".

(4) That pursuant to section 4(1) of ALTA a tenancy was to be presumed to exist.

(5) That the learned trial Judge had misdirected himself on the evidence and had erred in drawing inferences from the proved facts.

Mr. Qetaki submitted -

(1) That appellant was not in occupation of the land; Sitamma was holding over after her tenancy-at-will determined and she was in occupation. Appellant merely lived there as a member of Sitamma's family.

(2) No obligation rested on NLTB to evict appellant if he was not in occupation within the meaning of section 4(1) ALTA.

(3) That if it is found that appellant was both occupying and cultivating the land the NLTB had not consented thereto and accordingly no tenancy under section 4(1) ALTA can be presumed.

(4) There was no evidence that the NLTB had ever consented either, expressly, or by implication to appellant's occupation of the land.

(5) That appellant without the knowledge of NLTB made voluntary payments to the Tavua Post Office and the Bank of New Zealand in the guise of rent.

We are informed that during the hearing in the Supreme Court paragraph 2 of the Statement of Claim, was amended by Counsel to read :

"2. THAT the plaintiff is the lessee and/or tenant of the first defendant in respect of certain Native Land comprised in Native Land Trust Board File No. 4/4/231 and which land is known as Drasa having an area of 2 acres 3 roods and 18 perches (hereinafter referred to as the 'Said Land'). "

A consequential amendment to paragraph 19(a) in the prayer to the Statement of Claim was also made and it reads :

"For a declaration that the plaintiff is a lawful lessee and/or tenant of the first defendant in respect of the land comprised in Native Lond Trust Board file number 4/4/231 and which land is known as Drasa having an area of 2 acres 3 roods 18 perches."

Mr. Sahu Khan in the Supreme Court and in this Court submitted that upon the evidence oppellont was within the ambit of clause 4(1) of ALTA and thot a tenancy of the disputed land should be presumed in his favour. Section 4(1) and 4(2) of ALTA provide:

"4-(1) Where a person is in occupation of and is cultivating an agricultural holding and such occupation and cultivation has continued before or after the commencement of this Act for a period of not less than three years and the landlord has taken no steps to evict him, the onus sholl be on the landlord to prove that such occupotion was without his consent, and if the landlord fails to satisfy such onus of proof, o tenoncy shall be presumed to exist under the provisions of this Act:

Provided that any such steps taken between the 20th day of June 1966, and the commencement of this Act shall be no bar to the operation of this subsection.

(2) Where payment in money ar in kind to a landlord by a person occupying any of the land of such landlord is proved, such payment shall, in the absence of proof to the contrary, be presumed to be rent."

The question at issue in this appeal is whether, upon the evidence, appellant is within the ambit of section 4(1) of ALTA and whether a tenancy in respect of the disputed land should be presumed in his favour. The learned Judge in the Supreme Court held that no tenancy could be presumed to exist under section 4(1) in favour of appellant.

The preomble to ALTA states -

> "An Act to provide for the relations between landlords and tenonts of agricultural holdings and for matters connected therewith."

A tenont is defined as -

> "'tenant' means a person lawfully holding lond under a contract of tenoncy and includes the personal representatives, executors, administrators, permitted assigns, committee in lunacy or trustee in bonkruptcy of a tenant or ony other person deriving title from or through a tenant."

A Contract of Tenoncy is defined as -

> " 'contract of tenancy' means any contract express or implied or presumed to exist under the provisions of this Act that creates a tenancy in respect of agricultural lond or any transactian that creotes a right to cultivate or use any agriculturol lond."

It is comman ground that the land in dispute wos agricultural land.

We turn to deal with the prerequisites of section 4(1) of ALTA.

The first requirement is that appellant should have been in occupation far not less than 3 years. The evidence shaws that appellant at all material times was living on the land with his mother Sitammo who had been a tenant-at-will of the NLTB until November 1962. When her tenancy was determined by notice Sitamma carried on living on the land in a state of holding over but paying

no rent. NLTB took no steps to evict her due, no doubt, to the fact that the planned subdivision and development of the area was imminent. In the Act there is no definition of the words "in occupation".

The meoning of the words "in occupation" are not words of art having an ascertoined legal meaning applicable thereto; in this cose they take their colour from the context of the Act. The Court must look at the substance of the positian as o whole, take into account the various elements which have been canvassed and come to a common sense conclusian as to the meaning of the words "in occupation". In so doing we osk ourselves whether, on the facts of this case, we should restrict the meaning of the words "in occupation" to the occupancy of Sitamma alone.

It is clear appellant was physically present upon the land for not less than 3 years and that on two separate occasions two officers of NLTB inspected the property and saw and spoke to appellant.

The circumstances surrounding appellant's claim that he was the person in occupation must be considered and related to his claim that a tenancy under ALTA should be presumed in his favaur.

The application made by appellant in November 1964 for a tenancy of the disputed land was not approved by NLTB; no reply to the application was produced in evidence. In 1969 appellant applied with his brother Pushkar for a lease of 8 acres, which included the land formerly held by his mother, and other lands adjoining; the application was refused, the NLTB advised that the land was not available for leasing. Appellant claims he was advised by some employee of NLTB that a lease of the disputed land - "Drasa" - had been granted to him alone;

his brother it is to be noted was not included in this alleged approval of a lease; the other lands mentioned in the application were not included; no written or formal approval was ever received by appellant in respect of the alleged lease of "Drasa". Appellant gove evidence that he was told by this employee to pay $1.50 stomp duty for the lease of the disputed land. The application by Pushkar and appellant in June 1969 was not a reapplication for the lease formerly held by their mother Sitamma; the application was for 8 acres. As the learned Judge commented in his judgment - was appellant granted something for which he did not apply?

In dealing with this matter the learned Judge said :

> " There is only the plaintiff's word that some person at the NLTB told him that he had been granted a lease of 4/4/231. I do not believe him. All the documentary evidence emanating from the NLTB definitely repudiates the existence of such a lease. I do not believe the plaintiff's evidence that someone of the NLTB informed the plaintiff to pay $1.50 stamp duty relating to 4/4/231. He did pay $1.50 to some sub-accountant of the Government on 22nd May, 1970 who recorded that it was tendered as stamp duty for 4/4/231. I believe that the plaintiff told the person to whom he tendered the $1.50 that it was stamp duty. It is strange that he holds an official approval Exhibit D18 to lease 4/4/292 for his blacksmith shop but relies upon vague hearsoy from some member of the NLTB's Lautoka staff to support o claim to lease 4/4/231... .....There is no doubt on the evidence available that the NLTB had never supplied the plaintiff with any written document offering him a tenancy of any specific area of land contoined in its file 4/4/231. All the plaintiff says is that some employee of the NLTB at their Lautoka office had told him that his request for a lease had succeeded. It is the vague kind of statement that anyone could make."

The NLTB on its pleadings and in an affidavit sworn by the Secretary to NLTB admitted that appellant was illegally occupying and cultivating the disputed land. In our opinion therefore on the particular facts of this case we conclude that appellant was "in occupation" of the land "Drasa".

In support of his claim that he had been cultivating the land appellant produced cane contract No. 3351 from the Fiji Sugar Corporation dated 22nd January 1979 which appeared to have replaced an earlier one issued in 1970. Evidence was given that the Fiji Sugar Carporation when issuing a cane contract required an applicant to produce his title. Appellant stated in evidence that he had no title to show the Fiji Sugar Corporation; he claimed that NLTB supplied him with a letter to prove his title but that the Fiji Sugar Corporation retained this letter and accordingly he was unable to produce it before the lower court.

The learned Judge after considering the evidence hereon said :

> "The FSC have no right to retain the documentary evidence of a farmer's title. I do not believe that the NLTB would issue a document in 1970 acknowledging the plaintiff's title and in July 1972 write the letter Exhibit D7 saying that the plaintiff's application for a lease of 4/4/231 was rejected.
>
> I believe that the plaintiff's evidence that the NLTB supplied him with a letter for the FSC evidencing his right to farm 4/4/231 is untruthful. If the FSC retained it why did he not request them to produce it at the trial?

Appellant claimed that in 1981 he had about 50 tons of cane growing upon the land; the evidence showed it was about 15 tons. The learned Judge said :

> "He holds a cane contract No. 3351, which appears to have been in existence since 1970 according to the production record Exhibit (NLDC) 11 and which refers to 4/4/231. It is an interesting document having regard to the plaintiff's present claim of 50 tons of cane. The highest production was in 1971 of 21 tons, thereafter in nine years it produced a total of 46 tons - an average of five tons per year. .....
>
> The plaintiff was deliberately dishonest in claiming that two acres were under cane and that he had about 50 tons when the prospective yield was only about 15 tons. His evidence was not simply a generous over estimate in his own favour but a definite untruth verging on fraudulent."

Appellant was operating a rice mill and a blacksmith's and engineering shop and the growing of cane was no doubt a sideline. Nevertheless, we are satisfied that appellant was cultivating the land, albeit, on a small scale.

The evidence established that an officer of the NLTB became aware of appellant's presence on the land in 1976 when he visited the land in dispute but no steps were taken by NLTB to evict him. The learned Judge in dealing with this matter said :

> "The documentary exhibits reveal that the NLTB never agreed that the plaintiff should occupy the land but that they disagreed with all his written proposals to that effect. As long as Sitamma's continued presence was acquiesced in, and it seems to have been, the plaintiff would, so to speak, be under her umbrella of occupation. No steps were taken to evict the plaintiff because he had never been tenant-at-will; the person told to vacate and who had failed to vacate was not the plaintiff but Sitamma."

However, under section 4(1) the onus is on the NLTB to prove that the occupation of the land was without its

consent. Appellant submitted as part of his case that the NLTB had consented either expressly or by implication to the appellant's continued presence on the land and produced receipts for moneys paid to the Post Office at Tavua and the Bank of New Zealand at Tavua collecting agencies for NLTB. Appellant gave evidence that the sum of $28 per annum had been fixed by an employee of NLTB as his rental for the disputed land; this had been agreed orally between appellant and the employee.

In the Supreme Court appellant in evidence said:

"My brother, Pushkar and I applied for 4/4/231. I see my letter Exhibit D3 on 18/11/64, mother's land.

I see letter Exhibit D5 applying for Native land - Pushkar and I were applying for 4/4/231 and part of Viagoi.

Q. Where does it say 4/4/231?

A. NLTB told me that number. When I paid rent I referred to 4/4/231.

Q. How did you get the first receipt?

A. NLTB told me to use that number and if the sub-accountant refused the rent I should telephone them.

Q. When pay first rent?

A. 1970 - Tavua Post Office.
It was $28.00. I paid it in one sum.

The Tavua Past Office rong the NLTB. The NLTB sent me word to pay some stamp duties - April or May 1970 - this was three months ofter I paid my first rental.

On 12.6.69 I had applied for 4/4/231 and paid my first rent of $28.00 in 1970.

Receipts are in my name. The application is in name of Pushkar and I.

Q. Why not pay in your joint names?

A. NLTB told me to use my own name only when paying rent."

There was no evidence as to how the rent was assessed at $28 per annum, nor was there any formal documents produced evidencing the lease or tenoncy or confirming the rental at $28 per annum; nor was the term of years of the olleged lease or tenancy fixed or ogreed upon. The NLTB denied all knowledge of the receipt of rent either by itself or by its collecting agencies; the learned Judge found that the appellant had been told on at least four occasions by the NLTB that no tenoncy would be granted to him. The NLTB's decision not to lease the land to him, and the evidence given by its officers, was the very negation of ony occeptance by NLTB of the appellant as a tenant. The learned Judge in considering the evidence relating to the alleged payment of rent soid :

> "The NLTB had never induced the plaintiff to pay rent; they had never led him to believe that they would accept any rent. No one had told him that the rent was $28.00 per annum; of that I am quite sure. How then could it be rent - which, after oll, is arrived ot by ogreement?"

Mr. Sahu Khan referred to section 4(2) of ALTA which reads:

> "(2) Where payment in money or in kind to a landlord by a person occupying ony of the land of such landlord is proved, such payment sholl, in the absence of proof to the contrary, be presumed to be rent."

Mr. Sahu Khan argued that the appellant having paid moneys to the collecting agencies of the NLTB ond having been in occupation of the land for not less than 3 years such payments in the absence of proof to the contrary are presumed to be rent.

The NLTB claimed that the payments were voluntary payments made unilaterolly by appellont without its consent or opproval and without NLTB at ony time ever being aware of such payments; and without NLTB at any time agreeing to lease

271

the land to appellant at a rental af $28 per annum or any other figure. The learned Judge said :

> "However in the circumstances the receipts standing alane cannot be regarded as proof of the existence af any tenancy in respect of which payment purports ta be made. If that were so the NLTB could quickly be thrawn into chaos by devious schemes invented by individuals wishing ta lay claim to land who pretend to be paying rent far specified land so as to create an impression that a lease exists. The BNZ at Tavua obviausly has no idea as to what leases exist in that area nor has the sub-accountant at the Post Office. They can anly recard, for the information of the NLTB, that a person named in the receipt paid the sum shawn therein and alleged that it was in respect af same tenancy described by the payer.
>
> The NLTB is a huge organisatian in Fiji terms being the landlard of almast the whole of Fiji. Its tenants are scattered all aver the islands - and the establishment of persans and bodies authorised to receive rents is a convenience for tenants. Obviausly such representatives have no authority to create tenancies, they cannot acknawledge the existence of tenancies, they can only acknowledge payment of a sum of maney and recard the payer's comments. Naturally in the case of an existing tenancy the receipt is evidence of payment where the NLTB complains that payment has not been made. But where no written agreement or proof of the grant of a tenancy is available, acceptance of payment by the BNZ or suchlike agent connat be treated as the NLTB's acknawledgement of the existence of a tenancy."

With these camments we respectfully agree.

In Clarke v. Grant /1950/ 1 K.B. 104 Lord Goddard at p.105 said :

> "Therefare, when a landlord has brought a tenancy to an end by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy. A new tenancy must be created. That has been the law ever since it was laid down by the Court of King's

> Bench, presided over by Lord Mansfield, in Doe d. Cheny v. Batten (1775) 1 Cowp. 243. I need not read the judgments in extenso, but Lord Mansfield said (Ibid). 245 'the question therefore is, quo animo the rent was received, and what the real intention of both parties was.'
>
> It is impossible to find that the parties here intended that there should be a new tenancy. The landlord was all the time desiring to have possession of the premises: that is why we had given his notice to quit. The mere mistake of his agent in accepting as rent which had already accrued rent which was in fact payable, if it was payable at all, in advance, cannot be used to establish that the landlord was agreeing to a new tenancy."

The appellant is seeking a declaration that a tenancy be presumed in his favour. As we have said in NLTB v. Ram Dass (F.C.A. 30 of 1981):

> "The Act was passed by Parliament in its wisdom, no doubt, for the benefit of Fiji and to afford some security of tenure to cane farmers; the effect of the Act is to impose a certain 'status' on agricultural land in Fiji which binds both the landlord and tenant and any other person having dealings therewith."

Section 4(1) of ALTA, as we have had cause to say previously, has the effect that some occupiers of agricultural land may be elevated to the status of "tenants" when they have no title at common law.

Where a claim is made that a tenancy should be presumed, any tribunal or court should in our view in determining such an important issue carefully scrutinize the the evidence proffered in support thereof.

The question whether the payments by appellant to the Post Office or the Bank of New Zealand at Tavua constituted an unequivocal act of affirmance of a tenancy is a question of fact for the Judge to determine having regard to all the circumstances of the case.

Mr. Sahu Khan invited this Court to hold that the payment of $28 per annum by appellant for the years 1970 to 1981, ostensibly for rent for the disputed land, led inescapably to the inference that the NLTB had accepted the appellant as its tenant.

However, we are satisfied, on the evidence that NLTB was not aware that rent had been paid. Mr. J.E. Salman Senior Estate Officer for NLTB said :

> "Our records revealed no payments of rent and my letter Exhibit D14 explains this to plaintiff."

Admittedly, NLTB should have been put on inquiry by reason of the letters from Patel & Co. and Sahu Khan and Sahu Khan, but the fact remains that it did not know appellant was paying money to the collecting agencies; collecting agencies would not have known whether any rent was payable or not and their acceptance of the money tendered by appellant cannot in our view, on the facts of this case, be transloted into proof that the NLTB had agreed to accept the money as rent. This money was paid by appellant in the hope that it would be accepted and such acceptance would thereby enure to his benefit and estoblish the inference that the relationship of landlord and tenant existed between NLTB and appellant.

Appellant's case depended to a considerable degree upon appellant's oral testimony supported by the documentory evidence tendered to the Court. However, when the evidence was examined it was often found to be inconsistent with the documentary evidence.

The learned trial Judge who saw and heard the witnesses formed a very poor opinion of appellant's credibility. We have referred to various passages taken from the judgment in the Supreme Court which calls into question the veracity of the appellant.

The credibility of the witnesses was a matter of great importance in this case and this Court should not lightly disturb findings of fact made by a trial Judge which depended to any appreciable extent on the view that he took of the truthfulness or untruthfulness of a witness whom he has seen and heard. The learned Judge in assessing appellant's credibility said:

> "It is indicotive of plaintiff's claim generally. He is lacking in credibility to the extent that I would not accept his evidence on any material aspect of his claim unless it was supported by some persuasive evidence from an independent source. I am quite satisfied that he would not hesitate to tell lies and cheat in order to establish a case..... He has endeavoured to hoodwink responsible officers into believing that someone had 'somewhere along the line' agreed to one of his requests for a tenancy of 4/4/231. I regard his attempts as unscrupulous and based on cheating and deception. He is a witness and claimant without a scrap of acceptable credibility."

We agree with the trial Judge that the appellant had devised a scheme in the hope of beating the statutory system of creating tenancies of native land. We respectfully adopt the statement by the learned Agricultural Tribunal in Bijoy Bhadur v. Ram Autar & Others (Agricultural Tribunal W.D. 48/78) where the learned Tribunal said :

> "Section 4(1) affords protection to bona fide tenants whose landlords subsequently refuse to recognise them as such. It is not a shortcut to the acquiring of an interest in land by adverse possession."

Therefore, notwithstanding the fact that appellant had been in occupation of, and cultivating the disputed land, we are satisfied that the learned Judge in the Supreme Court was correct in concluding that the NLTB had discharged the

onus cast upon it by section 4(1) of ALTA of proving that such occupation was without its consent.

Accordingly this appeal fails. The judgment in the Supreme Court is affirmed. The appellant is to pay the costs of both respondents, to be taxed if not ogreed.

Chas Macnaghten

.....

(Judge of Appeal)

R. Sinclair

.....

(Judge of Appeal)

.....

(Judge of Appeal)