IN THE FIJI COURT OF APPEAL

Civil Appeal No. 81 of 1985

Between:

ARMUGUM s/o Krishna — Appellant

and

SHIU PRASAD s/o Raj Bali — Respondent

Mr. V. K. Kalyan for the Appellant
Mr. S. R. Shankar for the Respondent

Date of Hearing: 4th November, 1986

Delivery of Judgment: 14.11.86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal against the decision of Kearsley J. allowing an appeal against Nadi Magistrate's judgment and ordering vacant possession of a piece of land occupied by the appellant (original defendant).

The appellant has, since the lodging of the appeal, died and an order was made substituting his widow Dropati as administratix in his place.

Facts found by the Magistrate were: In 1972 one Subramani who occupied and cultivated 7 acres of

C.S.R. freehold permitted the appellant on payment of $400 to occupy approximately 20 perches of the land and build a house on it. The whole of this land was taken over by the Crown from the Colonial Sugar Refining Company on 1st April, 1973 and became Crown Land.

On 9th July, 1974 a notice was issued by the Lands Department to Subramani agreeing to lease the whole of the 7 acres to him. The land was surveyed early in 1979. In July 1979 Subramani sold it to the respondent who was then issued by the Lands Department a fresh approval notice the one issued to Subramani having been recalled. The area, the subject of the approval notice, includes the 20 perches occupied by the appellant.

The respondent issued a writ claiming vacant possession of the 20 perches, damages and costs.

He testified that he had seen the appellant's house on the land before he purchased it but had been told by Subramani that he was there only for two years. The appellant himself said that Subramani had specified no period when granting him permission to build. A document, however, put in by Counsel as an exhibit by consent, but unsigned, suggested that the permission was for the appellant, to stay in the house with his family "as long as he wish".

The Magistrate found :-

> " The position then, in the instant case, is that Defendant entered on 20 perches being part of the whole land when it was freehold, by paying Subramani $400. He built his house and thought he was there for life."

He later in his judgment said :-

> " I am of the opinion that as against Subramani and while the land was freehold, the Defendant acquired equitable rights over the 20 perches. He paid to go in, he built a house, he was told by Subramani that he could stay as long as he wished, and clearly he was encouraged and enticed by Subramani to believe that he could stay. He had the water supply connected and he used "c/o Subramani" as his postal address. At the time that he paid his money to Subramani the intention of both parties was that he could stay there as long as he liked. "

The Magistrate accepted knowledge on the part of the respondent of the appellant's rights when he purchased the 7 acres and the claim for possession was, therefore, dismissed with costs to the appellant.

While summarising the facts of the case the learned Magistrate said :-

> "He (Subramani) had no formal lease and was presumably a licensee with an interest because the major part of the area was cane farm."

The appellate Judge treated this as a definite finding of fact and stated :-

> "Now, I have accepted as valid the Magistrate's presumption that Subramani was at that time occupying the 7 acres as a licensee."

Having made that finding he said, "A licensee having no interest in the land in respect of which he is licensed, I cannot see how any encouragement or acquiescence on his part can establish an equitable right or interest in the land in favour of any other person." He allowed the appeal.

We find no evidence to support a conclusive finding by the Magistrate that Subramani was a mere licensee for he advisedly used the words "presumably a licensee with an interest". This was an important issue for the court before it could decide the nature of the transaction but almost no evidence was led by either party on it making the Magistrate's task extremely difficult. Subramani's evidence was, "I have been on the land 18 years. I used to be a C.S.R. tenant." While there was nothing to indicate what exactly a "C.S.R. tenancy" was, the evidence remained unchallenged and was supported by other evidence pointing to exclusive possession and cultivation for several years until the passing of the title from the Colonial Sugar Refining Co. to the Crown in 1973. There was, in our view, no evidence on which the finding of a mere licence could be based.

Mr. Kalyan, for the appellant, submits that, in any case, the provisions the Agricultural Landlord and Tenant Act (ALTA) applied in 1972 and the appellant had a right to a statutory tenancy over the 7 acres. This raises a problem frequently faced by this court, Counsel adverting for the first time to important issues not argued before the trial court. Counsel for the respondent also tried to raise, again for the first time, the applicability of the Subdivision of Land Act to this area. He had given no notice of it and, in any case, there was no evidence to suggest that the Act applied. This matter ought, in our view, have been dealt with fully before the Magistrate's Court, for if the Act did apply and if there was in fact a subdivision the legality of the transaction would become a serious issue. We recognise that, in this case, Mr. Shankar did not represent the respondent at the trial. As the evidence before the Magistrate stood, and as he found, there was no actual sub-division of the land. The appellant's evidence was :-

> "Agree I went to Subramani to get his permission to build on the land. He did not give me any definite period. He said the land was idle and I could use it."

All the appellant obtained from Subramani was permission to build on his (Subramani's) land and to stay there as long as he wished.

Mr. Kalyan, although he had made no mention of ALTA at the trial and made only a passing reference to it before the Supreme Court, used it here as a major thrust of his appeal submitting that the appellant was in 1972 by force of its provisions entitled to a declaration of tenancy over the 7 acres and was, therefore, in law a statutory tenant entitled to a sub-lease for a statutory period. Mr. Shankar does not challenge that preposition. No application, however, had been made for such a declaration and no instrument of tenancy ordered. Had there been such a declaration the contract of tenancy under section 9 of ALTA would have imposed a covenant on the part of the tenant :

> "9.(1)(e)(ii) - not to part with the possession of, mortgage, assign, sublet or otherwise alienate the holding or any part thereof without the consent in writing of the landlord previously obtained, which consent shall not be unreasonably withheld, and then, only in accordance with the provisions of this Act; "

We accept Mr. Shankar's submission that parting with possession of only 20 perches of agricultural land, an area far too small to be an agricultural holding under the Act, would not be in accordance with its provisions and would be in serious breach of the covenant. We do not, however, accept that such a breach on Subramani's part would

deprive the appellant of his equitable right to remain on the land visavis him or his successor in title with notice.

The learned Judge of the Supreme Court was in error in finding that Subramani was a licensee and that he could not therefore confer any equitable rights upon the appellant Armugum. The appeal would have been allowed had Armugum been alive.

How does this finding affect Dropati, the widow and administratix of Armugum's estate who has been substituted in his place? No submissions were made to us on this question by the appellant's Counsel who merely sought the restoration of the Magistrate's refusal to grant an order of possession against Armugum. No relief was sought in that court on his behalf other than the right to remain on the land. As the learned Magistrate said :-

> "Defendant has not counterclaimed or sought any order from this court, but he can have the costs."

As for his right to remain in occupation of the house the learned Magistrate clearly expressed the view that he was entitled to stay for life or, at any rate, as long as he wished to do so. While he lived in it, he could bring his family members to stay with him but the right to remain, so the Magistrate found, was personal to him.

Circumstances which enable a party to invoke the aid of equity vary infinitely. In Crabb v. Arun District Council (1975 3 W L R 847), for instance, a much greater right involving access and easement running with the property was involved. In Inwards v. Baker (1965 1 All E R 446) a right to remain on another's land for life,

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similar to the one in the instance case, was under consideration. Even in such a case circumstances may show that the right to remain was conferred upon more than one person. Here, however, there is nothing to suggest that Subramani had any dealings with, or even knew, the appellant's wife or any other relative. In any case, it is not contended by Counsel for the appellant that the scope of the equity found by the Magistrate in the appellant's favour be widened so as to confer its aid on persons other than Armugum.

The learned Magistrate did find $400 to have been paid by the appellant to Subramani by way of consideration for his agreement to let him build on, and use, that small area but there was no counter-claim by the appellant as to title and the matter, therefore, did not call for consideration.

We consider, on the facts found by the learned Magistrate, that the appellant's right to remain on the respondent's land for life ended with that life.

The appeal is consequently dismissed. There will be no order as to costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal