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IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 60 OF 1986

Between:

VINESH GIR AND RAMESH GIR

Appellants

- and -

ROSHNI DEVI

Respondent

Mr. Sohan Singh for the Appellants

Mr. Subhash Parshotam for the Respondent

Date of Hearing: 22 August 1989

Delivery of Judgment: 27 October 1989

JUDGMENT OF THE COURT

This is an appeal against the judgment of Dyke J. delivered in the Supreme Court (now known as the High Court) on 12 September 1986 in Lautoka Civil Action No. 772 of 1985 whereby he made an order of possession in favour of the respondent under Section 169 of the Land Transfer Act, Cap. 131.

The grounds of appeal are as follows:-

"1. THAT the learned Judge erred in law and in fact in making the order for possession on the grounds:

- (a) that the proceedings were commenced under Section 169 of the Land Transfer Act, and the

appellants showed cause against the making of the said order, that they were tenants of the said land which was governed by the provisions of Agricultural (Landlord and Tenants Act);

- (b) that the appellants' application for relief was pending before the Agricultural (Landlord and Tenants) Tribunal.

2. THAT the said decision is wrong in fact and in law having regard to all facts and circumstances."

The history of this case and the facts as found by the trial judge can be summarised as follows:-

The Agricultural land in question is situate in Ba and is comprised in Native Lease No. 12108 containing 42 acres 3 roods. The original lessee of the whole of this native land was Bakelal the father of the 2 appellants (the original defendants). The initial period of the lease is 30 years from April 1962. On the land were 3 houses that were occupied by Bakelal and his 2 sons and their families. There was only one contract for cane covering approximately 17 acres. Bakelal owed money to Mahadeo father of Vijay Chand and the husband of the respondent (original plaintiff). Bakelal could not pay his debt so he sold the land to Vijay Chand for \$30,000 and Mahadeo was paid off the debt from the proceeds. The transfer of the lease was registered in the name of Vijay Chand on 5/10/81. The cane contract was also transferred to Vijay Chand. But the 2 appellants continued residing on the land and continued occupying the houses. Bakelal died in 1983. Vijay Chand commenced proceeding in the Magistrate's Court to evict the appellants from the land but those proceedings were adjourned sine die because the appellants had applications before the Agricultural Tribunal for tenancy of 10 acres each of the land in question. The applications to the Tribunal were made in 1981. They were subsequently consolidated.

On 23 June 1983 Vijay Chand died intestate and the respondent obtained Letters of Administration of her husband's estate on 25 November 1983. As trustee and administratrix of her husband's estate, the respondent made many unsuccessful requests to the appellants to vacate the land and the houses. Even a written notice to quit dated 5 September 1985 from her Solicitors proved to be of no avail. She then commenced possession proceedings in the High Court in November 1985 under the provisions of Section 169 of the Land Transfer Act in her representative capacity.

Part of the supporting affidavit reads as follows:-

"17. That the aforesaid Tribunal Application was against the previous owner and not against my late husband.

18. THAT since the previous owner is dead and there is no trustee or administratrix of his estate, the Tribunal action pending before the Tribunal, I am told and I verily believe will be dismissed.

19. THAT the defendants are staying in the house which has been bought for the use of the estate and as a result, I haven't got any place to stay and to work on the said land.

20. THAT there are too many debtors to whom the estate owes money and which is to be paid from the proceeds.

21. THAT the tonnage of the crop is decreasing year by year due to the lack of cultivation and management.

22. THAT I cannot work and stay on the said land until the defendants give vacant possession of the said land and the three houses occupied thereon by them.

23. THAT there are five beneficiaries in the said estate including myself and it is very hard for me to provide food and clothings to my children.

24. THAT presently I am staying with my brothers who are helping me in cultivating the said land.

25. THAT the defendants are relying on the pending Agricultural Tribunal Application, which said application will not be heard until the Letters of Administration has been granted in the previous owner's estate.
26. THAT my husband was a bona-fide purchaser of the said land for valuable consideration and as a result the defendants have no action or claim against my husband's estate.
27. THAT there has been no fraud or misrepresentation in transferring the said land unto my husband's name and all rules and conditions of Land Transfer Act has been complied with to vest the said land unto my late husband's name.
28. THAT the defendant's occupation is unlawful as no consent has been obtained from the Native Land Trust Board.
29. THAT I verily believe that the defendants are trespassers all along in their occupation of the said property.
30. THAT I as trustee of the estate of my late husband am being deprived of administrating the estate in the best interest of the beneficiaries as a result of defendants' illegal occupation of the said property."

The appellants filed an affidavit in reply stating:

- "(a) That it is an agricultural land and we are tenants thereof;
- (b) That we are entitled to all the rights and protection under the Agricultural (Landlord and Tenants) Act and our application is pending before the Agricultural Tribunal;
- (c) That our tenancy has not been terminated in accordance with the provisions of Agricultural (Landlords and Tenants) Act."

Then the respondent filed a supplementary affidavit and the appellants replied to it with a joint one of their own stating:-

- "(a) That we have tenants of the land in question well before the deceased Vijay Chand became interested in the lease;
- (b) That the said Vijay Chand had actual, imputed or constructive notice of our tenancy plus actual possession, occupation and cultivation of the said land;
- (c) That we have been in possession, occupation and cultivation of the said land, and are still enjoying the same right and position."

Because there were conflicting affidavits Court ruled as follows:-

"Court: There is a dispute as to whether or not defendants are occupying and cultivating the land in question. If they are not they have no grounds for going to the Agricultural Tribunal. If they are they may have grounds for doing so. It is perhaps significant that the application has not been produced in court. We will proceed now to hear evidence as was decided on 9/5/86."

After hearing the evidence and listening to further arguments from the counsel on 11/8/86 the trial judge delivered a 6-page judgment on 12/9/86. He found inter alia:-

- (a) That the respondent as the administratrix and trustee of the estate was the last registered lessee of the land in question;
- (b) That the appellants never received any proceeds from the cane (a fact not disputed by the appellant) and all they got was wages.
- (c) That no consent was ever obtained from the Native Land Trust Board in respect of the alleged tenancy a fact which the appellants themselves acknowledged in their applications to the Agricultural Tribunal. There was no legal tenancy and none that could be legalised subsequently.

- (d) That the applications to the Tribunal were against their own father Bakelal who has since died and no attempts have been made to obtain letters of administration in respect of deceased's estate
- (e) That there was no application citing Vijay Chand or successor in title as respondent before the Agricultural Tribunal and that in any case the applications pending before the Tribunal since 1981 were adjourned sine die and were not being actively pursued
- (f) That "clearly they have no tenancy and although they may have lived on the land and cultivated it or part of it, they have not satisfied the court that it was otherwise that as a part of a joint family arrangement".

He therefore held that the appellants failed to show cause why possession should not be given and so made an order granting vacant possession to the respondent. The appellants have not given up possession and are still living on the land.

In refusing to adjourn the proceedings before him to await the outcome of the application pending before the Agricultural Tribunal the trial judge was mindful of the fact that in certain circumstances the tribunal had power to grant tenancies under the Agricultural and Landlord Act even though consent of the Native Land Trust Board had not been obtained.

With regard to the first limb of the first ground of appeal Mr. Sohan Singh (who appeared on instructions from Mr. G.P. Shankar the solicitor for the appellants) endeavoured to argue that it was not competent for the respondent to bring the action for possession because at the material time she was not "the registered proprietor of the land" a condition precedent for proceedings brought under section 169 (a) of the Land Transfer Act.

He drew our attention to the photocopy of the native lease annexed to the affidavit of the respondent filed in support of the application. The memorials on the lease indicated that the last registered proprietor was her deceased husband.

He also referred us to section 93 of the Land Transfer Act which makes provisions for registration of rights to land under transmission. Mr. Sohan Singh agreed that the point was not raised in the Court below and that it was not specifically made a ground of appeal. No application was made to amend the grounds of appeal. Mr. Subhash Parshotam informed us from the Bar table that that transmission had in fact been registered in the name of the respondent. He was not in a position to give the date of registration. He did not regard it as an issue in this appeal. However he referred us to section 93(4) of the Land Transfer Act regarding retrospective effect of registration. Mr. Singh did not object to the information supplied to Court by Mr. Parshotam nor did he dispute it.

Whilst we did not give Mr. Singh leave to raise the issue of competency of the respondent to issue summons under section 169 of the Land Transfer Act we feel we ought to deal with the question on our own motion in the broad interests of justice.

Section 169 of the Landlord Transfer Act makes provision for 3 different groups of persons, specified in sub-paragraphs (a), (b) and (c), who may bring an action for possession. The first of these being the "last registered proprietor of the land" (section 169 (a)). The other 2 groups are not relevant to this case and we accept that the only capacity in which the respondent could have brought the action is in her capacity as "the last registered proprietor....." whether in her own right or as trustee and administratrix of her husband's estate. Section 94(4) of the Land Transfer Act reads as follows:-

"The title of every personal representative of a deceased proprietor registered under the provisions of this section shall relate back to and take effect from the date of the death of the deceased proprietor."

An appeal to the Court of Appeal is by way of rehearing (Rule 15(1) of the Court of Appeal Rules) and by virtue of Rule 22(3) this Court has the power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require. Furthermore Rule 22(4) empowers this Court to make any order to ensure the determination on the merits of the real question in controversy between the parties, even though the point in issue has not been specified in the notice of appeal.

Since every appeal to the Court of Appeal is by way of rehearing we can in appropriate circumstances take cognisance of facts which have occurred since the delivery of judgment in the Court below i.e. look at the state of things as at the time of hearing of the appeal and make such order ruling or affirmation as the case may require. An appeal to the English Court of Appeal is also "by way of rehearing" (Rules of the Supreme Court O.59, r.3). In Attorney-General v. Birmingham Tame and Rea District Drainage Board [1912] A.C. 788 the House of Lords held that since an appeal is by way of rehearing the court may make such order as the judge of the first instance could have made if the case had been heard by him at the date on which the appeal was heard. Thus in the exercise of its powers to consider facts that have occurred since the trial, the English Court of Appeal may dissolve an injunction granted by the Court below against a nuisance or a breach of statute on the grounds that by reason of new words since executed by the defendants there was no longer a breach or reason for the continuance of the injunction.

And likewise where, since the trial below, H.M. Government have granted recognition to a foreign government, retrospective to the material dates, the English Court of Appeal will give the judgment that the Court below could have given, had the recognition then been accorded (Luther v. Sagar [1921] 3 K.B. 532).

In the appeal before us we take cognisance of the fact that the respondent's title has been registered although possibly after the trial. By virtue of the provisions of section 93(4) of the Land Transfer Act the respondent's title is deemed in law to have vested in her from the date of her husband's death. Since she instituted

the proceedings for possession after obtaining the letter of administration following her husband's death and now that the transmission has been registered she was by force of law at all material times the registered proprietor of the native lease in question albeit in her representative capacity. We therefore affirm the trial judge's finding that the respondent as administratrix and trustee was the last registered lessee of the land in question and as such she was competent to bring the action for possession.

We now turn to the grounds of appeal contained in the Notice of Appeal. All the arguments advanced in support of Grounds 1(a) revolve around the merits of the application pending before the Tribunal established under ALTA. Mr. Singh submitted that since the appellants appeared and showed "cause" as required by section 172 of the Land Transfer Act, the trial Judge ought to have dismissed the summons especially since such dismissal would not have prejudiced respondent's right to bring other proceedings e.g. by a writ. Ground 2 is vague, generalised and lacks particularity. In any case in the written skeleton arguments it is conceded that most of the arguments in respect of Ground 1 apply to Ground 2. We therefore do not find it necessary to deal with Ground 2 separately.

At the hearing of this appeal Mr. Sohan Singh on his own initiative and with the consent of Mr. Parshotam tendered a certified true copy of the full record of proceedings before the tribunal in respect of the application made by the 2 appellants (ref. WD 135/81). An entry made on 13/8/87 shows that the appellants' application was struck out for non-appearance. That being so there is now no application pending before the Tribunal. In these circumstances it will be at best a matter of academic interest only or at worst an exercise in futility to discuss the merits of the appellants' arguments relating to their alleged entitlement to tenancy under ALTA as advanced in Ground 1(a).

On the whole of the material disclosed in this case we are satisfied that the trial Judge's refusal to adjourn the proceedings before him to await the Tribunal's decision, was made in the proper exercise of his discretion. The adjournment of a hearing by a Court is a matter for the Court's discretion. An appellate court will not

lightly interfere with the exercise of such discretion unless it can be shown that the refusal would result in substantial injustice to any party. In our view such a result was not likely in this case. (See Maxwell v. Keun) [1928] 1K.B. 645). We therefore find no merit in Ground 1(b) of the appeal.

In an application for possession brought under section 169 of the Land Transfer Act the onus is on the defendant to show cause why he should not give up possession. The learned trial judge's findings that the defendants failed to show cause was based primarily on his findings of facts arrived at from the affidavits filed as well as from oral evidence in open Court. The learned trial Judge had had the advantage of hearing the witnesses and observing their demeanour. He was therefore better placed to assess their credibility. He was not impressed with the appellants or their witness with regard to their evidence and performance as witnesses of truth. In our view he had ample justification to come to the conclusions he did.

An application to the Agricultural Tribunal should not be used as a device to deny or indefinitely delay legal owners from enjoying their right to possession and use of their land.

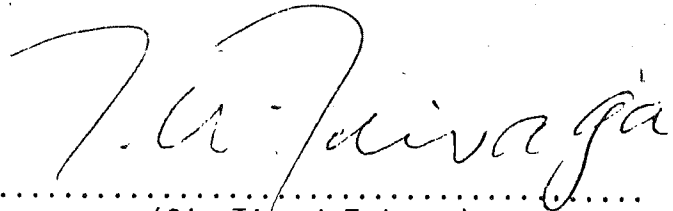
We echo the view expressed by the Agricultural Tribunal in Bijay Bhadur v. Ram Autar and Others (Agricultural Tribunal - WD 48/78), where the Tribunal stated:-

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

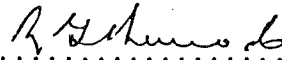
The above statement was also adopted by this Court in Shiva Rao v. NLTB and NLDC - Civil Appeal No. 76 of 1981.

We find no ground for disturbing the learned trial Judge's Order of vacant possession in favour of the respondent.

The appeal is dismissed with costs.



.....
(Sir Timoci Tuivaga)
President, Fiji Court of Appeal



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(Sir Ronald Kermode)
Justice of Appeal



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(Sir Moti Tikaram)
Justice of Appeal