# IN THE COURT OF APPEAL, FIJI ISLANDS
## ON APPEAL FROM THE HIGH COURT OF FIJI

**CIVIL APPEAL NO. ABU0091 OF 2005S**
(High Court Civil Action No. 30 of 2006S)

**BETWEEN:**

**SARBAN SINGH**

***Appellant***

**AND:**

**RAM UDIT**

***Respondent***

**Coram:** Ward, President
McPherson, JA

**Hearing:** Wednesday, 13th June 2007, Suva

**Counsel:** S Maharaj for the Appellant
M S D Sahu Khan for the Respondent

**Date of Judgment:** Monday, 25th June 2007, Suva

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## JUDGMENT OF THE COURT

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[1] This is an application by the unsuccessful appellant Sarban Singh for leave to appeal against a decision of the Court of Appeal delivered on 24 November 2006 dismissing his appeal against a decision of the High Court (Jiten Singh J) given in proceedings against the respondent Ram Udit. The proceedings arose out of an application to the Agricultural Tribunal made by the respondent for a declaration of tenancy under the Agricultural Landlord and Tenant Act (ALTA), which tenancy is by s.5(1) deemed to have commenced when the respondent tenant first occupied

the land, which in his case, was 1 March 1975. By s.13 of the Act, a tenant in the position of the respondent is invested with a right to an extension of his tenancy for a period of 20 years.

[2] The respondent applied to the Agricultural Tribunal to have it determined that he was entitled to the extension conferred by ALTA. At the hearing before the Tribunal, the applicant took the point that that the original tenancy in favour of the respondent was illegal and void, and that the Tribunal therefore had no jurisdiction in respect of it. The Tribunal acceded to this submission, as did the Central Agricultural Tribunal on appeal to it by the present respondent. However, on further proceedings in the High Court by the respondent, this decision was reversed by Jiten Singh J, whose decision was affirmed on appeal to this Court by its decision of 24 November 2006.

[3] In support of the application for leave to appeal to the Supreme Court, the applicant reiterates his submissions before the Court of Appeal last year by advancing three matters, which he says mean that the appeal involves a question or questions of "significant public importance." In essence, all three points turn on the validity of the primary point raised in the proceedings. It arises in this way. The land the subject of the disputed tenancy originally belonged to Santa Singh, who died in 1966. In that year his widow Parvati was entered up "as Executrix" by transmission on death. There must therefore have been a will duly executed by Santa Singh, although it was not placed in evidence at any stage of any of the many proceedings in this matter.

[4] In March 1975 Parvati executed a lease in favour of Ram Udit for a term of 20 years. It is this tenancy which the applicant claims is illegal. It is said to be illegal because s.23(1)(e)(ii) of the Trustee Act confers on a trustee like the executrix Parvati in this case a power to lease property for only 10 years, and not for 20 years as she purported to do here. This is what is said to make the lease illegal.

[5] Both Jiten Singh J and the Court of Appeal agreed that this submission must fail. Section 23(1) of the Trustee Act is concerned not to penalise but to empower a trustee. In a case where a trustee does not have any other power of leasing, he or she can resort to s.23(1)(e)(ii) to exercise the power conferred by that Act of leasing for 10 years . If the statutory power of leasing is exceeded, it does not follow that the lease is illegal. For one thing, the statutory power may not have been needed at all. There may have been an express power in the instrument of trust enabling Parvati to lease for 20 years or more. We do not know and cannot say, because the applicant failed at any of the hearings below to put in evidence the will of Santa Singh to enable it to be said whether or not Parvati was armed with an express power to lease going beyond the statutory power of 10 years.

[6] Acting in excess of one's power as trustee does not entail illegality, although it may sometimes entail invalidity, which is by no means the same thing, and does not have the same consequences as illegality. In any event, the Court has power under ss.85 and 86 of the Trustee Act to authorize dealings with trust property, and to vary or enlarge powers under a trust. That confirms that it cannot be automatically illegal to exceed the powers of leasing conferred by s.23(1)(e)(ii) of the Act. Section 3(2) of the Trustee Act makes it clear that the powers conferred by or under the Trustee Act are in addition to the powers given by the instrument, if any, creating the trust.

[7] It is therefore apparent that the applicant's contention that the agreement of lease entered into by Parvati was "illegal" is not on the evidence tenable. In any case, at the time of the lease agreement with the respondent she owned half the land in her own right as beneficiary under the will of her late husband, so that on any view the lease was always valid at least as to her undivided moiety in the land.

[8] This is really the end of the applicant's argument from illegality. It gains no further traction from the provision in s.2 of the Interpretation Act defining "contravene' as including a failure to comply with a statutory requirement or condition. Entering

into a 20 year lease instead of a 10 year lease does not amount to a failure to comply with a requirement or condition, but is simply an act in excess of power. What is said on this subject is true also of the provision in s.59(3) of ALTA that that Act does not apply to a contract of tenancy made "in contravention of any law." The lease agreement made in 1975 for 20 years did not contravene any law.

[9] This leaves for consideration only the final point put forward by the applicant, which is that the privative clause in s.61 of ALTA is effective to preclude the High Court and this Court from granting relief by way of certiorari or otherwise to either of the two Tribunals in this instance. To give effect to this submission would involve overruling this Court's decision in ***Re Azmat Ali*** (1986) 32 FLR 30. The Supreme Court has the power to do so; but we would be surprised if it chose to overrule that decision in view of the decision of the Lords in ***Anisminic v Foreign Compensation Commission*** [1969] 2 AC 147. The two Tribunals here did not merely go wrong in the course of exercising their statutory jurisdiction. They refused altogether to exercise their jurisdiction for reasons which were bad in law. This has always attracted prerogative relief from superior courts.

[10] The practical difficulty that the applicant now faces is that in order to establish his claim of illegality, as he asserts it to be, he was bound to prove that the lease granted in 1975 was in excess of the trustee's power. To do so, he needed to show that a 20 year lease was in excess of any power that might have been conferred on the trustee Parvati by the will of Santa Singh. The will, or the probate of it, was not adduced in evidence.

[11] Mr Maharaj submits that the applicant may yet obtain the leave of the Supreme Court to place the will in evidence in that Court. So perhaps he might; but until he succeeds in obtaining leave of the Supreme Court to admit that further evidence, there is here no question capable of being regarded or certified as of significant public importance, and consequently nothing in respect of which we are in a position to give leave to appeal. The applicant's failure in the lower court or

tribunals is not such a question. It is hardly to be supposed that the Supreme Court would welcome our giving leave to appeal to it on the contingency that that Court will or might grant leave to adduce this further material. Furthermore, as Dr Sahu Khan points out, the applicant is not in a position to show that his failure to exhibit the will in evidence is consistent with the exercise of due diligence on his part in preparing his case for hearing. The onus of proof of illegality lay and lies on the applicant, and on any view of it he failed to discharge that onus.

[13] The application should be refused with costs fixed at $500.

**Ward, President**

FIJI COURT OF APPEAL

**McPherson, JA**

**Solicitors:**

**Suresh Maharaj and Associates, Lautoka for the Appellant**
**Sahu Khan and Sahu Khan, Ba for the Respondent**

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