GANPATI

v.

SOMASUNDARAM

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.), 12th, 26th November]

Civil Jurisdiction

Landlord and tenant—tenancy at will—whether such tenancy a protected lease—whether consent of Director of Lands required for its transfer—Crown Lands Odinance (Cap. 113) *s.* 13(1)*—Crown Lands (Leases and Licences) Regulations regs.* 34, 35, 36, 38, 43.

The respondent executed an agreement to sell his interest to the appellant in land which he held as a tenant at will under a letter issued by the Director of Lands. Subsequently the respondent surrendered his interest in the land to his wife and applied for a formal lease in her favour, thus revoking his agreement with the appellant.

In the Supreme Court, the judge held that the lease of the land in question was a 'protected lease' and that any dealing in land covered by such a lease was unlawful unless the consent of the Director of Lands was first obtained. This had not been done, and therefore the agreement between the respondent and the appellant was void and the appellant's claim for specific performance of the contract for sale and purchase must fail.

Held: The judge had erred in elevating a tenancy at will into a protected lease. A document which indicated an intention to create a protected lease did not of itself suffice to create one. The appellant and respondent were not, therefore, parties to an illegal contract and the Crown Lands Ordinance *s.* 13(1) did not apply. *(Damodaran Reddy v. Ragwa Nand* Civil Appeal 3 of 1972—unreported, followed and applied).

Cases referred to:
Jai Kissun v. Sumintra Civil Appeal 18 of 1970—unreported.
Shiu Ram v. Surui Pal 9 F.L.R. 141.
Cadogan (Earl) *v. Guinness* [1936] 1 Ch. 515.
Cooper v. Robinson [1842] 10 M & W 694; 152 E.R. 651.
Jervis v. Tomkinson [1856]1 H & N 195; 156 E.R. 1173.
Shaw v. Kay [1847] 1 Exch. 412; 154 E.R. 475.

Appeal against the judgment in the Supreme Court dismissing the appellant's claim for specific performance of a contract for sale and purchase.

K. C. Ramrakha for the appellant.
H. C. Sharma with S. C. Verma for the respondent.

The following judgments were read:

MARSACK J.A.: [26th November 1976]—

This is an appeal against a judgment given in the Supreme Court sitting at Lautoka on the 30th day of April 1976. The appellant as plaintiff brought an action against the respondent as defendant claiming specific performance of an agreement (headed 'Sale Note') dated 8th August 1973 and made between the respondent as vendor and the appellant as purchaser for the sale of what was described as a piece of Crown land contained in a tenancy-at-will known as lot 12 Togabula subdivision. The purchase price was stated to be $3,000 of which $600 was paid on the execution of the agreement and the balance of $2,400 was to be paid within seven days of the grant of consent by the Director of Lands to the transfer. The sale included two bullocks valued at $400; as these were not handed over to the purchaser it was agreed that the balance of purchase money should be reduced from $2,400 to $2,000. The evidence as to the subsequent financial dealings between the parties is tangled and to a considerable extent in dispute. A second payment of $400 was made on 11th October 1973 and a further $99 at the office of Mr Gordon, solicitor on a date which was not ascertained. Whatever may have been the financial position in the later stages, it is clear that on the 30th April 1974, the respondent executed an assignment to the appellant of the sugarcane contract covering the land in question.

On 3rd May 1974 both parties executed a formal transfer of the respondent's interest in the lands to the appellant. The land is described as 'C.L.' which presumably stands for Crown Lease, but the column headed 'Number' is left blank. On the 9th May 1974 and application for consent to the transfer was sent to the Director of Lands; but a few days later the respondent wrote to the Director of Lands cancelling his previous application, and on the 26th July, an official reply was sent to the solicitors, Messrs. Patel and Gordon, stating that the consent was not granted.

The appellant entered into possession of the lands some time after the agreement was signed, and according to his statement of claim, was still in possession at the time of filing his claim on 18th September 1975; and he was cultivating the sugarcane crops on the land. The respondent in June 1975 surrendered his interest in the lands in favour of his wife Kaliamma, and applied to the district surveyor for a formal lease in favour of Kaliamma. This application, as we are informed, has been held up pending the determination of the matter before the court.

The learned judge in the Supreme Court held that the tenure of the land in question was a "protected lease" under the provisions of the Crown Lands Ordinance; that under section 13 of the Ordinance, any dealing in land covered by such a lease was unlawful unless the consent of the Director of Lands had been first obtained to it. As that had not been done in the present case, the plaintiff and the defendant were parties to what became an unlawful agreement. Accordingly, he held that the plaintiff's claim for specific performance of the contract for sale and purchase must fail.

Seven grounds of appeal were filed, but at the hearing Mr Ramrakha informed the court that he would rely solely on the ground that this was not a "protected lease" within the meaning of the Ordinance. He drew attention to the fact that the transfer dated 3rd May 1974 and signed by the parties left blank the column in which should be inserted the number of the Crown lease; and if such a lease existed its number would appear there. It is perfectly true that there is a document dated 7th October 1975 headed "Approval Notice of Lease Form" addressed to Kaliamma Chetty, setting out the terms of the lease and stating "this is a protected lease under the provi-

sion of the Crown Lands Ordinance", but in Mr Ramrakha's submission no actual
A lease was in existence at the time of the transaction between the respondent and the appellant. The transfer referred to, in which the number of the lease was left blank, was so drawn, in counsel's submission, because it was hoped that a Crown lease would ultimately materialize. When such a lease was issued it was conceded that it would be a protected lease. While no such lease had been issued then, counsel argued, the respondent had been not a lessee but a tenant at will.

B The question of what constitutes a "lease" is a difficult one. There is no definition of lease in the Crown Lands Ordinance. Regulation 34 of the Crown Lands (leases and Licences) Regulations provides that all leases under the regulations should be in the form set out in Schedule, headed "Memorandum of Lease". No such document was produced in the present case. The learned trial judge held that the sentence "this is a protected lease under the provisions of the Crown Lands Ordinance" in the approval notice addressed to Kaliamma Chetty on the 4th September 1975
C (exhibit B15) and signed by her, "places the lease within the four corners of section 13(1)". Thus it would appear that the learned judge held that that document proved that the tenancy held by the respondent at the time of the agreement for sale to the appellant on the 8th of August 1973 and the formal transfer of 3rd May 1974, was a "protected lease" under the Crown Lands Odinance. In Mr Ramrakha's contention the approval notice did not in itself constitute a lease, nor was it in evidence that a
D lease under the Crown Lands Ordinance existed either then or previously. He relied heavily on a decision of the Supreme Court in *Damodaran Reddy v. Raghwa Nand* (Civil Appeal 3/1972).

In that case Stuart J. held that a letter of approval, in the same terms as exhibit B15 in this case, did not constitute a lease. The document indicated an intention to create a protected lease, but did not in itself suffice to create one. He pointed out in
E his judgment that under regulations 35 and 36 certain steps must be carried out, subsequently to the giving of the notice of approval, before a lease is prepared in the form laid down in the regulations and signed by the Director of Lands. The tenancy in that case was held by Stuart J. to be neither a "protected lease" nor a "lease" within the meaning of those terms in the Crown Lands Ordinance; and he held, further, that the transaction between the parties—which was on all fours with the transaction in issue in the present case—was not one which required the consent of the
F Director of Lands and was therefore neither void nor illegal.

Counsel for the respondent pointed out that the judgment in *Damodaran Reddy's* case was not cited in the court below, and contended that the reason for that omission was that no reference in it was made to regulation 43. That regulation provides that a "licensee" may not deal with lands comprised in his licence without the consent of the Director of Lands. But that regulation is not general in its effect. It
G appears in part III of the regulations headed "Licences". It proceeds in regulation 38 to define the powers of the Director of Lands to grant licences. This regulation reads:

"*Part III.—Licences*

38. Licenses may be granted under this Part by the Director for a period not exceeding twelve months for the following purposes:—
H

(a) cattle grazing;
(b) the removal of sand, lime and common stone;
(c) the cultivation of animal crops;

(d) residence;

Provided that licences for residential purposes shall be granted only in respect of land in a Government Settlement." A

It is to be noted that the tenancy held by the respondent does not fall within any of these categories; and that accordingly the respondent cannot be considered a "licensee" for the purposes of regulation 43.

Counsel for the respondent strongly relied on the judgment of this court in *Jai Kissun v. Sumintra,* Civil Appeal 18/70. But the land involved in that case was held under a registered lease No. 9488, from the Native Land Trust Board. The reasoning in that judgment therefore cannot apply to the present case where no such lease existed. B

It is true that the parties considered the consent of the Director of Lands necessary to the transaction in issue here, and that they applied for such consent. In the assignment from the vendor to the purchaser of the cane contract affecting the lands in this case, the parties referred to the land covered by the cane contract as a "Crown Lease". These actions of the parties cannot, in my opinion, establish that the respondent did in fact and in law hold under a Crown lease. C

Accordingly, I would hold that the appellant and the respondent were not parties to an illegal contract, the appeal must succeed, and the judgment of the Supreme Court be set aside. A decree of specific performance would follow, but for the fact that the Director of Lands has a discretion in the granting of his consent and this court cannot order him to grant it in the present case. It can however, express the view—upon which the Director of Lands may or may not act—that this would be a proper case for the grant of such consent. I would therefore order, subject to the consent of the Director being obtained, specific performance of the agreement of the 8th August 1973, and that the respondent execute a transfer, on the terms set out in the agreement, of his interest in the lands to the appellant. If the Director of Lands refuses his consent then the appellant would be entitled to damages, to be assessed by the Supreme Court. Liberty to all parties to apply for the purpose of working out any or all of these orders. I would order that the costs in this court and the court below be paid by the respondent. D E

SPRING J.A. F

The facts in this case under appeal are set out in the judgment of my learned brother Marsack J.A., and there is no need to repeat them. The sale agreement dated the 8th of August 1973 and made between the respondent as vendor and the appellant as purchaser purported to sell all that the interest of the respondent in a property described as C.L. Togabula, formerly NL. 28/141—Lot 12 D.S.W. Plan. As at the 8th of August 1973 the only tenure that the respondent held in the said land was pursuant to a document issued to him by the Director of Lands and described as a tenancy-at-will. I set out the operative part of the document: G

"

L.D. 4/11/770

DEPARTMENT OF LANDS, MINES AND SURVEYS
SUVA, FIJI.
CROWN LAND:

2nd October 1964 H

Dear Sir,

A I am directed to inform you that you are hereby authorised to occupy the described land as tenant-at-will on the following terms and conditions:

Land	:	Togabula—Formerly NL. 28/141—Lot 12 D.S.W. Plan.
Area	:	4.5 Acres approximately.
Rent	:	£9.00 per annum payable in advance.
Tikina	:	Malomalo.
B Ownership	:	Crown Schedule 'A' Land.
Purpose	:	Agricultural.

Conditions:

(1) The right to occupy and to use the land is not transferable.
(2) The lands described may be used solely for agricultural purposes and no C buildings whatsoever may be erected thereon after the date hereof.
(3) In the event of failure on your part to pay the rental as aforesaid punctually this authority may be cancelled without further notice and you will be required immediately to vacate the land.
(4) This letter shall not operate to create a tenancy in respect of the said lands, and you may be required to vacate the land on receipt of notice to that D effect.
(5) This letter is issued subject to an investigation for reparcellation into economic sized leases.
(6) This letter cancels the tenancy-at-will issued to Kistamma (s/o Sarawaiya) on 29/2/64.
(7) Fees be collected on execution.

E

Licence fee	=$1.10.0
Stamp Duty	
Original & duplicate	10.0
	$ 2.0.0.

F

Yours faithfully,
J. F. SAUNDERS
for Director of Lands

G I hereby accept this tenancy on the terms and conditions as set out above.

Somasundaram (f/n Kistamma)
C/- District Officer,
NADROGA.

Sgd.
_____
Somasundaram
Tenant. "

H In June 1973 the respondent surrendered his interest in the lands in favour of his wife Kaliamma and applied for a formal lease in respect of the said land in her

favour. An approval notice dated 7th October 1975 was issued to the wife of the respondent by the Director of Lands offering her a lease for 10 years from the 1st January 1970. The learned judge in the court below, in the course of his judgment said: A

"I find that the defendant agreed to assign his lease to the plaintiff for $3,000 under the sale note of 8/8/73."

It is apparent that the learned trial judge considered that the respondent was selling a lease, whereas in fact the only tenure held by the respondent as at the 8th August 1973 was a tenancy-at-will. The learned judge, in my view, elevated the tenancy-at-will into a lease—in fact a "protected lease"—the transfer of which requires the consent of the Director of Lands pursuant to section 13(1) of the Crown Lands Ordinance. B

The question we have to determine is whether the sale of the tenancy-at-will held by the respondent at the date of the sale not required the consent of the Director of Lands under the provisions of the above-mentioned Ordinance. This question was alluded to in the judgment of the Supreme Court of Fiji in *Shiu Ram v. Suruj Pal,* Fiji Law Reports Vol. 9, p. 141. At page 142 Hammett Ag. C.J. said: C

"It appears, therefore, that it is only when a lease is expressly stated to be "a protected lease", that the consent of the Director of Lands to its transfer becomes necessary. If it is not "a protected lease" the consent of the Director of Lands does not appear to be necessary before it can be transferred or sold. There is no evidence in this case that the land concerned is held under a protected lease, in fact if the respondent only held a tenancy-at-will it is extremely unlikely that his title could be "a protected lease" at all. The consent of the Director of Lands would not, therefore, appear to have been required in this case under the Crown Lands Ordinance itself." D E

The learned trial judge fell into the error of treating the tenancy-at-will as a protected lease, which, in my view, it was not. The tenancy at will was determinable by the Director of Lands at any time; there was no reference to it being a protected lease as indeed it was not; accordingly, in my view, the transaction between the appellant and the respondent was not illegal as being in breach of section 13 of the Crown Lands Ordinance. I agree therefore with the conclusions reached by my learned brother Marsack J.A. I would allow the appeal, and I concur in the orders which my learned brother proposes. F

GOULD V.P.

The facts are set out in the judgment of Marsack J.A. and need not be repeated. At the time the respondent executed the agreement (Sale Note) in favour of the appellant the document of title held by the respondent was what has been referred to as a tenancy at will, though it contains the statement that it shall not operate to create a tenancy. It contains also the condition that "The right to occupy and use the land is not tranferable", which in its own way serves as a covenant not to assign transfer or sublet without consent. This document does not contain any reference to a protected lease. G

The Approval Notice dated the 7th October 1975, was more then two years after the Sale Note. It was issued to Kaliamma Chetty, the wife of the respondent, and contains the words— H

A "Lease to be subject to the conditions set out in the Crown Lands (Leases and Licences) Regulations, a summary of which conditions is noted on the back hereof. This is a protected lease under the provisions of the Crown Land Ordinance."

This is not a document between the parties to the action, but as I understand counsel, the procedure is routine and the appellant would have received such an approval notice had not the respondent sought to withdraw fom the transaction and B had the Director of Lands given his consent. The words I have quoted from the Approval Notice I think are an indication of what is to be contained in the lease when issued.

The instant case is therefore stronger on the facts (in favour of the appellant) than *Damodaran Reddy v. Raghwa Nand,* to which Marsack J.A. has referred in his judgment. Stuart J. there had to consider whether an approval notice, similar to the C one before this court had in equity the status of a lease. He held that it did not, as no action for specific performance could have been brought against the Director of Lands. The bar against an action for specific performance by the holder of a tenancy at will such as the one in the present case is even stronger—the document is expressed to create no tenancy and the right of occupancy can be brought to an end at any moment. Also, as has been said, the tenancy at will contained no reference to a protected lease.

D

I agree with Marsack J.A. that the appellant and respondent were not parties to an illegal contract. The case of *Damodaran Reddy v. Raghwa Nand* was in my opinion rightly decided by Stuart J. and the present case is an even stronger one. I had some doubt at one stage whether the position could be affected by the fact that the approval notice abovementioned showed the Director of Lands intention to grant the lease in due course to run from the 1st January 1970, a date prior to the signing of E the sale note. I am satisfied however, on the authorities, that such a provision does not operate to give the lease, when signed, any type of pre-existence as such. It operates from its execution: see *Cadogan (Earl) v. Guinness* [1936] 1 Ch. 515: *Cooper v. Robinson* (1842) 10 M. & W. 694; 152 E.R. 651: *Jervis v. Tomkinson* (1856) 1 H. & N. 195; 156 E.R. 1173: *Shaw v. Kay* (1847) 1 Exch. 412; 154 E.R. 175. Prior to that, the relationship between the parties is regulated by whatever agreements for arrage- F ments are then in force. In the result in my judgment section 13 of the Crown Lands Ordinance (Cap. 113) did not apply.

All members of the court being of the same opinion there will be the orders proposed in the judgment of Marsack J.A.

Appeal allowed.