IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 900 OF 1982.

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Between:

NARPAT SINGH s/o Jagan Singh — PLAINTIFF

- and -

1. ATTORNEY GENERAL OF FIJI
2. MINISTER OF LANDS
3. DIRECTOR OF TOWN & COUNTRY PLANNING
4. DHARAM SHEELA d/o Parshu Ram Shukla
5. DAYA WATI d/o Parshu Ram Shukla
6. KRIPA CHANDRA s/o Parshu Ram Shukla
7. BASANT KUMAR s/o Parshu Ram Shukla — DEFENDANTS

Mr. S.M. Koya for the plaintiff.
Mr. S.P. Sharma for 1st, 2nd and 3rd defendants.
Dr. M.S. Sahu Khan for 4th, 6th and 7th defendants.

D E C I S I O N

In this action the plaintiff seeks the following declarations :

(a) A Declaration that by virtue of a Declaration made by the Agricultural Tribunal on the 20th day of March, 1970, the plaintiff is entitled to occupy and cultivate the agricultural land known as "Lot 5 on DP No. 2513 Waisovusovu" (hereinafter called 'the said agricultural land') comprised in Certificate of Title No. 10219 containing 14 acres 2 roods 27 perches situate at Nasoso, Nadi as an agricultural tenant under the Agricultural Landlord & Tenant Act.

(b) A Declaration that the purported approval of a proposed subdivision for residential purposes under Plan No. 609/1 made on the 26th day of

October, 1981 in respect the said agricultural land aforesaid by the Third Defendant under his powers in the Town and Planning Act, Cap. 139 and/or the Subdivision of Lands Act, Cap. 140 is null and void at law.

(c) A declaration that the Fourth, Fifth, Sixth and Seventh defendants as the present registered proprietors of Certificate of Title No. 10219 as aforesaid hold the said agricultural land subject to an agricultural tenancy held by the plaintiff under the provisions of the Agricultural Land and Tenant Act.

The action against the fifth defendant has been discontinued.

There is no dispute about the relevant facts.

Since the year 1946 the plaintiff has been occupying and cultivating a piece of land known as Lot 5 on D.P. No. 2513 being part of the land comprised in Certificate of Title No. 10219 containing 14 acres 2 roods 27 perches situated at Nasoso Nadi.

There is another Lot, Lot 4 separate from Lot 5 which is also included in the same title. The plaintiff does not occupy any part of this lot.

When the plaintiff first went into possession of Lot 5, one Hubraji d/o Hari Charan was the registered proprietor. He paid rent to her from 1946 to 1969.

On the 20th March, 1970, the plaintiff lodged an application with the Agricultural Tribunal against the said Hubraji for a declaration of tenancy and to secure an instrument of tenancy pursuant to sections 5 and 22 of the Agricultural Landlord and Tenant Ordinance 1966 (ALTA).

It appears to me on the facts that the Tribunal should not have entertained the application for a declaration under section 5 of the Act. The plaintiff was an

acknowledged tenant who had paid rent from 1946 up to the end of 1969.

By virtue of section 6(a) of the Act he already had a contract of tenancy for 10 years with effect from the 29th December, 1967, the date the Act became operative. Section 5 of the Act is intended to cover the situation where a person claims to be a tenant but his landlord refuses to accept him. He can seek a declaration that he is a tenant. The plaintiff was apparently never in that situation.

I will be referring to this situation later because the plaintiff in 1981 made another application seeking the same declaration which has yet to be considered by the Tribunal.

On 1st October, 1970, Lots 4 and 5 were transferred to the fourth, fifth, sixth and seventh defendants. On the 28th March, 1972, the Tribunal declared that the plaintiff was the tenant of Lot 5 but ordered that the instrument of tenancy should not be made until the rent was agreed or fixed. No copy of the declaration has been produced but it would appear the plaintiff considers he had a 10 year tenancy from the date of the declaration. That is not in my view correct. He had a tenancy expiring on 28th December, 1977.

The plaintiff continued to pay rent to the 4th to 7th defendants, both inclusive, and rent has been paid to the end of 1982. From 1946 to 1982 the plaintiff has paid rent for his occupation of Lot 5.

It does not appear that any instrument of tenancy was made or, if it was, it has not been registered.

To digress from the facts stated by Mr. Koya in his written submission, there is no mention in that submission of the term of the tenancy or in the plaintiff's affidavit filed in support of the summons.

Under section 6 of ALTA (1966) the term of the tenancy would be for a term of not less than 10 years from 29th December, 1967, as I earlier stated and not from 28th March, 1972, the date of the declaration. Section 6 of ALTA was amended by section 4 of Act 35 of 1976 by substituting a new section.

After the amendment any contract of tenancy created after the commencement of the Act and before 1st September, 1977 (the date the amendment became law) is deemed to be for a term of not less than 10 years.

After that date, however, the contract of tenancy is deemed to be for a term of not less than 30 years.

Section 13 of the 1966 Act dealing with extensions of contracts of tenancy was also amended by section 8 of Act 35 of 1976.

At the time in 1972 when the Tribunal purported to declare the plaintiff to be a tenant, section 13 of the 1966 Act provided that a tenant was entitled to be granted not more than two extensions of his tenancy each extension to be not less than 10 years. The plaintiff at that time could normally expect, subject to the Act, in particular section 13, to have been granted those two extensions.

When section 13 was replaced in 1976 a tenant then holding under a contract of tenancy could expect only one extension of 20 years.

The foregoing digression was necessary at this stage in order to comment on the plaintiff's actions after the Tribunal declared him to be a tenant on 28th March, 1972.

Although the plaintiff was in my view not entitled to any extension of his tenancy for reasons I shall state later, he lodged another application with the Tribunal on the 8th May, 1981, purporting to seek a declaration of tenancy under section 5 of the Act.

In my view there is considerable doubt whether the Tribunal can entertain a further application for determination of a tenancy where such a determination has already been made. In my view, the plaintiff on the facts cannot allege that he is a tenant whose landlord refuses to accept him and call in aid section 5 of the Act. At the time of his second application he was a tenant with a contract of tenancy which did not expire for about another 10 months, if he is correct that his tenancy expired on 28th March, 1982. My view however is that his statutory tenancy had expired on 29th December, 1977, and thereafter he was an annual tenant.

If a second application can be entertained and another declaration made, section 6 of ALTA would now operate to create a 30 year tenancy. It is possible that a second application was made by the plaintiff under section 5 of ALTA because it was considered Regulation 4 of the Agricultural Landlord and Tenant (Exemption) Regulations did not affect section 5 of the Act. It does however exempt agricultural land referred to in the Regulation from the operation of sections 6, 7 and 13 of the Act.

Section 13 of the Act deals with extension of a contract of tenancy.

Regulation 4 has to be considered because the 4th to 7th defendants in answer to the application filed on 8th May, 1981, pleaded that ALTA had no application because a plan for residential subdivision of the land contained in C.T. 10219 had been approved by the third defendant the Director of Town and Country Planning.

By virtue of Regulation 4, agricultural land approved by the Director for subdivision for residential, industrial or commercial purposes is exempted from the provisions of sections 6, 7 and 13 of the Act.

While the Regulation does not refer to section 5 of ALTA, if the Regulation applies to the land in respect

of which an applicant is seeking a declaration under section 5, any declaration made by the Tribunal would be of little value to the applicant because section 6 which fixes the term of the tenancy would not operate. The applicant would be left with a bare declaration if the Tribunal granted it. Nor could he seek an extension under section 13. Since section 7 would not operate, the tenancy could be terminated in the manner provided by law or the agreement for tenancy not protected by the Act.

The four defendants in their defence delivered the 30th June, 1981, alleged that the Director had approved the plan of subdivision.

That allegation was not factual. The Director did not formally approve the plan of subdivision until the 26th October, 1981.

There were two plans of subdivision, apparently one each for Lots 4 and 5. Each is a residential subdivision. There is a typographical error in the letter written on behalf of the Director addressed to Messrs. Koya & Co. dated 22nd September, 1982, stating that proposed subdivision on drawing 610/1 was approved on 26/1/81. That date should have been 26/10/81 the date drawing 609/1 (of Lot 5) was approved.

The plaintiff's application to the Tribunal has been adjourned sine die.

The position at the present time is that the plaintiff's statutory tenancy appears to have expired and he is now an annual tenant of Lot 5. He did not on the evidence before me seek either from his landlords or the Tribunal any extension of his statutory tenancy to which he might have been entitled if Regulation 4 had no application. Extension under the Act is an entitlement provided the tenant has cultivated the land and is not in breach of any of the provisions of his contract of tenancy. The tenant must however

ask for the extension since the extension is not automatic. The plaintiff however could not seek an extension because Regulation 4 became operative before his tenancy expired. He has purported to apply to the Tribunal under section 5 of the Act for a declaration that he is a tenant of Lot 5.

Mr. Koya in his lengthy submission has set out facts which are not in dispute some of which I have already mentioned. Based on those facts he has formulated six issues.

All issues are concerned either with the Director's decision to approve the plan of subdivision which Mr. Koya argues is null and void for a number of reasons, or with Regulation 4(d) which he also argues is null and void for a number of reasons.

Before considering these issues I would first comment on the Director's powers and the Agricultural Landlord and Tenant (Exemption) Regulations.

Under the Subdivision of Land Act Cap. 140, no land within the purview of the Act can be subdivided without the prior approval of the Director of Town and Country Planning.

The Act specifies the procedure to be followed when applying for the Director's approval, the Director's powers and other procedural matters. The Director is given wide powers to either refuse or approve an application and the Act does not seek to limit his discretion or spell out in detail factors he has to consider. He only has to consider whether in his opinion building development is desirable or whether, with regard to considerations of health amenity or convenience of the neighbourhood, the subdivision is desirable.

While the Director is not directed by the Act to ascertain who is in occupation of the land to be subdivided before he approves a plan, section 9 of the Act does spell out a number of situations that are stated to be sufficient reasons for refusing an application.

Two of the situations relate to land subject to a registered lease of Native or Crown land issued ostensibly for agricultural or pastoral purposes. There is no mention of freehold land or a lease of freehold land or of unregistered interests in land.

In the instant case the plaintiff has an unregistered tenancy of freehold land. There is nothing in the Act which requires the Director to consider the position of the plaintiff as an occupier of agricultural land.

One reason for the wide discretion is that the development of land, which is also under the control of the Director, is also covered by the Town Planning Act. It is under that Act that the Director receives directions and is more fully and specifically empowered to control development after constitution of town planning areas.

The Local Authority and the Director are directed by section 7(1)(4) to have regard to the matters set out in the schedule to provisions proposed to be included in a scheme and to any other material considerations.

None of the matters referred to in the schedule requires the Director to consider who is in occupation of the land.

Mr. Koya has mentioned section 11 of the Act which restricts forfeiture of a lease as indicating that the legislature was concerned with the rights of persons on land. The section merely restricts forfeiture of a lease for any breach of any covenant or condition rendered incapable of performance by any decision or order given or made under the provisions of sections 7, 9 and 10 of the Act. There are wide powers provided under the Act which could, if exercised, make it impossible for a lessee to comply with a covenant in his lease. It is equitable that a lessee in that situation should be protected.

Even without section 11, a lessee who is prevented by a statutory body exercising statutory powers from complying with a covenant in a lease could seek and would be granted relief from forfeiture for alleged breach of a covenant.

The Director is not concerned at all to consider whether his approval of a plan of subdivision of freehold agricultural land has an effect on an occupant of that land. Provided the application complies with the Town Planning and Subdivision of Lands Acts he either approves or refuses the plan in accordance with his powers and duties under the two Acts.

In the instant case I do not consider the Director's approval null and void.

Mr. Koya has also submitted that Regulation 4(d) could put an end to ALTA. That is an exaggeration. All the regulation does, if the Director approves a subdivision of land for residential purposes, is to take away an entitlement of an agricultural tenant who would otherwise be entitled to an extension of his tenancy. It in no way affects the rights the tenant has under his tenancy to occupy the land until it expires. The statutory entitlement can be nullified by the very statute that creates it.

No breach of natural justice or unfairness is involved. On the contrary the regulation when it can be invoked removes some of the initial arbitrary restraint imposed on landowners by the Act. The Act was designed for the benefit of tenants initially with little regard to the rights or wishes of landowners and in complete denial of legal agreements freely entered into between landowners and their tenants. Notwithstanding that situation, the legislature did not lose sight of the need to exempt agricultural land from the Act where the interests of the public generally are considered paramount and for other reasons considered valid.

Section 3 of ALTA exempts agricultural holdings of less than 2½ acres, all native land within a native reserve and tenancies held by members of a co-operative where the society is a landlord.

In addition under section 58(f) the Minister may exempt "any agricultural land or contracts of tenancy of such land or classes of such land or contracts with or without conditions from all or any of the provisions of the Act."

The Exemption Regulations were originally made by the Governor-in-Council under section 58. There are 15 instances when ALTA has no application at all, one instance when sections 7 and 13 do not apply, four where sections 6, 7 and 13 do not apply, two instances when sections 6, 7, 13 and 45 do not apply and one instance when sections 22 and 24 do not apply. There are valid and compelling reasons for all such exemptions.

Section 58(4) confers very wide powers originally on the Governor-in-Council and now the Minister.

Regulation 4(d) is not in my view invalid and is not ultra vires the Minister's (or Governor-in-Council's) power to make.

The provision of some 86 sections for residential purposes in the instant case must be considered to take precedence over a farmer's right to an extension of his tenancy. It was the plaintiff's misfortune to occupy a farm near a town where agriculture has to make way for the residential needs of an increasing population. He cannot expect to tie up agricultural land for another 20 or 30 years where there is a greater need for residential sections.

I have considered all matters raised by Mr. Koya although not all of them have been discussed in this decision.

The Director acted quite properly in approving the plans of the proposed residential subdivisions and Regulation 4(d) operates to prevent the plaintiff from obtaining an extension of his tenancy. Holding those views, I am not prepared to grant any of the declarations sought by the plaintiff.

The application is dismissed with costs to the defendants.

(R.G. KERMODE)
J U D G E

S U V A,

7. JUNE, 1983.