

Ram Shankar s/o Pachu - - - - - - - - - *Appellant*
v.
Parekh Holdings Ltd. - - - - - - - - - *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 24TH MAY 1976

Present at the Hearing :

LORD DIPLOCK

LORD SALMON

LORD FRASER OF TULLYBELTON

[*Delivered by LORD DIPLOCK*]

The respondent company has been at all material times the registered proprietor of six acres of land known as "Tokotoko" at Navua. On 20th October 1972 it brought summary proceedings under section 169 of the Land Transfer Act, 1971, to recover possession of the land from the present appellant, Ram Shankar, and two other members of his family, Ram Sarup and Shanti Devi. All three defendants appeared at the proceedings before Tuivaga J. So the provisions of section 172 which is in the following terms applied:—

" 172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit:

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:".

Under this section, it is mandatory upon the judge to dismiss the summons if it is proved to his satisfaction that the person summoned has a right to the possession of the land, but it lies within his discretion whether or not to make an order for possession in any other circumstances. The proviso makes it clear that the dismissal of the summons does not deprive the plaintiff of his remedy by ordinary action; and the established practice of the Court under the corresponding provisions in previous laws has been for the judge to decline to make an order for possession under the summary procedure where the evidence which is given upon affidavit discloses a serious dispute on relevant facts or where difficult questions of law are involved. (*Caldwell v. Mongston and Others* (1907) 3 Fiji L.R.58.)

In the instant case, the judge, in the exercise of his discretion, made an order for possession against all three defendants. Ram Shankar alone appealed to the Court of Appeal. They upheld the judge's order. The only question on the appeal from their decision to their Lordships' Board is whether upon the evidence that was before the judge at the hearing of the summons his decision to grant an order for possession against Ram Shankar was an improper exercise of this discretion.

The undisputed facts as to the title to the land appear upon the Register and can be stated shortly. From 1964 until November 1968, Shanti Devi had been the registered proprietor of the land. It was not subject to any registered lease. In November 1968 she executed a registered transfer of the land in favour of a company, Craids Enterprises Limited, for a stated consideration of \$1,700. That company then became the registered proprietors. They mortgaged the land to the Bank of New South Wales. In 1972, in exercise of its powers of sale as mortgagee, the bank transferred the property to the respondent company.

The only evidence in opposition to the respondent company's claim for possession that was adduced before the learned judge at the hearing of the summons was an affidavit sworn by Shanti Devi on her own behalf together with exhibits. She based her claim to resist an order for possession upon three grounds. With two of these it is unnecessary for their Lordships to deal except to mention that they were devoid of any substance and were not relied upon by the appellant in the Court of Appeal.

The ground that is in point in this appeal is contained in paragraphs 11 and 12 of Shanti Devi's affidavit:—

"11. That in the alternative, I say that the said purported sale of the said land was subject to then existing agricultural tenancies to the following persons:

- (a) Ram Sarup son of Pachu of Tokotoko, Navua, Farmer
- (b) Ram Shankar son of Pachu of Tokotoko, Navua, Farmer.

12. That I have been informed by the said Ram Shankar and do verily believe that he has instituted legal proceedings against the Plaintiff Company under the provisions of the Agricultural Landlord and Tenant Ordinance, namely the Agricultural Tribunal Reference No. C6ED 27 of 1972 which said action is still pending before the Agricultural Tribunal. A copy of the said proceedings is hereto annexed marked 'B'."

The sale referred to was the sale to Craids Enterprises Limited in November 1968 and Annexure B was an application to a tribunal appointed under the Agricultural Landlord and Tenant Ordinance, 1966, signed by Ram Shankar and seeking a declaration that he was tenant of the whole of the six acres of land known as "Tokotoko". It was dated 6th December 1972, *i.e.* more than four years after the sale of the land by Shanti Devi and some six weeks after the summons for possession had been issued by the respondent company. It stated that the applicant had occupied the land for about twelve years as tenant, and gave the following particulars of payment of rent:

"My original landlord was maintained and supported by me in lieu of rent. Her successors in title were tendered rent but they refused to accept."

There was no affidavit by Ram Shankar himself verifying any of the statements contained in the application form; Shanti Devi's affidavit did not purport to depose to the continuance of any tenancy of the land after the sale in November 1968; and even what she did depose to was in

conflict with what appeared in Ram Shankar's application form. According to her affidavit, the land in 1968 was subject to two separate agricultural tenancies. In his application form, Ram Shankar claimed to have been the sole tenant of the whole of the land for the last twelve years, viz. since 1960. Ram Shankar's "original landlord" referred to in the application form must have been a predecessor in title of Shanti Devi. She did not become registered proprietor until 1964, and would thus have been one of the successors who, according to the application form, had refused to accept rent when tendered it by Ram Shankar. Furthermore in an exhibit to another paragraph of Shanti Devi's affidavit, dealing with the sale of the land in November 1968, there was evidence that that transfer was made in settlement of debts to the amount of \$1,700 owed to Craids Enterprises Limited, by a firm, the Navua Trading Company, of which Ram Shankar was at all material times the manager.

The reasons given by the learned judge for his decision in the summary proceedings were brief. He made no reference to the suggestion that the evidence disclosed a *prima facie* case that at the time of the summons for possession the land was subject to agricultural tenancies in favour of Ram Shankar or Ram Sarup.

On the appeal by Ram Shankar to the Court of Appeal this was the only defence relied upon. That Court left open the question of law as to whether a right to a tenancy under the Agricultural Landlord and Tenant Ordinance can be enforced against a registered proprietor of the land who is a purchaser for value without notice. In the Court's view a *prima facie* case for the existence of any agricultural tenancy at any time had not been shown by any evidence worthy of credence. They disposed of the matter by saying:

"It is enough for present purposes to say that he clearly has not shown himself to have any claim as a common law tenant; nor has he, by the manner in which he has chosen to put forward a case which at best can only be described as shadowy and suspect, shown sufficient cause to be permitted to remain in possession while he pursues his application to the Agricultural Tenancy Tribunal."

The Court of Appeal clearly thought that the opposition to the claim for possession and the appeal by Ram Shankar was a "try-on"; their Lordships see no reason to differ from that view. They will humbly advise Her Majesty that this appeal be dismissed.

In the Privy Council

RAM SHANKAR s/o PACHU

v.

PAREKH HOLDINGS LTD.

DELIVERED BY
LORD DIPLOCK