

22

IN THE FIJI COURT OF APPEAL  
Civil Jurisdiction  
Civil Appeal No. 57 of 1981

Between:

SOMAI s/o Ram Kissun

Appellant

and

1. DIRECTOR OF LANDS

2. THE ATTORNEY-GENERAL OF FIJI

Respondents

K.C. Ramrakha & N. Dean for the Appellant.  
A. Rabo for the Respondents.

Date of Hearing: 16th March 1982.

Delivery of Judgment: 2nd April 1982.

JUDGEMENT OF THE COURT

Henry J.A.

This is an appeal in respect of an action commenced in the Supreme Court at Lautoka under Order 15 rule 16 of the Supreme Court Rules. Appellant, plaintiff in the Supreme Court, was sued as executor and trustee in the estate of Ram Kissun who is hereafter referred to as "the deceased". During his lifetime the deceased was registered as the proprietor of a leasehold interest in the land described as Korobalau No. 3 situated at Momi, Nadi, and containing 117 acres. The land was Crown land and the Memorandum of Lease was registered as Crown Lease No. 485. The lease expired by effluxion of time on March 3, 1953. Deceased continued to pay the rent previously paid under the lease until the date of his death on September 20, 1955. By his last will and testament the deceased appointed appellant as his executor and devised and bequeathed all his estate to his wife for life and after her death to his six sons, including appellant,

in equal shares. The deceased's wife pre-deceased him. At all material times appellant and some members of the family continued to occupy the land. Appellant paid rent as it became due but receipts were always issued in the name of deceased. The officers of second respondent did not become aware of the death of deceased until October 1980. Probate of the will was not granted until August 23, 1979. Transmission to appellant was registered with the Registrar of Titles on July 24, 1981.

The Supreme Court held that the deceased became a tenant from year to year after the expiration of the lease in 1953. There has been no appeal against this finding. The learned Judge held that the silence and secrecy of appellant and the beneficiaries concealed from the Director his right under section 21 of the Crown Lands Ordinance (Cap.138), later set out in full, to require the executor to give up possession on proper notice to quit. The Supreme Court held as follows:-

" A tenancy from year to year only continues so long as the parties refrain from serving notice of termination. This requires consent on the part of the landlord to accept the same individual as tenant when the current year expires and vice versa. If the tenant dies he is no longer able to consent to the tenancy continuing. Although his successors in the title can consent to its continuation they must do so as executors and the landlord is thereby given the opportunity of approving a continuation of the holding over by the new occupier. "

" The situation must be regarded as it was in 1955. The Director cannot, by deceit be prevented from following a course he may have followed in 1955. In my view the executor cannot be heard to say that the Director does not know what course would have been taken in 1955 had he been told of Ram Kissun's death because the executor is the person whose deceit has created the situation. "

The appellant's claims were dismissed with costs.

In our opinion the learned Judge has misconceived the true position. The deceased was a tenant, who with the

consent of the landlord, remained in possession after the expiry of his lease. As such he remained in possession as a tenant at will until the payment of rent on a yearly basis in accordance with the expired lease. The tenancy then became a yearly tenancy as the learned Judge has rightly held and no appeal has been made against this finding.

The law is summarised in Halsbury's Laws of England 3rd. Edition Vol. 23 para. 1153 p. 507:-

"1153. Possession after expiry of lease.  
A tenant, who, with the consent of the landlord, remains in possession after his lease has expired, is tenant at will until some other interest is created; until, for instance, the tenancy is turned into a yearly tenancy by payment of rent; "

Further at para. 1161 p. 511 it is stated:-

"1161. Tenancy from year to year by presumption of law. A tenancy from year to year arises by presumption of law where a person who has entered upon premises pays rent with reference to a yearly holding, provided that there are no circumstances to rebut the presumption. Thus, where a tenant is in possession under an agreement for a lease, he acquires a legal estate as a tenant from year to year as soon as he pays rent on a yearly basis. "

In Woodfall Landlord and Tenant 28th Edition Vol. 1 para. 1-1822 the following passage appears:-

" Devolution of tenancy from year to year

In the case of a tenancy from year to year, if the tenant die, his personal representative has the same interest in the land as he had, and the tenancy continues until the expiration of notice to determine it given by or to the personal representatives. "

In Halsbury's Laws of England 4th Edition it is stated in para. 1097 (at p.568) as follows:-

"1097. Leaseholds. The vesting of a term of years in the deceased's personal representative is by operation of law. The executor who accepts the office cannot waive the term, and is bound by covenants contained in a lease. The vesting, being a conclusion of law, is not an assignment within a clause in a lease restraining assignments.

A yearly tenant's interest is transmissible to the deceased's personal representative, and notice to quit must be given to him. "

In the same volume the following paragraph also appears, namely: Para. 729 p.387 -

"729. Source of executor's title. The executor derives his title under the will, if he has been appointed or is deemed to have been appointed executor by the will, but not if he has been appointed by the court under statutory powers. His title under the will is aided in the case of real property by statute, and the testator's property vests in him as from the date of death without any interval of time. The probate itself is a mere authentication of his title; but, if it affects the legal estate in land, it is also a document of title. "

From the law as cited it is clear that the interest of the deceased in the yearly tenancy vested in appellant on the death of deceased by virtue of the will and the subsequent granting of probate was a mere authentication of that title. The finding of deceit in the Court below is based on section 21 of the Crown Lands Ordinance 1945 (Cap. 138) which is contained in Vol. III of the Laws of Fiji (1955 Edition). This section in its relevant provision reads:-

"21.(1) If on the death of the lessee or licensee of a Crown lease or licence no probate has been granted or letters of administration issued and no application for grant of probate or issue of letters of administration has been filed within six months after the death of such lessee or licensee and the Director of Lands is of the opinion that the lease or licence is of so small a value that it is expedient to exercise the powers hereby conferred upon him, he may either sell the lease or licence and execute a transfer of the same to any person, and receive the purchase money on account of the persons entitled

thereto under the will or intestacy of the deceased, or he may execute a transfer of the lease or licence to the persons entitled thereto under the said will or intestacy, or to any one or more of them in trust for all. "

Section 21(1) does not, unless it is exercised, in any way effect or diminish an existing interest in the lease which continues as a yearly tenancy. With respect to the learned Judge we do not find any evidence of deceit. The facts are entirely consistent with a family continuing to occupy the family land under a will which gave that right. We do not find anything in evidence which, in law, can terminate the yearly tenancy which passed to appellant under deceased's will. It is pure speculation to attempt to predict what the then Director would have done, if at any time six months after the deceased died, he had found this family in possession in the circumstances existing at any particular time. It is true that the Agricultural Landlord and Tenant Ordinance came into force only in 1967 but it cannot be suggested that possession was continued in the hope that some such protection might be given by Statute. Nor can it be suggested that appellant knew of the provisions of section 21 so that with intention to avoid its consequences, he deceived the officials responsible for administering lease under the relevant statutory provisions. Indeed, no charge of deceit was made and appellant was not called upon to meet any such charge even if it were an appropriate matter to be determined on the pleadings on which question we pass no opinion.

The relief sought by appellant was as follows:-

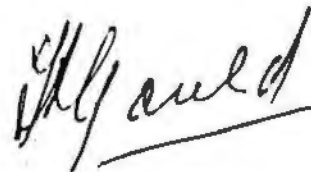
- "(a) a declaration that the Plaintiff is the lawful lessee or tenant of the first defendant;
- (b) an order that the first defendant do issue a registered lease to the Plaintiff;
- (c) costs. "

The Court is prepared to make a declaration that a tenancy from year to year is vested in appellant as from the date of

death of deceased.

In this Court, and in the Court below, it was claimed that the provisions of the Agricultural Landlord & Tenant Act (Cap. 270 Ed. 1978) applies. No relief was asked in respect of that Act. It is sufficient if we grant a declaration pursuant to para. (a) above to the effect that appellant is the lawful tenant of the said land as a tenant from year to year. The order applied for in (b) above was not sought in this Court so relief under (b) is accordingly refused. The applicability of the ALTA can be determined in appropriate proceedings.

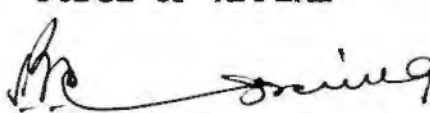
The appeal will be allowed and the judgment in the Court below is set aside with costs in both Courts to be fixed by the Registrar and paid by respondent. Declaration accordingly.



.....  
VICE PRESIDENT



.....  
JUDGE OF APPEAL



.....  
JUDGE OF APPEAL