IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 54 of 1980

Between:

1.	GANGA RAM s/o Ram Jiwan	
2.	HIRALAL s/o Ganga Ram	Appellants
	and	
1.	SHYAM NARAYAN s/o Ram Narain	
2.	ABHYAS NARAYAN s/o Ram Narain	Respondents

K.C. Ramrakha & H.K. Patel for the Appellants
J. Singh & R. Patel for the Respondents

Date of Hearing: 11th March, 1983
Delivery of Judgment: 23rd March, 1983

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from an order of the learned Chief Justice striking out an order allowing an amendment to a defence to counterclaim. We will refer for convenience to the appellants as the plaintiffs and the respondents as the defendants.

The plaintiffs brought an action against the defendants by writ dated the 23rd October, 1970, claiming specific performance of a sale and purchase agreement. The defendants denied the validity of the agreement and counterclaimed for vacant possession. The plaintiffs filed a defence to the counterclaim in the following

terms :

> "Defence to counterclaim The plaintiffs deny each and every allegation contained in paragraphs 10, 11, 12, 13 and 14 of the counterclaim, and say that they have entered into valid agreement for sale and purchase of the said land, and are on the said land by virtue of the said agreement for sale and purchase and not otherwise. "

The action came to trial and, on the 23rd May, 1975, judgment was given for the defendants - the judgment was confirmed on appeal to this Court. It is important to note that at the request of counsel for the parties the counterclaim that the plaintiffs were trespassers was not adjudicated upon either in the Supreme Court, or, it followed, upon the appeal, and so remained as a cause yet to be tried.

On the 17th October, 1978, however, the plaintiffs applied to a Judge of the Supreme Court for leave to amend their reply and defence to the counterclaim. Mr. Nagin for the defendants is recorded as objecting on the grounds of lateness but Mishra J. in October 1978, gave leave to the plaintiffs to amend the defence to the counterclaim as follows :

> "1. THE plaintiffs admit that the defendants hold Certificate of Title 8940 'Davuilevu' (part of) being Lot 1 on Deposited Plan 2110 containing an area of 3 acres 3 roods and 23 perches.
>
> 2. THE said land is agricultural land within the meaning of the Agricultural Landlord and Tenant Act (hereinafter referred to as the Act).
>
> 3. BY registered Lease No. 70886 the first plaintiff Ganga Ram f/n Ram Jiwan held all the said land as lessee as the tenant for the space of five (5) years from the 1st day of July, 1960, and subsequently continued to occupy the said land after formal expiry of the said lease as a tenant holding over on an annual tenancy basis, and paid rent to

the defendants in respect thereof. The second plaintiff resides on the said land as part of the family.

4. THE said annual tenancy has never been validly determined, and no notice to quit was ever served by the defendants on the plaintiffs.

5. THE plaintiffs therefore claim the protection of the Act, and say they are protected tenants, and now hold the land as protected tenants under the said Act. "

This amounts to a claim to have an undetermined annual tenancy, and to have the protection of the Act above mentioned. The defendants filed a reply to this amended pleading dated the 23rd August, 1979.

There is scant information available in the record of the appeal to this Court but we were informed from the bar that the action on the counterclaim came on for hearing before the learned Chief Justice (who had been the trial Judge in the original action) and that Mr. Sherani, for the defendants, then made the application which resulted in the order under appeal.

The reasoning of the learned Chief Justice is contained in the following passage of his judgment :

" Both Mr. Sherani and Mr. Ramrakha have submitted at length on the issue before me as to whether or not I should strike out the amended defence to counterclaim as set out above.

I think there can be no doubt that the amendment has in fact changed the original defence to counterclaim into one of a substantially different character and as such it would be difficult to justify its acceptance at this stage. It is a general rule of practice that no amendment would be allowed at the trial which would enable a party to set up an entirely new case or to change completely the nature of his case (see Halsbury's Laws of England (3rd Edition) Volume 30 paragraph 73).

In the whole of the circumstances of this case I am satisfied that it would be unreasonable and unjust to allow the amendment to stand. "

The grounds of appeal to this Court are set out in the Notice as follows :

1. The defendants counterclaim for possession is in effect an independent action for possession, and an amendment having been granted therein, the action ought to have proceeded as if it were separate action by the defendants.

2. The amendments to the pleadings did not take the defendants by surprise, nor were they vexatious or embarrassing to the defendants, and the learned Chief Justice erred in law, and in fact in striking them out.

3. The amendments were moved for, and the application heard by another Judge of the Supreme Court, and duly granted, and the proper cause for the defendants was to seek leave to appeal from the said order granting leave to amend, rather than raising the issue summarily in the course of the trial.

4. The amendments raised questions of substance, and the plaintiffs were entitled to have the issues tried. "

We accept the greater part of what is contained in Grounds 1, 2, and 4. Particularly in the circumstances of the case, where counsel had agreed that the counterclaim should be excluded from consideration at the hearing of the action itself, the separate nature of the latter was thus emphasized; there was no suggestion that the counter-claim was being discontinued and it was treated as a separate proceeding.

Thus there was no question of the amendment being allowed, "at the trial". It was allowed a very

long time before the trial of the counterclaim and it is in this regard, with respect, that the learned Chief Justice appears to have misdirected himself in the passage from his judgment quoted above. There could have been no question of surprise or embarrassment. Among the Notes in the Annual Practice (1967) O.20/5-8/10 is the following, based on Hippgrave v. Case 28 Ch. D. at 361: "But the court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago, and then not asked for". Nothing like that happened in the present case.

It must be accepted that the amendment raised matters of substance: whether they could be supported or not was another question, but if they had been on the face of them frivolous they should and no doubt would have been rejected on that ground. There is no suggestion of that sort in the judgment. It was suggested by Mr. R. Patel, counsel for the defendants, that all matters of substance had been disposed of in the action itself. In a sense that may be so, because of the state of the pleadings at that stage, but that should not impede the plaintiffs when they wished to raise other matters of substance on the counterclaim at a time and of a nature which was not prejudicial to the defendants.

On the question of amendment generally this Court said in Ganga Ram v. Shyam Narayan and Anor F.C.A. Civil Appeal 24 of 1975 :

> "Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. "

We think those words are applicable here.

We have been occasioned some concern by Mr. Ramrakha's third ground of appeal which appeared to us to raise the question whether it was open to the

learned Chief Justice to make the order he did at the time and in the circumstances in which he made it. We refer to the fact that another Judge had already sanctioned the making of the amendment in question and we had in mind the question whether the defendants ought not to have appealed against its making. In argument, however, Mr. Ramrakha disassociated himself from reliance on any such argument and drew from Ground 3 only the submission that the learned Chief Justice ought not to have made the amendment in the circumstances. The matter has not therefore been raised or argued before us and we prefer to leave it as an open question, particularly as the result of an order based on lack of jurisdiction would be the same as the order we propose to make.

For the reasons we have given the appeal is allowed and the order of Mishra J. is restored. The appellant will have the costs of this appeal.

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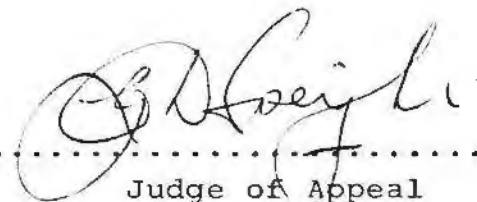
Vice President



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Judge of Appeal