IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 45 of 1984

Between:

LOTAN s/o Durga — APPELLANT

- and -

1. DOUGLAS J.G. GARRICK
2. HELEN L. GARRICK — RESPONDENTS

S.M. Koya for the Appellant
B.N. Sweetman for the Respondents

Date of Hearing: 16th November, 1984
Date of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

Speight V.P.

On 21st June, 1984, Kearsley J. made an order in Chambers, pursuant to Section 172 of the Land Transfer Act Cap. 131, in which he ruled that the abovenamed appellant had failed to show cause why possession of certain lands should not be given up to the respondents. This appeal is against that decision. Briefly, the history of the matter is as follows.

The late Joseph Hector Garrick was the registered proprietor of C.T. 3210, containing 4832 acres, for many years. The date of his death is uncertain but the property then passed into the hands of the trustees under his will. From 1946 onwards the appellant Lotan

was an annual tenant of part of the area - approximately 336 acres - his landlords at that stage were the trustees. In 1970 the estate land was transferred to six beneficiaries, all named Garrick, including first respondent Douglas but not his wife Helen Garrick, second respondent. Appellant continued to occupy as an annual tenant.

On 9th May, 1974, the beneficiaries gave the appellant notice to quit, terminating the tenancy at 31st December, 1974. The appellant remained in possession after the expiry of the notice and in February 1975 applied under Section 22(1)(g) of the Agricultural Landlord and Tenant Act Cap.270 to the Agricultural Tribunal for relief against forfeiture and for a declaration under Section 5 that he was a tenant of the 336 acres. For convenience the statute will be referred to as ALTA. On 24th August, 1977, the Tribunal refused both applications, on the ground, inter alia, that the lease subsisted at the date of the coming into force of the Agricultural Landlord and Tenants Ordinance and was exempted from its provisions by virtue of an exception in Exemption Regulations, relating to leases under a trust. The reasoning of that decision is not relevant to the present proceedings.

The appellant appealed against that decision to the Central Tribunal, but his appeal was disallowed on 21st June, 1978. Kearsley J. was shown copy of those decisions which held that appellant's tenancy had been terminated in 1974, and that a document tendered by the appellant purporting to be a contract of tenancy was a forgery. At both the Tribunal and the Central Agricultural Tribunal hearings the beneficiaries opposed. The upshot was that as at the 22nd June, 1978, the present appellant held no rights to the property and the owners had demonstrated their continuing opposition to any claims by him. However, appellant continued on the land or on part of the land.

On 2nd July, 1981, the beneficiaries transferred

29 acres 3 roods 27 perches in fee simple to the respondents Mr. & Mrs. Garrick and a new title No. 20544 eventually issued. This was part of the 336 acres which had been the subject of appellant's previous tenancy. There is a dispute on the present papers whether appellant continued to occupy all the land and has been cultivating, or whether he is merely running a saw mill on some two acres. No rent had been accepted either by the beneficiaries since 1974 or by the respondents since 2nd July, 1981. On 15th December, 1982, respondents, who claim there had been some delay in receiving title, issued a Chamber Summons under Section 169 of the Land Transfer Act 1971 for the appellant to show cause why he should not give up possession. These are the proceedings which were before Kearsley J. and are the subject of this appeal.

On 29th March, 1983, appellant applied to an Agricultural Tribunal for a declaration of tenancy (Section 5) and for an order for an instrument of tenancy (Section 23). In his application he said that he had occupied the land (29 acres 3 roods 27 perches) "after 21st June, 1978". He said rent had been offered but the landlord had not accepted. In a Statement of Claim he alleged that his "occupation and cultivation" of the 29 acres 3 roods 27 perches was "with the consent of the respondents". The same statement appears in an affidavit filed in the Supreme Court, in opposition to the Summons. It is to be noted that it has not been submitted in the Supreme Court, nor before this Court, that the previous registered proprietors consented. Indeed Mr. Koya conceded that Section 4(1) of ALTA did not apply.

The application to the Tribunal was adjourned by it in mid 1983 pending the outcome of the respondents' Summons under Section 169 of the Land Transfer Act. Hereafter we will refer to sections of that Act by number only. We were told from the bar that Mr. Sweetman,

counsel for the Garricks, was willing for the Tribunal to hear and determine, but Mr. Koya for Mr. Lotan sought adjournment until the Supreme Court could hear the Summons. At the hearing before Kearsley J. Mr. Koya asked for the matter to be :

(a) dismissed leaving the respondents to issue a writ for possession if they wished; or

(b) that the matter be adjourned to enable the Agricultural Tribunal to determine appellant's application.

Kearsley J. refused both these applications. His principal reasoning is found on pages 7, 8 and 9 of the judgment and can be summarised thus:

1. The provisions of presumed consent arise from Section 4(1) of the ALT Act, and as the respondents had taken steps by way of issuing the Summons in 1982, they had demonstrated non-consent. Hence any application by the appellant to the Tribunal would be bound to fail, so it would be idle to adjourn the Supreme Court proceedings to enable such application to be heard.

We will deal with this when discussing Mr. Koya's submissions in this Court. It is worth noting at this stage however, that during his submissions in the Chambers hearing Mr. Koya had said that he was not limited to a consideration of the relationship between the parties since July 1981, and the conduct of the previous registered proprietors was not irrelevant. In view of the firm attitude they had taken from 1974/1978 and in the absence of any evidence of change of heart after that, we doubt if the appellant could have gained much assistance from that period. However, in the Court of Appeal, Mr. Koya relied on the post-July 1981 situation.

2. A further and alternative approach was discussed on page 11 of the judgment. The best status that the appellant could claim in 1981/1982 would be as a tenant at will, with non payment of rent being irrelevant. The Judge held that that tenancy had been determined by the Summons for possession: Martinali v. Ramuz (1953) 2 All E.R. 892.

The appellant's grounds of appeal as eventually argued can be summarised as follows:

Grounds 1 and 3:

There were disputed matters of fact which made the case unsuitable for a Summary Chambers hearing, and the matter should have been adjourned to allow the Agricultural Tribunal to hear and determine the appellant's application.

Ground 2:

Having embarked upon a hearing, the learned Judge erred -

(i) in making an order based on the assumption that there could be no consent, as Section 4(1) did not apply, and hence the Tribunal application must fail.

(ii) he should have concluded that there was evidence to show cause against the Summons and hence it should have been dismissed.

During the course of the lengthy submissions from each counsel, it emerged that there are a number of uncertainties and perhaps even conflicts between the provisions of the law of property and the procedures of the Supreme Court on one hand, and the provisions

of ALTA on the other.

The following observations are not necessary in deciding the issue before the Court, but perhaps will help to show that ALTA can in major part be read with the general body of law and the Court's duty is to harmonise the provisions wherever possible.

The provisions of Section 2, for the purposes of the Act, include definitions of tenancy, and contract of tenancy which are wider than in the general law, but will apply in agricultural land cases (Section 3).

The Agricultural Tribunal and the Central Tribunal have certain procedures for declaring the interests of parties which are not ordinarily available in the Courts (Section 5).

Nevertheless, and contrary to the view which some counsel have expressed in other cases, the Tribunals do not have exclusive jurisdiction in respect of agricultural land. Its powers are set out in Section 22.

The power to apply to the Court independently of ALTA is preserved in Section 169 (summarily) and in the first proviso to Section 172 (by writ). And under Section 3 the Land Transfer Act prevails over any other Act inconsistent therewith. Yet in Soma Raju v. Bhajan Lal F.C.A. Civil Appeal 48/1976 this Court held that the indefeasibility provisions did not mean that registration under the Act extinguished an ALTA tenancy: an example of special provisions prevailing over general.

An illustration of the exercise of the general jurisdiction of the Supreme Court is to be found in Shiva Rao v. Native Land Trust Board - a fully defended action which became the subject of appeal to this Court - F.C.A. Civil App. 76/81.

During the course of the judgment, consideration was given to a claim by the appellant that he was entitled to "a declaration" from the Court that he was a tenant of Native Land Trust Board, and in this enquiry the provisions of Section 4(1) of ALTA were extensively canvassed.

The power to determine the status of the parties in a possession case must continue to exist, but whether an action for a declaration only under Supreme Court Order 15 Rule 16 could be maintained on its own must be doubtful, in view of Parliament's action in establishing a tribunal and an appeal tribunal to determine Section 5 applications. We are not called upon to decide that point.

It is also useful to look at the question of actions for possession generally. Part V of ALTA deals with the rights of Landlords and Tenants and Section 37 of that Act in particular deals with termination of tenancies - to this extent it would override any provisions of Section 89 of the Property Law Act in relation to agricultural land. But an examination of Part V of the former Act and Part IX of the latter will show how Parliament has endeavoured to synthesize the respective provisions. See for example Section 38 of the one and Section 105 of the other dealing with relief against forfeiture.

The availability of the Agricultural Tribunal as a forum for obtaining possession seems to be limited. Its functions are prescribed in Section 22, particularly in subsection (1). It may fix rent, determine compensation, alter the size of holdings, grant relief against forfeiture and generally exercise wide supervisory powers. Despite the provisions in subparagraph (j) to "decide any dispute.....relating to such land" the power to grant recovery of land, however, is limited by subparagraph (i)

to cases of failure to cultivate - the only such power. Hence the general applicability of the ordinary action for possession - see Section 60 of ALTA and the provisions of the Land Transfer Act.

Nevertheless the courts and the tribunals are encouraged to work in harmony - see the provisions of Section 62 of ALTA aimed at avoiding conflict - in particular subsection (3) applying the principles of res judicata to the tribunals, and subsection (4) giving the tribunals discretionary powers to adjourn applications which concern matters pending before the courts. Conversely the general power in the courts to adjourn has often been exercised to enable tribunal adjudication to be obtained - which in many cases will define the status of the parties in a way which renders further court proceedings unnecessary.

It is the operation of these co-related powers of adjournment which lie at the heart of this appeal, and there are previous decisions of this Court which provide assistance, particularly in cases where a summary application for possession has been made under Section 169.

Given that the question of right to occupy may emerge before either the tribunal or the court, it would be quite inappropriate if the result were determined by the fortuitous circumstance of which jurisdiction was invoked first; so it is desirable to see if guiding principles have been laid down.

In Chandra Wati v. Gurdin F.C.A. Civil Appeal 34/80, an order for possession had been made in Chambers on a Section 169 Summons, in relation to 8 acres of agricultural land. There had been earlier proceedings, both by way of a summons for possession in the Magistrate's Court, and by an application to an agricultural tribunal to approve an assignment and declare a tenancy. An inconclusive settlement had collapsed. Then on 20th May,

1980, appellant re-applied under ALTA for an assignment of tenancy and on 23rd May a Section 169 Summons came on for hearing. Both counsel conceded that the matter should be adjourned to allow the Agricultural Tribunal to determine the matter. However, the Judge took the view that the consent of the Native Land Trust Board should have been obtained and that in its absence the applicant's occupation was illegal and he made a summary order for possession. On appeal it was contended that the adjournment should have been granted. This Court said :

> " It was common ground that an application for relief under the Agricultural Landlord and Tenants Ordinance had been filed with the Tribunal prior to the hearing of the summons for possession; further, it was acknowledged by both counsel that the merits or demerits of the application before the Tribunal was a matter entirely for the Tribunal to determine, and that in its discretion it may order that a tenancy of the lands occupied by the appellant be assigned to her pursuant to the provisions of the Agricultural Landlord and Tenants Ordinance; accordingly her right to occupy the lands could well be validated although the matter of the consent of the Native Land Trust Board would, at that stage, no doubt be considered and dealt with by the Tribunal.
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> It was apparent on the fact of the record that at the time the summons for possession came on for hearing at the Supreme Court the appellant's application was before the Agricultural Tribunal, and if successful, could result in the appellant obtaining an assignment of a tenancy in respect of the lands from which the respondent sought her ejectment. The learned judge was quite correct in finding that at the precise moment the appellant had not shown a right to possession but the application filed by appellant with the Tribunal raised an issue or question which if decided in her favour would render nugatory and oppressive an order for possession made under Section 172 of the Land Transfer Act 1971 at that point of time. The authorities Maxwell v. Keun (1928) 1 K.B. 645 and Dick v. Pillar (1943) K.B. 497 indicate that the adjournment of a hearing by any Tribunal is a matter prima facie in the discretion of the Tribunal and an exercise of that discretion will not be interfered with by an appellate

> court in normal circumstances; however, if the discretion has been exercised in such a way as to occasion a risk of injustice to any of the parties affected then the proper course for an appellate court to take is to review such an order.
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> Accordingly, the application for adjournment of the hearing of the summons for possession, duly consented to by counsel for the respondent, should in our opinion, have been allowed; the refusal to allow the adjournment could, on the particular facts of this case, result in the appellant suffering a substantial injustice. Admittedly, the appellant had been not only vacillating, but also dilatory in prosecuting her former applications to the Agricultural Tribunal and these factors no doubt influenced the mind of the learned judge in refusing the application for adjournment."

And later :

> ".....we are quite satisfied that the learned Judge should have permitted counsel for appellant to present his case in support of the adjournment application and in failing so to do he deprived appellant of the consideration that the application merited; further, the fact that an issue pending before the Agricultural Tribunal which, if decided in favour of the appellant, could result in the confirmation of her occupancy of the lands farmed by her was in our opinion a good and sufficient reason for declining at that particular stage, to make the order for possession under Section 172 (supra)."

Now we digress to note that both counsel in that case acknowledged that an application (which can only be made by a person claiming a tenancy) was a matter entirely for the Tribunal to determine, and the Court accepted that view - and similarly in other cases. But that may be only because the person claiming a tenancy has no easy access to any other body. But we do not think that the jurisdiction of the Supreme Court to determine whether there is a tenancy or not is ousted if the issue arises as part of a general possession action - as it did in Shiva Rao (supra).

In Dharam Lingam Reddy v. Pon Samy & Others F.C.A. Civil Appeal 42/81, the sequence had been:

16 January 1981 Notice to quit by owner to occupier.
16 February 1981 Application to Tribunal by occupier, based inter alia on Section 5.
20 March 1981 owner issued a Section 169 Summons.

Much of the decision turned on allegations of an employer/employee relationship, which provides an exception to ALTA, and that does not concern us. But on the question of adjournment to allow an application to be heared by the Tribunal, which if successful, would confirm him in possession, this Court said :

> " In our opinion upon respondents taking proceedings for possession of the lands appellant exercised the right given to him under ALTA to seek relief as above mentioned. Accordingly at the time the Supreme Court considered the application by respondents for an order for possession an issue was pending before the Tribunal which, if decided in favour of appellant, could result in a tenancy of the lands being presumed in his favour. It was a matter solely for the Tribunal.
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> However the making of an order for possession, at that stage, could result in the right of the appellant to obtain relief being defeated which would occasion substantial injustice.
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> Counsel for respondent submitted that all the appellant had was a mere 'hope' that he might obtain possession and that unless appellant could immediately show 'cause' an automatic order for possession should follow. We do not agree. Section 172 (supra) includes the words 'or he may make any order and impose any terms he may think fit'. These words are of wide application and would enable the judge to make any order which the dictates of justice so required."

A similar matter was considered at the same sitting with an identically constituted court in Azmat Ali v. Mohammed Jalil F.C.A. Civil Appeal 44/81.

The court said that the provisions of

Section 62(4) giving the tribunal power to adjourn pending determination in a court of law was not mandatory and the Supreme Court in its turn, of course, had the converse power.

In discussing which way the adjournment should operate, attention was drawn to the additional power of the Judge under Section 172 - "or he may make any order and impose any terms he may think fit". In cases where delaying tactics are suspected, the power to impose terms, as to time or by requiring security, could be salutory. The court went on to say :

> " There is accordingly nothing in Section 172 which requires an automatic order for possession unless 'cause' is immediately shown.
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> The position of the Supreme Court as the mainstay of the great bulk of judicial proceedings, is well known. Whether it should adjourn to permit proceedings to continue in a tribunal of lesser status must depend in each case upon the particular circumstances, but the very fact of the high status of the Supreme Court will make it careful to ensure that insistence upon its process may not be oppressive.
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> The tribunals under ALTA are of a special category. They are given full and even unique powers in a special limited category of cases. Appeal does not lie to the Courts (though under section 62(5) questions of law may be referred to them) but to the Central Agricultural Tribunal appointed under the Act, who must, under section 48(1) be a person of high legal qualifications. The tribunals are intended and are qualified to deal with matters within their own sphere and will no doubt take into consideration when asked to grant relief, whether there is a concealed objective to evade any law.

As with the earlier cases, the Court allowed the appeal against the refusal of the adjournment saying "the refusal of the stay involved some risk of injustice to the appellant, of sufficient weight to justify the intervention of this Court". Nevertheless it is salutory to note that in the same context as we are considering,

the Court mentioned the Supreme Court's power to "insist upon its processes". The questions then are whether in the present case the appellant totally failed to show cause against the making of a Section 172 order; whether an adjournment or dismissal was called for; or whether some other order such as the imposition of terms was appropriate.

Relevant factors appear to be :

(i) Attention was concentrated on the attitude of the respondents since July 1981. The previous proprietors had always been opposed to the appellant's occupation.

(ii) The present owners had purchased in July 1981 and had obtained title some undefined time later, and had then commenced proceedings in December 1982. It was conceded that no presumption arose under Section 4(1).

(iii) It was not until March 1983 that the appellant filed his application and he produced no evidence of consent other than the bald ascertion that he occupied with the "respondents' consent".

(iv) In the face of this the first respondent's affidavit detailed his consistent refusal to entertain requests by the appellant and by his solicitors to grant a lease. He further specifically alleged that the area involved was less than the minimum required to bring it under ALTA and he specified the use to which it was being put, which use again would negative the applicability of ALTA. In the face of this evidence, the appellant remained silent. In phraseology

borrowed from cases under Supreme Court Order 14 relating to summary judgments, the respondent "condescended upon particulars". The appellant apparently could not or would not.

(v) When the application came before the Agricultural Tribunal in mid 1983, the respondents were willing to have the matter heard, but the appellant asked for it to be adjourned pending the determination of the Section 169 Summons - this application was granted by the Tribunal.

(vi) When the matter finally came on in a Chambers hearing in July 1984, appellant then pressed for the case to be regarded as appropriately one for the tribunal - a reversal of the attitude taken more than 12 months earlier.

We recognise the policy which has actuated this Court on previous occasions in the cases detailed above. ALTA was an instrument of social policy. In Shiva Rao (supra) a statement of the Agricultural Tribunal in Bijay Bhadur v. Ram Autar (W.D. 48/78) was approved. It had been said :

> "Section 4(1) affords protection to bona fide tenants whose landlords subsequently refuse to recognise them as such. It is not a shortcut to the acquiring of an interest in land by adverse possession."

In the course of his submissions, Mr. Koya quite correctly pointed out that Section 4(1) is an evidentiary provision but it is not an exclusive expression of the circumstances from which a tenancy can be inferred. Hence his submission that despite the shorter period under the respondents' ownership, it

would be possible for a Section 5 application to be entertained. We agree and the above quoted remarks are appropriate to any Section 5 application. But before a judge can entertain the possibility that there is a cause for refusing to give up possession because of the pendency of an ALTA application, the occupant must point to some evidence worthy of evaluation by an Agricultural Tribunal. This is the threshold question. To hold otherwise would be to allow sham defences for the purposes of delay.

Although the discretion of the Court will usually be exercised to allow a bona fide claim to be examined by the tribunal most conveniently suited to such a task, the Court must still have the power in a given case to decide that there is no material fit to be so assessed. If it had been the intention of Parliament that this should not be so in relation to agricultural land, then in our view Sections 169 and 172 would be differently expressed.

We agree with the view of the Judge that this was such a case, although for somewhat different reasons from those he expressed. As we have already stated, inability to bring the case within Section 4(1) was not necessarily fatal, but as Mr. Koya very properly conceded the task was made much more difficult. And when one takes into account the factual matters put before the Judge in the first respondent's affidavits, and in the absence of anything to the contrary, no ground was made out, and the conclusion that it would be inappropriate to adjourn the matter was the only proper one in the circumstances.

Having so held we are not called upon to determine the alternative ground relied upon by the Judge.

Appeal dismissed - appellant to pay costs to be taxed if not agreed upon.

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Vice President

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Judge of Appeal

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Judge of Appeal