IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 23 OF 1987

Between:

KISSUN LAL ANTHONY

Appellant

- and -

PRITAM SINGH

Respondent

Mr. V. Maharaj for the Appellant
Respondent in person

Date of Hearing: 5th July, 1988

Delivery of Judgment: 25th August, 1988

JUDGMENT OF THE COURT

This is an appeal from an order of Mr. Justice Sheehan made on the 20th of February, 1987 when he dismissed an application made by the appellant, the original plaintiff, for possession of certain freehold land at Tailevu, of which the appellant is the registered proprietor part of which is occupied by the respondent.

The application was made pursuant to section 169 of the Land Transfer Act. Under that section the last registered proprietor of the land in question may summons a person in possession of that land to show cause why an order for possession should not be granted against him. Mr. Justice Sheehan when dismissing the application made the following statements:-

> " Here the Defendant has asserted there is a tenancy paid up to June 1987. He has he says been on the land since 1977 and this is in fact not disputed. He further says that since 1982 he has farmed that land and obtained an income from

it. That too is not disputed. He claims that the house he constructed on the land was erected at the instigation and with the assistance of the Plaintiff.

Under these circumstances it seems to me that there is a claim of an equitable interest and "some evidence worthy of evaluation by an Agriculture Tribunal". Accordingly I do not think that this is a case where an Order for possession should be granted under Section 169 of the Land Transfer Act and accordingly the application is dismissed."

From this decision the appellant appeals on three grounds:-

"1. THE Learned Trial Judge erred in failing to consider that there was evidence suitably convenient for the exercise of the Court's discretion by acknowledging at failing to give sufficient weight to the fact that the Director of Town and Country Planning had granted approval for the land to be sub-divided for residential purposes as at January, 1987.

2. THE Learned Trial Judge erred in failing to direct his mind to the issue at hand namely whether there was an interest as such that was capable of being classified as an interest under the Agricultural Landlord and Tenant Act as opposed to considerations of equitable interest or evidence worthy of evaluation by an Agricultural Tribunal akin to an equitable interest.

3. THE Learned Trial Judge erred in failing to make out the Order under Section 169 by failing to consider the issue at hand namely whether there was prima facie evidence sufficient to dismiss the claim of the Defendant at hand."

Mr. Maharaj argued the first two grounds together and based his argument on the alleged fact that, as the land had been approved as residential land by the Director of Town and Country Planning, the land was outside the ambit of the Agricultural Landlord and Tenant Act by virtue of section 58 of the Agricultural Landlord and Tenant (Exemption) Regulations.

214

The respondent had notified the learned Judge that he had made application to the Tribunal for a declaration of tenancy pursuant to the Agricultural Landlord and Tenant Act. The learned Judge, in the extract quoted from his ruling, considered that the respondent had adduced "some evidence worthy of evaluation by an Agriculture Tribunal."

We pointed out to Mr. Maharaj that this court was not concerned whether the respondent had applied to the tribunal or not. Such an application does not prevent the High Court from considering a section 169 application where evidence is adduced which enables a court to decide whether or not the defendant had shown cause why an order should not be made.

There was clear evidence before the learned Judge which indicates that there are issues which could not properly be resolved on affidavit evidence alone.

Even if the argument of Mr. Maharaj is correct that the land is outside the jurisdiction of a Tribunal there still remains the conflicting evidence regarding the respondent's right to occupy the appellant's land.

On the evidence before us, this court is of the view that the real issue is whether the learned Judge who had a discretion in the matter, properly exercised that discretion.

On examiantion of that evidence we would first point out that the appellant in his own affidavit in support of his section 169 application stated "that the defendant is a licensee as he is not paying rent and is a squatter". He goes on in his affidavit to state that he has given the respondent notice to vacate and he has not done so and he claims that the defendant is still illegally in possession.

So far as the evidence adduced by the respondent is concerned, it was brought before the learned Judge in rather an unusual manner. Section 170 of the Land Transfer Act provides that a person summonsed may appear and show cause why he refuses to give up possession of the 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. Under that section it is provided that dismissal of this summons shall not prejudice the right of the plaintiff to take other proceedings against the person summonsed to which he may be otherwise entitled.

Usually a defendant shows cause by filing an affidavit in reply to the plaintiff's affidavit. In the instant case the respondent, who was not represented, filed no affidavit but he did write to the Chief Registrar in, a three page letter, setting out the reasons why he refused to give up possession. This three page letter was supported by a list of damages he claimed to have suffered and two other letters signed by a number of neighbouring farmers on the land purporting to verify the fact that the respondent had been residing on the land since 1982 and was cultivating it. They confirmed he had erected a house on the land.

These papers were apparently placed before the learned Judge but copies were not given to the appellant's solicitor until after Mr. Maharaj and the defendant appeared before the learned Judge. After a number of adjournments the learned Judge permitted the respondent to swear to the veracity of the statements contained in his letter.

Apparently no opportunity was given to Mr. Maharaj to file a further affidavit in reply or rebuttal nor did Mr. Maharaj seek an adjournment for that purpose.

The manner in which the learned Judge dealt with this application, which we have stated was unusual, has not been challenged in this appeal. Mr. Maharaj did apply to amend his grounds of appeal, which the court refused, because we were of the view that the outcome of the appeal would not be changed as a result of allowing further grounds of appeal.

The respondent was not called on to reply to Mr. Maharaj.

The evidence produced by the respondent is that he claims (inter alia) that he is a tenant and has paid rent to June 1987, a date beyond the date of the application seeking possession.

We pay no attention to the learned Judge's statement that this fact was not disputed because the record indicates that the appellant had no opportunity to do so.

The real issue, and the only issue which this court has to consider, is whether the learned Judge exercised his discretion in a proper manner. He was of the view that the respondent might be able to claim an equitable interest in the land and he declined to make an order granting an application for possession of the land.

Mr. Maharaj quoted an extract from Grould V.P.'s judgment in Shyam Lal v. Eric Martin Schultz 18 F.L.R. P. 152 which would be relevant if there was no contested evidence in the instant case. He said:-

> "that I am in sympathy with the proposition that complicated questions of fact (particularly where there are allegations of Fraud) cannot adequately be investigated and dealt with on a summary proceedings in Chambers. The present case, however, involved initially no contested relevant fact and the Learned Judge in my opinion rightly entertained and dealt with it."

The instant case, while it does not involve complicated questions of fact does contain disputed facts which the learned Judge could not be expected to resolve on affidavit evidence. It is a case which should be dealt with in open court where all issues can be properly considered. The Court would not be precluded from considering whether the Tribunal had jurisdiction. The absence of jurisdiction would not be the end of the matter. The other issues would still have to be resolved.

While we do not agree that the Agricultural Tribunal would necessarily be concerned with the evidence before the learned Judge and might well hold it had no jurisdiction, our consideration of the evidence before the learned Judge indicates that there are issues which he could not have decided on the affidavit evidence before him. His order dismissing the application was in our view a proper exercise of his discretion and the appeal against his order accordingly fails.

The appeal is dismissed with no order as to costs. The successful respondent should have complied with the practice of filing an affidavit or at least giving the appellant a copy of his letter to the Chief Registrar and his failure to do so resulted, to a large extent, in his application being considered in a manner which made it difficult for the appellant to rebut. In the circumstances we feel it would be equitable for each party to bear his own costs.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal