IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0009 OF 1998S
(High Court Civil Action No. HBC 260 of 1997L)

BETWEEN:

MOHAMMED NASIR KHAN
IMDAD ALI
JAITUN NISHA — *Appellants*

AND:

MOHAMMED RAFIQ — *Respondent*

Coram: The Rt. Hon. Justice Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Justice Sir David Tompkins, Justice of Appeal
The Hon. Justice Sir Rodney Gallen, Justice of Appeal

Hearing: Friday, 19 May 2000, Suva

Counsel: Sir Vijay R Singh for the Appellants
Mr. H. A. Shah for the Respondent

Date of Judgment: Thursday, 6 July 2000

JUDGMENT OF THE COURT

The respondent in these proceedings is the registered owner of Lot 10 on plan no.1966 Veivadravadra comprising 1.6313 hectares being Crown lease 6876, LD4/11/1443. The lease of the land concerned was originally owned by one Namdar. On the death of Mr Namdar it was transferred to his son Mohammed Azam by final transfer on 24 April 1995. In the High Court the Judge proceeded on the assumption that the leasehold interest in the land had subsequently been sold to the respondent and the Judge held that the respondent was the registered owner with locus standi to bring the application which was before the Court. It was also not in dispute that the appellants were occupying a part of the land. The respondent applied to the Court for an order for possession of the part occupied by the appellants. This application was opposed by the appellants.

At the hearing in the High Court the appellants indicated that they were making an application to the Agricultural Tribunal that they were entitled to be regarded as an agricultural tenant with the rights to which that gives rise under the provisions of the Agricultural Landlord and Tenant Act (Cap 270); and they sought an adjournment of the proceedings pending the decision of the Tribunal. That was refused by the Judge who having considered the evidentiary material before him contained in affidavits filed by the parties, came to the conclusion that the respondent was entitled to the orders he sought for vacant possession of the subject land. The Order was stayed for six weeks to allow the appellants time to make alternative arrangements. Subsequently the stay was extended until such time as this appeal had been disposed of.

The basis of the objection of the appellants was that they were entitled to possession of the land by virtue of historic arrangements of which evidence was given in the High Court. It was contended in the High Court that as they may be successful in obtaining an agricultural tenancy as the result of their further application to the Agricultural Tribunal, no order for possession should be made until that application had been determined. The Judge did not accept that contention, holding that any further application was bound to fail.

While on the view to which we have come we do not think it necessary or desirable to go into the factual matters in any great detail, some reference to what has occurred is required. The original owner of the land the subject of the proceedings, Mr Namdar, is said to have been a brother-in-law of one Nasir Ali, the husband of one of the appellants and the father of the others. Mr Ali having lost his entitlement to other land needed to make provision for a residence for himself and his family and it is claimed that Mr Namdar gave possession of the land concerned to Mr Ali in 1968. The land was originally owned by South Pacific Sugar Mills Limited as Head Lessor and there was evidence of two typewritten notes purporting to be signed by Mr Namdar requesting the Head Lessor to transfer part of the land to Mr Ali. One of those documents referred to one acre while on the other, the area had been altered by hand to 2 acres.

The land subsequently became State land and at some subsequent time Mr Ali commenced to pay rent. The receipts which were produced indicated that the rent was paid in respect

of a property, the legal description of which was LD 4/11/1246. That is not the same land as that in contention in these proceedings and it appears that it is land which at least since 1984 has been registered in the name of some other person. It was the contention for the appellants that a mistake had been made by the Lands Department and that the rental had been paid for the land the subject of these proceedings.

In 1992 Mr Ali made an application to the Agricultural Tribunal seeking a declaration of tenancy under the provision of sections 5(1) and 22 of the Agricultural Landlord and Tenant Act. That application was heard by the Tribunal and in the course of the decision the Tribunal made reference to a number of the difficulties set out above. He expressed the view that the application might have been better directed to resolve the position as between the Lands Department and Nasir Ali but the application that was before him was in any event for an area less than 2.5 acres so there was no jurisdiction to make the orders sought.

Subsequently the appellants claim to have obtained a survey which indicated that the land at issue was in excess of 2.5 acres, although no direct evidence of that survey has been given. It was apparently in reliance on this survey that the appellants proposed to bring their further application to the Agricultural Tribunal, although in this Court counsel for the appellants accepted that such a further application was not now appropriate.

In the High Court the Judge considered that on the material before him the respondent had made out a prima facie case for the Order sought. The Court held the onus of proof on the issue of entitlement passed to the appellants. The Judge found that that onus had not been discharged and on the confused material before him he was clearly right to do so. Even now the position with the Lands Department has not been fully explored and there is no adequate material to establish any area in excess of the figures referred to in the two typewritten notes. In our view there is nothing in the material on which the appellants rely which would justify our interfering with the Order of the High Court. The entitlement or otherwise of the appellants ought to be established in other proceedings.

Unfortunately, the position has now become even more complex. Nasir Ali has died. He left a Will which apparently leaves the land concerned to one of the appellants. That Will has not

been the subject of probate and the entitlement of the appellants to maintain the position which they do is by no means clear.

Having regard to the circumstances therefore we propose to dismiss the appeal but we consider that the appellants ought to have the opportunity at least to explore the possibility of obtaining a declaration as to entitlement if it is possible to obtain the necessary evidence to support such a declaration.

We propose therefore to extend the stay in respect of the Order made for a further four months from the date of this decision. If the appellants initiate proceedings for a declaration or in some other form which would support the position which they maintain, then they would be able to seek a further stay. In the event of no such proceedings being issued or no such stay being obtained, then the order for possession would be enforceable on expiry of the stay we are ordering. Any application for extension of the stay should be made to the High Court.

Decision:

(1) The appeal is dismissed.

(2) The stay granted in the High Court pending appeal is extended for a period of four months from this date.

(3) The respondent is entitled to costs which we fix in the sum of $ 750.00.

Sir Thomas Eichelbaum	**Sir David Tompkins**	**Sir Rodney Gallen**
Justice of Appeal	**Justice of Appeal**	**Justice of Appeal**

Solicitors:

Sir Vijay R Singh and Company, Sigatoka, for the Appellants

H A Shah Esq, Lautoka, for the Respondent