VENKATAMMA

v.

BRYAN CHARLES FERRIER-WATSON

[SUPREME COURT, 1995 (Tuivaga P, Cooke, Mason JJ.SC)
24 November]

Civil Jurisdiction

Landlord & tenant-agricultural tenancy-whether S44 of the Agricultural Landlord and Tenant Act (Cap 270) allows parties to contract out of the provisions of Section 37 of the Act

The parties entered into a contract of agricultural tenancy which provided for the tenancy to be terminated in the event that certain payments were not made within the stipulated time. On appeal against an order for possession of the land HELD: the rights to relief against forfeiture contained in Section 37 cannot be circumvented.

Cases cited:

Anisminic Ltd v. Foreign Compensation Commission [1969] 1 All ER 208
Plymouth Corporation v. Harvey [1971] 1 All ER 623
Richard Clarke & Co. Ltd v. Windnall [1976] 3 All ER 301
Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, 100 to 101

Appeal from the Fiji Court of Appeal

D.S. Naidu for Appellants
M.S. Sahu Khan for Respondents

JUDGMENT OF THE COURT

This is an appeal by leave granted by the Fiji Court of Appeal from a judgment of that Court, delivered on 9 November 1992, affirming a judgment of Saunders J. delivered on 12 February 1991. On 22 August 1989 the plaintiffs in the proceeding who are the present respondents, had issued against the present appellants a summons under s. 169 of the Land Transfer Act seeking vacant possession of certain agricultural land, namely some 17acres being Lot 3 on Deposited Plan 1439, Certificate of Title 10842. The plaintiffs claimed as being the last registered proprietors of the land, within the meaning of s. 169(a). They contended that the contract evidenced by an instrument of tenancy under the Agricultural Landlord and Tenant Act (ALTA) had expired because of the failure of the defendants to pay arrears of rent within stipulated times; and that accordingly the defendants were no longer lessees and were entitled to no statutory protection, either under ALTA or under the second proviso to s. 172 of the Land Transfer Act. The Judge accepted these contentions, making an order for possession, and the Court of

Appeal dismissed an appeal from that decision.

A The litigation has been marked by procedural irregularities on both sides. It emerged on the subsequent hearing of a stay application that the plaintiffs, who were the executors of Norma Athol Ferrier-Watson, had ceased to be the registered proprietors of the land before the hearing by the High Court Judge. After the issue of the summons, in accordance with the will of their testatrix they had transferred the title to a family company, Kennedy Watson Limited.
B This fact appears not to have been disclosed to the High Court Judge or to the Court of Appeal. As this Court indicated during the argument of the present appeal, the proceeding could apparently have been regularised by a simple amendment substituting the company as plaintiff, but no application for an amendment has been made, unless (which is not altogether clear) counsel for the respondents is to be understood as having made a tacit application to this
C Court.

On the part of the appellants the irregularities have been failures to comply with the Supreme Court Rules 1992. Rule 24(b) requires the appellant to lodge his case in the appeal within one month of being notified that the record is ready. Rule 37(1) requires the appellant to file a statement of written submissions
D within 30 days after the lodging of his case. Despite reminders by the Registrar and the President of the importance of complying with these Rules, the appellants by their solicitors omitted to do so. The Chief Justice declined to grant any extension of time, but he left the question of the future of the appeal to be determined by this Court. At our hearing Mr. Sahu Khan submitted that the appellants should not be allowed to prosecute the appeal. He indicated that if
E this submission did not succeed he would prefer in the interests of his clients to proceed with the argument of the appeal forthwith; Mr. Naidu for the appellants tendered their case and written submissions.

After hearing counsel on the question the Court intimated that in the special circumstances the appeal would be allowed to proceed. We took into account
F that, surprisingly, counsel for the appellants had evidently not been fully alive to the importance of compliance with the Rules, but that this is an early case under the Rules; that questions arise of some general significance between landlords and tenants of agricultural holdings; and that there have been mistakes on both sides, as already explained. We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on
G notice that non-compliance may well be fatal to an appeal: in cases not having the special combination of features present here, it is unlikely to be excused.

The Facts of the Case

Accordingly we turn to consider the case on its merits. The appellants are said to have been in possession of the land and to have cultivated it since 1954.

There was a dispute over rent and arrears and their rights, and after some earlier proceedings they applied in 1984 to the Agricultural Tribunal to have the rental fixed and to secure an instrument of tenancy. On 12 July 1988 on the day of the hearing an agreed settlement was reached, and a consent order was made by the Tribunal in the following terms:

1. That the Respondent will execute an Instrument of Tenancy within 28 days in the statutory form as prescribed by the Agricultural Landlord and Tenant Act for the Statutory period of 20 years under section 13 of the Act from the 1st day of January 1980.

2. The rent prior to 1980 was $158.00 per annum. The rent from 1st January, 1980 to 31st December, 1984 is $400.00 per annum. The rent from 1st January, 1985 is $550.00.

3. The Applicants will pay premium for the extension of tenancies within 14 days from today as follows:

   (a) $158.00 being for 1st extension

   (b) $400.00 being for 2nd extension

Being premiums payable under Section 13 of Agricultural Landlord and Tenant Act.

4. The rents are to be paid as follows:

   (a) any rents owing by the applicants prior to 1st January 1980 to be paid within 14 days of the receipt of the letter from the solicitors of the Respondents by the Solicitors for the Applicants.

   (b) The rent for the period 1980 to 1984 to be paid within 14 days from today.

   (c) The rent from the period from 1st January 1985, to date shall be paid within 21 days of the receipt of the instrument of tenancy executed by the Respondents and when the instrument of tenancy is received by the Solicitors for the Applicants.

5. If the rent and/or premium as stipulated and agreed today are not paid within the stipulated time then the Applicants must give vacant possession immediately.

An instrument of tenancy embodying those terms was subsequently executed by the parties. It bears date 16 May 1989 and was registered on 19 May 1989. It is expressed to be a lease of the land by virtue of statutory extension of

tenancy under s. 13 of ALTA for a term of 20 years commencing on 1 January 1980 at the yearly rental of $400 to 31 December 1984, $550 from 1 January 1985, such payments to be made annually on 1 January, together with premiums of $158 and $1400 to be paid by 26 July 1988. After various covenants which it is unnecessary to reproduce, the document concludes as follows:

> (10) The rent prior to 1980 was $158.00 and the Tenants shall pay the whole amount due in respect of the rent payable prior to 1980 within fourteen (14) days of receipt of a letter from the Landlords specifying the amount outstanding.
>
> (11) That all rents outstanding from the 1st day of January, 1980 to the 31st day of December, 1984 and the said premiums of $158.00 and $400, shall be paid by the Tenants to the Landlords by the 26th day of July, 1988.
>
> (12) That all rents which are due from the 1st day of January, 1985 to date shall be paid by the Tenants to the Landlords by the 5th day of August, 1988.
>
> (13) That time for payment under Paragraph 10 to 12 herein are of the essence of the agreement.
>
> (14) That notwithstanding anything herein contained and as agreed between the parties and ordered by the Agricultural Tribunal on the 12th day of July, 1988 in the Reference No. WD 51 of 1984, if any of the payments referred to in Paragraphs 10 to 12 herein are not paid within the stipulated time then the Tenants shall give immediate vacant possession of the said land referred above to the Landlords.
>
> (15) This contract is subject to the provisions of the Agricultural Landlord and Tenant Ordinance, and may only be determined, whether during its currency or at the end of its tea in accordance with such provisions. All disputes and differences whatsoever arising out of this contract, for the decision of which that Ordinance makes provision, shall be decided in accordance with such provisions.

The payments required were made somewhat belatedly. The relevant dates given to us by counsel for the appellants and not disputed before us by counsel for the respondents were that with a letter dated 7 November 1988 arrears and current rent were paid to 31 December 1988, whereas payment should have been made by 5 August 1988. The respondents declined to accept the payments as rental and purported to receive them without prejudice, to be applied towards any

damage that might be payable to them. They maintained that the appellants were trespassers.

A

The Statutory Provisions

Sections 169 and 172 of the Land Transfer Act provide:

Ejectors

169. The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:- B

(a) the last registered proprietor of the land;

(b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease, and in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or any previous demand has been made for the rent; C

(c) A lessor against a lessee or tenant where a legal notice to quite has been given or the term of the lease has expired. D

Dismissal of summons

172. If the person summonsed appears he may show cause why he refuses to give possession of such 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, mortgagee or lessor or he may make any order and impose any terms he may think fit: E

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summonsed to which he may be otherwise entitled. F

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons. G

The provisions of ALTA chiefly material for the present case are ss.7(a), 15, 37, 38 and 44. We reproduce these as far as relevant:

Limitation on termination of contracts of tenancy

7. Except in the manner provided by this Act -

(a) no contract of tenancy of any agricultural land subsisting at the commencement of this Act or thereafter shall be terminated by the landlord or by the tenant of such land within the term fixed by such contract or during an extension granted in accordance with the provisions of this Act;

Contracting out of Act void

15. A provision in any contract of tenancy whereby the tenant purports to contract himself out of the provisions of this Act or the effect of which would be to contract the tenant out of any such provisions shall be against public policy and void.

Termination by landlord

37. - (1) A landlord may terminate his contract of tenancy and may recover possession of an agricultural holding -

...

(c) by three months' written notice to quit -

(ii) if any part of the rent in respect of the holding is in arrear for a period of three months or more or if any lawful term or condition of the tenancy which is capable of being remedied is not performed or observed by the tenant:

Provided that, if the tenant pays the rent in arrear or, in the case of breach or non-observance of any lawful term or condition of the tenancy, the tenant makes good such breach or non-observance within three months of notice to quit, the notice to quit shall be deemed to be cancelled and of no force and effect. (Amended by 35 of 1976, s. 13.)

(2)

(a) the tenant may, at any time, before the expiry of a notice lawfully given and served upon him under the provisions of paragraphs (b) and (c) of subsection (1) and of section 39, apply to the tribunal for relief against forfeiture and pending the award of the tribunal, such tenant shall not be evicted.

(b) The tribunal shall consider and decide upon any application made to it under the provisions of this section within the period of twelve months specified in sub-paragraph (ii) of paragraph (f) of subsection (1) of section 9.

Termination by agreement

44. Nothing in this Act shall prevent or shall be deemed to prevent a landlord and tenant of an agricultural holding from terminating a contract of tenancy by agreement.

The Termination Argument

The respondents do not claim to have terminated the contract of tenancy under s. 37(1)(c,)(ii). Had notice been given under that paragraph, the appellants would have had the opportunity afforded by the proviso and also the opportunity of applying for relief against forfeiture under s.37(2). The whole argument for the respondents is that the term of the settlement embodied in para. 5 of the consent order and para. 14 of the instrument of tenancy amounted, upon default in due payment of the arrears, to an agreement terminating the contract of tenancy within the authority of s.44. It is this argument that was accepted by the courts below.

A

B

It is convenient to refer to the two substantially identical paragraphs as the stipulation. Mr. Sahu Khan accepts that such a stipulation would be outside the liberty of contract given by s.44, and would consequently be ineffective, if it purported to terminate the tenancy on the contingency of failure to pay future rent. He contends, however, that failure to pay arrears by the date or dates agreed is distinguishable: the parties, he says, may validly agree under s.44 that a tenancy will terminate on that contingency.

C

Without expressly drawing any distinction between arrears and future rent, the learned Judges in the High Court and the Court of Appeal were persuaded to accept the result of the argument for the respondents, holding that upon the default here the parties ceased to be landlord and tenant. We are respectfully unable to take that approach. Such an approach could partly undermine the scheme of ALTA, by depriving agricultural tenants of the statutory safeguards consisting of a requirement of certain notice to quit, the right to have the notice cancelled by making good the breach, and the right to apply for relief against forfeiture.

D

E

There is nothing in the wording or spirit of s.37(1)(e)(ii) and its proviso to confine the statutory protection to cases of arrears of future rental payable under an agreement or consent order. In this ease the amount due prior to 1980 and the subsequent rents had not been settled before the making of the consent order in 1988. It would be a harsh result if, however excusable the failure of the tenants to meet the payment dates under the consent order might be, any failure automatically brought the tenancy to an end. On the approach advanced for the respondents there would be a real possibility of hardship resulting to the tenants in cases like the present and conceivably in other cases of different circumstances. Beating in mind those possibilities, we conclude that the relevant safeguards in s.37(1) should apply in all ALTA tenancy cases where in substance the landlord is seeking to dispossess the tenant for non payment of rent or for any other breach falling within the scope of the subsection.

F

G

Section 44 can and in our opinion should be interpreted consistently with that view of s.37. Indeed, the prohibition in s. 15 against contracting out reinforces

the correctness of that approach. In its natural and ordinary sense, s.44 is directed to simple cases where the landlord and the tenant agree on the termination of the agricultural tenancy either forthwith or at a specified date. It is not directed to cases of purported terminations of the tenancy on the contingency of default by the tenant. Cases of the latter class are in substance disguised forfeitures. Section 37 cannot be circumvented by such devices. Compare Plymouth Corporation v. Harvey [1971] 1 All ER 623, where a purported surrender of a lease in the event of failure to comply with agreed terms was held to be a forfeiture and ineffective for want of the statutory notice; see also Richard Clarke & Co. Ltd v. Windnall [1976] 3 All ER 301 for another unsuccessful attempt to avoid statutory safeguards against forfeiture.

Section 37 of ALTA and also s.38 (which it has not been necessary to quote) may be seen as in part statutory manifestations in relation to agricultural tenancies in Fiji of the principle that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The classic modern exposition of the principle is the speech of Lord Wilberforce in Shiloh Spinners Ltd v. Harding [1973] 1 All ER 90, 100 to 101, in which the following passage is pertinent to the present case:

> ... it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default is wilful, of the gravity of breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.

The approach to ss.37 and 44 that this Court is adopting accords, in our view, both with the general scheme and purposes of ALTA and longstanding equitable doctrine.

It remains to notice that s.61(1) of ALTA is a widely drawn privative clause; but such clauses cannot protect an order made in excess of jurisdiction (Anisminic Ltd v. Foreign Compensation Commission [1969] 1 All ER 208) and it is clear that by making an order by consent the Agricultural Tribunal could not endow the parties with capacity to make a contract outside the scope of s.44 and in breach of the prohibition against contracting out in s. 15.

For these reasons we hold that as the procedure and safeguards in s.37 of ALTA have not been complied with, the statutory tenancy of the appellants remained in existence at the date of the hearing of the summons, and still remains in existence. It should therefore have been held in the High Court that the appellants had proved a right to the possession of the land. The summons should have been dismissed with costs. The appeal is allowed and the judgments below vacated, with costs in all three courts.

We think it appropriate to add that this result implies no criticism of the courts below, for we doubt whether the true issues were brought out in the arguments there.

(Appeal allowed.)