

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
 AT LAUTOKVA

Civil Jurisdiction

Action No. 167 of 1980

167/80

BETWEEN :

AHMAD SAMI s/o Subarmani

Plaintiff

- a n d -

RAWOBILAS s/o Nam Garib

Defendant

Dr. Sahu Khan &
 Mr. G. P. Shankar

Counsel for the Plaintiff
 Counsel for the Defendant

O R D E R

This is an application by a plaintiff to have the defence struck out as frivolous and vexatious and disclosing no defence; that it is an abuse of court process and that judgment be entered for the plaintiff.

The Statement of Claim alleges that the defendant has been in illegal possession and occupation since 1st January, 1979 and claims special damages of \$2,500 per annum for loss of earnings by way of cultivation. He alleges that no consent of the Native Land Trust Board was obtained under the Native Land Trust Ordinance, Section 12.

There is no indication as to when the defendant went into occupation and the plaintiff for reasons of his own avoided any indication as to how the defendant came to be in occupation. However, his reference to Section 12 (supra) shows that there must be more to the Statement of Claim than the plaintiff was revealing.

The Statement of Defence alleges that the plaintiff agreed to sell the land to the defendant for \$8000 and that the Native Land Trust Board consented subject to the plaintiff having the title transferred to his name. It appears that the plaintiff was sole beneficiary of the former deceased owner.

It then says that the parties agreed to a sale and transfer for \$10,000, but it is not apparent why a second agreement was necessary if the first one was lawful and conditionally approved by the Native Land Trust Board.

He alleges in his defence that he is appealing against a decision of the Agricultural Tribunal refusing to grant him an assignment of tenancy.

There is also a counter-claim in which the defendant pleads that since 1974 he has cultivated the land but the plaintiff has collected the cane proceeds and he asks for an account.

The plaintiff's reply admits an attempt dealing in the land which was not consented to by the Native Land Trust Board.

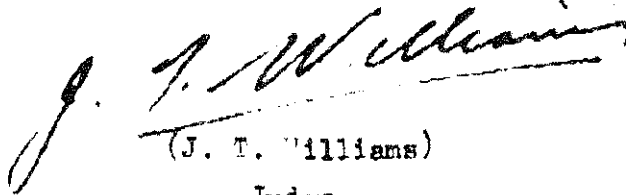
In his application to strike out the defence the plaintiff's affidavit annexes the decision of central Agricultural Tribunal in which the learned chairman, Stuart J, dismissed the defendant's appeal and uphold the Agricultural Tribunal's decision that the defendant was not entitled to a tenancy or an assignment.

The defendant's application to the Agricultural Tribunal dated 7th December, 1970 states in section 9 thereof that "the tenancy" is unlawful in that no consent of the Native Land Trust Board was obtained. That statement is in direct contradiction to the allegation in his Statement of Claim that conditional approval had been granted.

In his affidavit in reply the defendant argues that although the first agreement for sale was not relied upon he bases his claim for specific performance on the second agreement for sale. No doubt he relies upon Civil Appeal (C. A.) 16/78, Ram Bilas v. Shiu Narayan (in the typed reports of 1978, Volume IV). It is no doubt his contention that the defendant's illegal possession is referable to the first agreement and that he is not holding illegally under a second agreement which will make his possession lawful if the Native Land Trust Board consents to it. However, in Ram Bilas's case (supra) consent of the Native Land Trust Board was applied for at once following the second agreement and was obtained. In the instant case the first agreement was clearly "rescinded" when the parties agreed to a fresh price. Was the defendant in possession as a result of the "rescinded unlawful agreement? Is the defendant entitled to insist that the plaintiff apply to the Native Land Trust Board for consent? If consent is refused the defendant could not possibly claim the right to remain on the land under the second agreement. If consent is given by the Native Land Trust Board can it be maintained that there has been no dealing in the land under the second agreement? No doubt the defendant on the second agreement being made would expect the plaintiff to at once apply for N.L.T.B. consent. It would be, on the face of it, an exercise in futility for him to move off the land completely and then to resume occupation on receipt of N.L.T.B. consent.

In my view there are matters for consideration which cannot be decided without a hearing on the pleadings and submissions thereon.

The application to strike out is dismissed. The plaintiff (appellant) will pay the defendant's costs.



(J. T. Williams)

Judge

LANTOKA,

19th June, 1981