

IN THE SUPREME COURT OF FIJI AT SUVA
ON APPEAL FROM THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. CBV 0003/92
(Fiji Court of Appeal Civil No. 8/91)

BETWEEN: SULTAN MOHAMMED

Appellant

A N D: BRYAN CHARLES FERRIER-WATSON
DENNIS ALLAN McELRATH
DAVID WILLIAM ZUNDEL

Respondents

Coram: The Hon. Sir Timoci Tuivaga, President
The Rt. Hon. Sir Robin Cooke
The Hon. Sir Anthony Mason

Hearing: 17 November 1995

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

Judgment: 24 November 1995

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 allowing an appeal from a judgment of Sadal J. delivered on 18 January 1991. The present appeal was heard in this Court together with the appeal in the case of *Venkatamma*, since the issues are closely similar. As occurred in the Court of Appeal, judgments in both cases are being delivered contemporaneously and it will be sufficient for the purposes of the present judgment to treat the reasoning of our *Venkatamma* judgment as incorporated without repetition.

As in *Venkatamma*, there have been procedural irregularities on both sides and, for the reasons given in our judgment in that case, we have allowed the present appeal also to proceed and we deal with the case on the merits.

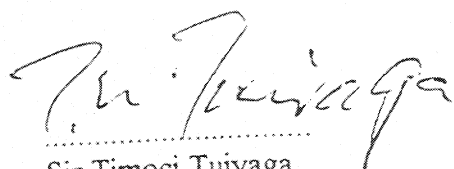
In this case likewise, the appellant is said to have been in possession of and to have cultivated the relevant land, Lot 2, Deposited Plan 1439, Certificate of Title 10842, since 1954; a consent order in the same terms was made by the same Agricultural Tribunal on 12 July 1988, an instrument of tenancy in materially similar terms was subsequently executed by the parties and was registered on 24 August 1988; default was made by the appellant in paying the arrears of rent and the premiums; a late payment was purported to be accepted by the respondents without prejudice; and on 25 August 1987 the respondents applied to the High Court by summons under ss.169 to 172 of the Land Transfer Act for an order for possession of the land.

In this case the delay in payment was even shorter than that in *Venkatamma*. According to information given to us from the bar by counsel for the appellant and not disputed by counsel for the respondents, payment was made on 22 August 1988 discharging the arrears and current rent until 31 December 1988, whereas payment should have been made by about 5 August 1988.

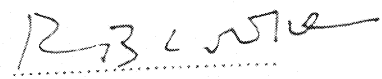
The Judge who heard this summons took a different approach from that of the Judge who heard the *Venkatamma* summons. After mentioning the delay of 'a few days' in paying the agreed amounts, Sadal J. said that the Court had powers under s.172 of the Land Transfer Act to dismiss the summons 'when all rents are paid as in this case'. That was apparently a reference to the second proviso to s.172. For that reason he dismissed the summons with costs to the defendant; but the Court of Appeal allowed the appeal and made an order for possession on the agreed termination or expiration of tenancy ground which they had adopted in *Venkatamma*. They said:

It is sufficient for us to say that, for the reasons given in the *Venkatamma* appeal, the right of the Respondent to remain in occupation of the Appellants' land ceased by virtue of the Tribunal's order as soon as there was default in payment and the tenancy could not be revived by the provisions of s.172 of the Land Transfer Act. If it is thought that this conclusion is a harsh one because of the brief period of default then we observe that the terms of the Tribunal's order were not imposed on the Respondent but were made by consent. It was the Respondent's obligation to observe the order scrupulously.

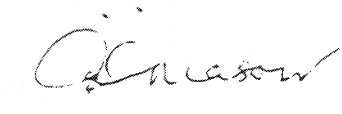
For the reasons that we have given in *Venkatamma*, we are respectfully unable to accept the approach of the Court of Appeal. Accordingly this appeal must be allowed, their judgment vacated and the dismissal of the summons at first instance restored. The present appellant will have costs in all three courts.



 Sir Timoci Tuivaga



 Sir Robin Cooke



 Sir Anthony Mason

Solicitors:
 Pillai Naidu & Associates, Nadi, for Appellants
 Sahu Khan and Sahu Khan, Ba, for Respondents