IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 34 of 1980

Between:

CHANDRA WATI d/o Ram Kissun — Appellant

and

GURDIN s/o Bhulai — Respondent

Mr S.M. Koya for the Appellant
Mr H.M. Patel for the Respondent

Date of Hearing: 9th September, 1980
Date of Judgment: 30th September, 1980

JUDGMENT OF THE COURT

Spring, J.A.

The appellant appeals to this Court from an order made in Chambers by the Supreme Court of Fiji at Lautoka on 23rd May 1980. on a summons for possession issued by the respondent pursuant to Section 169 of the Land Transfer Act, 1971.

The appellant was ordered to vacate, by 31st July 1980, an area of 8 acres (approximately) of agricultural land which was occupied and farmed by her and members of her family, and, had been since 1958.

The facts may be briefly stated.
The respondent, Gurdin, held lease Number 8064 covering 22 acres 3 perches of agricultural land known as "Taukonomo"; the lease was granted in

November 1946 and expired in November 1976; thereafter Gurdin continued as lessee on an annual basis. In 1958 the respondent permitted his brother Badri Prasad - the late husband of the appellant - to occupy and cultivate 8 acres of "Taukonomo" at an agreed annual rent; the appellant and her late husband erected 2 houses on, and generally improved, the land occupied by them to an estimated value of $8,000. Badri Prasad died 23 October 1974; letters of administration in his estate were granted to appellant who continued to occupy and cultivate the 8 acres of land; appellant paid rent to the respondent until 1978 when the respondent refused to accept any further rent. On 16 June 1979 respondent gave notice to appellant to vacate the lands which appellant refused to do; proceedings seeking possession of the lands were issued by respondent out of the Magistrates Court at Nadi on 26 June 1979; thereupon, application was made by appellant to the Agricultural Tribunal established under the Agricultural Landlord and Tenants Ordinance (Cap.242) seeking relief; the application was struck out for non-appearance; liberty was reserved to appellant to re-apply. Subsequently - 4th September 1979 - appellant re-applied to the Tribunal seeking relief pursuant to Sections 5, 18(2) and 22 of the Agricultural Landlord and Tenants Ordinance; on 18th December 1979 as a result of discussions between appellant and respondent and their respective legal advisers a settlement was proposed and the application was withdrawn by appellant with leave of the Tribunal; again, liberty to re-apply was reserved; the settlement was not concluded between the parties and appellant advised she wished to proceed with

another application to the Tribunal; on 20th May 1980 appellant lodged an application for restoration of the withdrawn application claiming (inter alia) an assignment of a tenancy in respect of her occupancy of the 8 acres of land pursuant to the provisions of the Agricultural Landlord and Tenants Ordinance. On 23rd May 1980 the summons for possession under Section 169 of the Land Transfer Act came before the Supreme Court in Chambers at Lautoka.

At the hearing of this appeal an agreed statement of facts surrounding the hearing before the Supreme Court, signed by both counsel, was placed before this Court. The statement of facts records:

(1) that immediately before the hearing agreement was reached between both counsel that an adjournment of the hearing of the summons be requested until the Agricultural Tribunal had determined the issues contained in the appellant's application to that body;

(2) counsel for appellant sought the adjournment as agreed, but the learned Judge inquired whether the consent of the Native Land Trust Board had been obtained; upon being advised that consent had not been sought, nor obtained, the learned Judge stated that appellant's occupation of the 8 acres of land was unlawful;

(3) counsel for appellant immediately requested postponement of the hearing for half an hour to enable further discussion between the parties which was refused by the learned Judge;

(4) counsel for appellant thereupon sought to present his argument and submissions in support of the application for adjournment of the summons;

(5) the learned Judge refused to hear any argument in support of the application for an adjournment of the summons pending determination of the application to the Agricultural Tribunal;

(6) the learned Judge made an order that the appellant vacate the lands occupied by her by 31 July 1980 without hearing counsel for appellant.

Mr. Koya, in support of his grounds of appeal submitted:

(a) that the summary procedure provided for under Section 169 of the Land Transfer Act 1971 should not be invoked where the proceedings involve consideration of complicated facts or serious issues of law.

(b) that the learned trial Judge acted in breach of the rules of natural justice in refusing to hear counsel for appellant's submissions for an adjournment pending the determination by the Agricultural Tribunal of appellant's application.

(c) that the merits of appellant's application under the Agricultural Landlord and Tenants Ordinance were entirely for the Tribunal to determine; that on the face of the record and the affidavits before the Supreme Court it was apparent that the Tribunal had

power in its discretion to assign a tenancy of the 8 acres to the appellant notwithstanding that her present occupancy was unlawful.

Mr. Patel submitted that the learned trial Judge acted correctly in making the order for possession; that the consent of the Native Land Trust Board had not been obtained and appellant's occupation was unlawful; that the appellant had filed 2 former applications to the Tribunal one of which had been struck out for non-prosecution and the other withdrawn; that the learned Judge was correct in refusing to stay the hearing of the summons pending the determination of the application presently before the Tribunal. Mr. Patel conceded, however, that the application which was presently before the Tribunal was a matter which called for the Tribunal's determination alone; further, he acknowledged that on a consideration of the application by the Tribunal it was possible, that, in the discretion of the Tribunal, appellant may obtain relief under the provisions of the Agricultural Landlord and Tenants Ordinance albeit that her occupancy was unlawful at that particular time as the consent of the Native Land Trust Board had not been applied for or obtained.

Our function on this appeal is limited to the question whether, on the facts of this particular case, the learned Judge was correct in making the order for possession under Section 172 of the Land Transfer Act 1971; it is convenient to set out the provisions of the section 172 (supra) which reads as follows:

"172. If the person summoned 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 an order and impose any terms he may think fit:

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

It is apparent from the reading of the said section 172 that the Judge is required to dismiss the summons if it is proved to his satisfaction that the person or persons to whom it is directed has a right to possession of the land; the dismissal of a summons does not, however, prejudice the right of the lessor to take any other proceedings to which he may be otherwise entitled.

It was common ground that an application for relief under the Agricultural Landlord and Tenants Ordinance had been filed with the Tribunal prior to the hearing of the summons for possession; further, it was acknowledged by both counsel that the merits or demerits of the application before the Tribunal was a matter entirely for the Tribunal to determine, and that in its discretion it may order that a tenancy of the lands occupied by the appellant be

assigned to her pursuant to the provisions of the Agricultural Landlord and Tenants Ordinance; accordingly her right to occupy the lands could well be validated although the matter of the consent of the Native Land Trust Board would, at that stage, no doubt be considered and dealt with by the Tribunal.

It was apparent on the fact of the record that at the time the summons for possession came on for hearing at the Supreme Court the appellant's application was before the Agricultural Tribunal, and if successful, could result in the appellant obtaining an assignment of a tenancy in respect of the lands from which the respondent sought her ejectment. The learned judge was quite correct in finding that at the precise moment the appellant had not shown a right to possession but the application filed by appellant with the Tribunal raised an issue or question which if decided in her favour would render nugatory and oppressive an order for possession made under Section 172 of the Land Transfer Act 1971 at that point of time. The authorities Maxwell v Keun (1928) 1 K.B. 645 and Dick v Pillar (1943) K.B. 497 indicate that the adjournment of a hearing by any Tribunal is a matter prima facie in the discretion of the Tribunal and an exercise of that discretion will not be interfered with by an appellate court in normal circumstances; however, if the discretion has been exercised in such a way as to occasion a risk of injustice to any of the parties affected then the proper course for an appellate court to take is to review such an order.

Accordingly, the application for adjournment of the hearing of the summons for possession, duly consented to by counsel for the respondent, should in our opinion, have been allowed; the refusal to allow the adjournment could, on the particular facts of this case, result in the appellant suffering a substantial injustice. Admittedly, the appellant had been not only vacillating, but also dilatory in prosecuting her former applications to the Agricultural Tribunal and these factors no doubt influenced the mind of the learned judge in refusing the application for adjournment.

However, there is a further matter which calls for our consideration. It is acknowledged that the learned Judge not only refused to grant the adjournment of the summons for possession, but also refused to permit counsel for appellant to present his case in support of the adjournment application. We take the view that counsel for appellant was entitled to be heard and that it was essential that a reasonable opportunity be given for the proper presentation of appellant's case for adjournment; that it was important that counsel's submissions be considered by the learned Judge if justice was to be done, or to appear to be done.

Upon full consideration therefore of the matters urged upon us by Mr Koya on this appeal, we are quite satisfied that the learned Judge should have permitted counsel for appellant to present his case in support of the adjournment application and in failing so to do he deprived appellant of the consideration that the application merited; further, the fact that an issue

pending before the Agricultural Tribunal which, if decided in favour of the appellant, could result in the confirmation of her occupancy of the lands farmed by her was in our opinion a good and sufficient reason for declining at that particular stage, to make the order for possession under Section 172 (supra). Counsel for appellant was entitled to an opportunity of being heard and his submissions would, we are sure, have directed the learned judge's mind to the possibility of an injustice resulting from the refusal at the adjournment pending the determination of the application before the Agricultural Tribunal.

Accordingly, the appeal is allowed; the order for possession made in the Supreme Court is set aside, the proceedings issued out of the Supreme Court by the respondent under Section 169 of the Land Transfer Act 1971 are adjourned pending the determination of the appellant's application presently before the Agricultural Tribunal; appellant is ordered to proceed with all due diligence to have her application heard by the Agricultural Tribunal as soon as possible. Leave reserved to either party to apply to the Supreme Court in respect of any or all of the foregoing orders or any matter or matters arising therefrom.

Respondent to pay appellant's costs in this Court, to be taxed by the Chief Registrar, if not agreed.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

Suva,
30th September 1980

(Sgd.) B.C. Spring
JUDGE OF APPEAL