IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Action No. 44 of 1981

Between:

AZMAT ALI
s/o Akbar Ali — Appellant

and

MOHAMMED JALIL
s/o Mohammed Hanif — Respondent

K. Govind & D. Kumar for the Appellant
E.S. Sahu Khan for the Respondent

Date of Hearing: 22nd March, 1982
Delivery of Judgment: 2nd April, 1982

JUDGMENT OF THE COURT

Gould V.P.,

This appeal is brought from a judgment of the Supreme Court of Fiji at Lautoka whereby it was ordered that appellant give up possession of 25 acres of land, being part of the land comprised in Native Lease No. 12261, of which the respondent is the registered lessee. The proceedings were brought by the respondent by way of an application for summary ejectment under section 169 of the Land Transfer Act (Cap. 131 - Ed. 1978).

Shortly, the facts are that the parties entered into an agreement dated the 21st August, 1975, the text whereof reads :

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" AGREEMENT BETWEEN JALIL AND AZMAT ALI
CANE CONTRACT NO. 6612 FROM 1976 TO 1986

1. Ajmat Ali has no right to apply in government to own the land under the agreement on the area developed.

2. Ajmat has the agreement to develop the land for 10 years.

3. You will develop only 25 acres near the area of Subhan.

4. Small crop such as arhar, rice, corn, peanut - ½ for M. Jalil.

5. First ploughing and harrowing only one time for 4 acres will be paid by Jalil.

6. First planting only for 4 acres labour paid by Jalil - ½.

7. Wood and bamboo must be cut by Jalil's order Azmat - can use for his own.

8. Read maintenance - half & half.

9. Cane payment on nett money - half & half.

10. An average for one acre - 4 bags salt - 2 bags matti.

11. Any dispute on land both owners must see and settle.

12. When Jalil will tell Ajmat to leave the land within 10 years of time, Jalil will have to pay all the amount for damage on work by Ajmat.

13. When Ajmat will leave the land ploughed 1st time on 4 acres Ajmat will have to pay for the ploughing. When planted not damaged.

14. On flat land only sugar cane must be planted.

15. Rent ½ share - Ajmat 25 acres.

16. 1977 to 1987 singment of cane cutting would be hired to Anwar Ali. 6612 and 6749. Anwar Ali will get good well on gang rait only Jalil's share from Mr. Jalil.

17. Cane payment must be given within 8 days. After F.S.C. payment.

18. If Azmat leave the land between 10 years he won't get any damage.

Land owner	:	(Sgd.)	Mohammed Jalil
Sub owner	:	(Sgd.)	Azmat Ali
Witness	:	(Sgd.)	San Ali "

It is common ground that the land is agricultural land within the meaning of the Agricultural Landlord and Tenant Act (Cap. 270 - Ed. - 1978) to which, for convenience, we will hereinafter refer as ALTA; it is portion of the block of 194 acres 2 roods comprised in Native Lease 12261 abovementioned.

In his supporting affidavit the respondent alleged that the appellant worked under the agreement as a labourer; that he "breached" the agreement; that no consent by the Native Land Trust Board (hereinafter called "the Board") was ever obtained to the agreement; nor was there any consent by the Board to the appellant's living on the land or cultivating it.

The appellant denied any breach of the agreement and this matter has not been pursued. He claimed to be cultivating and occupying as a tenant, admitted that there was no consent of the Board and for the assertion of his rights under ALTA he had instituted an application No. W.D. 42 of 1980 to the Tribunal established under the Act. This was done on the 21st April, 1980, and the hearing had been set down for the 26th August, 1981; we note that the summons instituting the present proceedings is dated the 28th May, 1981.

Broadly speaking the matter for decision by the Supreme Court was whether the action should be struck out as frivolous and vexatious or whether it should be stayed pending the determination by the Tribunal of the appellant's application. Only the second of these questions survives to this Court. The learned Judge

decided against any stay and made an order for possession. He did this in the light of his finding that the failure to obtain the consent of the Board to the agreement constituted a breach of section 12 of the Native Land Trust Act (Cap. 134) rendering the agreement null and void, and thus depriving the appellant of any right or title to remain on the land.

If that were all, there would be no problem but in leading up to the question of the impact of ALTA it will be necessary to look at the relevant legislation. Section 12 of the Native Land Trust Act is so well known as not to need repetition. Suffice it to say that it provides that a lessee of native land under the Act may not alienate or deal with the land comprised in his lease without the consent of the Board first had and obtained. If he does do so without consent the "sale, transfer, sublease or other unlawful alienation or dealing" is null and void.

It ought to be observed that an agreement of the nature that the parties entered into in this case, is not necessarily an alienation or dealing within that section merely because it can be classified as a share-farming agreement. That was shown by high authority in Kulamma v. Manadan [1968] 72 W.L.R. 1074 P.C., in which an agreement of a similar nature was considered and found not to contravene section 12; the judgment of their Lordships in the Privy Council commenced at p.1075 - "This litigation relates to a sharefarming agreement....." The case makes it clear that each agreement is to be construed on its own merits.

In saying this we are not saying that we disagree with the learned Judge in the present case in his finding that the agreement, in the absence of consent by the Board, contravened section 12. But we advert to the matter to indicate that a sharefarming agreement that may not contravene section 12, may well be unlawful

under ALTA. We quote from the judgment of the Central Agricultural Tribunal in Har Kaur v. Pariappa Gounder, C.A.T. appeal No.3 of 1980 :

> "I support the Tribunal's finding that the respondent was not a bona fide employee of the landlord. He was in truth a sharefarmer, and as such, of course, the appellant was in breach of section 12 of the Agricultural Landlord and Tenant Act. The respondent is also entitled to be regarded as a tenant."

For present purposes it does not matter whether the last sentence of that passage is based upon section 12 of ALTA or upon the Tribunal's own appreciation of the particular agreement; the Tribunal considered a sharefarming agreement under ALTA unlawful.

Section 18 of ALTA is relied upon by the appellant. Subsection (1) is not relevant. Subsections (2) and (3) are as follows :

> "(2) Where a tribunal considers that any landlord or tenant is in breach of this Act or of any law, the tribunal may declare the tenancy or a purported tenancy granted by such landlord or to such tenant as aforesaid, null and void and may order such amount of compensation (not being compensation payable under the provisions of Part V) paid, as it shall think fit, by the landlord or by the tenant, as the case may be, and may order all or part of the agricultural land the subject of an unlawful tenancy to be assigned to any tenant or may make any determination or order that a tribunal may make under the provisions of this Act.
>
> (3) Any application to a tribunal for a declaration, for compensation or for the ordering of the making of an assignment or other order or determination under subsection (2) may be made notwithstanding the provisions of subsection (3) of section 59 but nothing contained herein shall be deemed to permit the ordering or making of an assignment in breach of the provisions of the Subdivision of Land Act or which would otherwise be unlawful."

The appellant says, in effect, that accepting for the argument's sake that his agreement is in breach of section 12 of the Native Land Trust Act, he is entitled to apply to the Tribunal (as he has done) under section 18 of ALTA for relief.

In the present session of this Court, in the case of Dharam Lingam Reddy v. Pon Samy and Others (Civil Appeal No. 42 of 1981) a case of similar circumstances to those of the present, we have dealt with section 18 and do not repeat what we said there. To invoke the section it is necessary that the applicant be a tenant, and if the tribunal "considers" there is a breach of the Act or of any law, it may grant relief. The relief may take the form of compensation or relate to the land, but it would be relief authorised only by the section and which would not be in the power of the Supreme Court to grant. It is implicit in what we have said in the Dharam Lingam Reddy case that we do not accept Mr. Sahu Khan's argument that it would not be possible for a Tribunal to grant relief touching the land itself.

Whether there is a tenancy for the purpose of ALTA will be decided by the Tribunal under the definitions of "tenant" and "contract of tenancy" in section 2 of the Act, and, in the present case, the presumption created by section 4 arising from cultivation for a period of not less than three years. All we need say, and that without binding a tribunal in any way is that prima facie there appears to be no reason to anticipate that a tribunal would not accept jurisdiction under the section.

We are able therefore to come straight to the question whether the Supreme Court should have stayed or adjourned the proceedings before it in order to allow the Tribunal the opportunity of completing the hearing which had been fixed for only a few weeks ahead.

Section 62(3) and (4) should be noted; they appear under the heading "Avoiding Conflict" :

> "62(3) A tribunal shall not entertain any application for adjudication upon any issue which has been decided between the same parties by any court of law.
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> (4) Where proceedings have been instituted in any court of law in relation to any matter submitted for adjudication to the central agricultural tribunal or a tribunal, the central agricultural tribunal or a tribunal, as the case may be, may refuse to adjudicate or may stay or adjourn the matter as it shall think fit."

The learned Judge construed subsection (4) as indicating that where this type of situation arises it is the Tribunal and not the Supreme Court which should consider a stay of proceedings. We think the subsection is empowering rather than directive, and the Supreme Court, of course, has ample power without any special provision.

The Supreme Court had before it an application for possession of the land. Mr. Sahu Khan has placed great weight upon the requirements of the law as laid down in section 172 of the Land Transfer Act. That section reads :

> "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 any 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:
>
> 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."

Counsel's argument was that under the section the onus was upon the appellant to show cause why he refuses to give up possession and he must prove to the satisfaction of the judge a present right to possession. It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit". These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown.

The position of the Supreme Court as the mainstay of the great bulk of judicial proceedings, is well known. Whether it should adjourn to permit proceedings to continue in a tribunal of lesser status must depend in each case upon the particular circumstances, but the very fact of the high status of the Supreme Court will make it careful to ensure that insistence upon its process may not be oppressive.

The tribunals under ALTA are of a special category. They are given full and even unique powers in a special limited category of cases. Appeal does not lie to the Courts (though under section 62(5) questions of law may be referred to them) but to the Central Agricultural Tribunal appointed under the Act, who must, under section 48(1) be a person of high legal qualifications. The tribunals are intended and are qualified to deal with matters within their own sphere and will no doubt take into consideration when asked to grant

relief, whether there is a concealed objective to evade any law.

In the present case, in our opinion, there is at least one matter, of substantial importance, to which weight should have been given. It is that the Tribunal could exercise powers under section 18 of ALTA which were not open to the Supreme Court. The learned Judge was doubtful whether any useful relief under that section could be granted; as we have said, we do not agree.

It was suggested by the learned Judge that his decision would not prevent the appellant from obtaining from a tribunal any relief to which he was entitled. But is this clear? The appellant would go before the tribunal handicapped by a finding of the Supreme Court that he had no right to the possession of the land. That finding would bind the tribunal by virtue of section 62(3) of ALTA which we have set out above. It could have an inhibiting influence upon the tribunal in its approach to the issues, including that of possible relief, and might influence those whose consent to the relief might be relevant.

On full consideration of this matter we are of opinion that the refusal of a stay involved some risk of injustice to the appellant of sufficient weight to justify the intervention of this Court. The appeal is allowed and the order for possession made in the Supreme Court set aside. The proceedings in the Supreme Court are adjourned pending the determination of the appellant's application to the Tribunal (including appeal, if any) mentioned above. The order for costs in the Supreme Court is set aside but the matter of costs in the Supreme Court will be in the discretion of the Judge at the re-institution of those proceedings.

The appellant will have his costs of this appeal to be taxed if not agreed.

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Vice President

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Judge of Appeal

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Judge of Appeal