IN THE FIJI COURT OF APPEAL

Civil Appeal No. 34 of 1986.

Between: NARPAT SINGH Appellant

- and -

KUMAR V. J. (PTY) LTD Respondent

(IN CHAMBERS)

Mr. S.M. Koya for the Appellant
Dr. M. S. Sahu Khan

Date of Hearing : 27th June, 1986.

Delivery of Judgment: 4th July, 1986.

JUDGMENT OF THE COURT

Speight, V.P.

This is a chambers application seeking a stay of execution in respect of an order for possession of agricultural land made by Mr. Justice Dyke in a judgment of the Supreme Court delivered at Lautoka on 18th April 1986.

The present Respondent, who is and was at the relevant time the registered proprietor of the land had issued a summons under section 169 of the Land Transfer Act Cap. 131 for the appellant to give up vacant possession.

Mr. Koya had appeared on behalf of the appellant and sought to discharge the onus imposed on his client to satisfy the Court of his right to possession. He was unsuccessful, but he has filed an appeal against the Supreme Court judgment and pending hearing in this court has made this Chambers application for a stay. As before Mr. Sahu Khan appears for the respondent and opposes.

To appreciate the force of Mr. Justice Dyke's judgment it is necessary to refer to earlier proceedings.

The appellant has occupied the land for many years - starting in 1946 and he paid rent right through until 1982. In 1972 he obtained a declaration of tenancy in his favour under section 5 of the Agricultural Landlord and Tenant Act Cap. 270 and this gave him a statutory tenancy until 1977. When that expired he did not apply for a further extension so it would seem that thereafter he continued as an annual tenant.

In 1981 the respondent's predecessors obtained approval for a subdivision under the Town and Country Planning Act Cap. 139. Presumably because of this, and perhaps because of apprehension as to the effect on him of the Agricultural Landlord and Tenant (Exemption) Regulations appellant issued proceedings in 1982 (Civil Action 900/82) seeking the following declarations:-

"(a) A Declaration that by virtue of a Declaration made by the Agricultural Tribunal on the 20th day of March, 1970, the plaintiff is entitled to occupy and cultivate the agricultural land known as "Lot 5 on DP No. 2513 Waisovosovu" (hereinafter called 'the said agricultural land' comprised in Certificate of Title No. 10219 containing 14 acres 2 roods 27 perches situate at Nasoso, Nadi as an agricultural tenant under the Agricultural Landlord & Tenant Act.

(b) A Declaration that the purported approval of a proposed subdivision for residential purposes under Plan No. 609/1 made on the 26th day of October, 1981 in respect the said agricultural land aforesaid by the Third Defendant under his powers in the Town and Planning Act, Cap. 139 and/or the Subdivision of Lands Act, Cap. 140 is null and void at law.

(c) A declaration that the Fourth, Fifth, Sixth and Seventh defendants as the present registered proprietors of Certificate of Title No. 10219 as aforesaid hold the said agricultural land subject to an agricultural tenancy held by the plaintiff under the provisions of the Agricultural Land and Tenant Act."

The matter came before Mr. Justice Kermode and in a judgment of 7th June, 1983 he held:-

> "That the statutory tenancy had expired and no application had been made, nor could be made for extension because Regulation 4 of the Exemption Regulations had become operative meanwhile and the owners had obtained subdivisional approval, with the consequent exemption of the land from the provisions of certain restrictive provisions of the Act."

Mr. Koya's advanced argument that the Regulation 4(d) was ultra vires and invalid but Kermode J. rejected that and refused to make the declarations. The matter was then taken to appeal in this Court and was heard on 9th November,

1983. From the judgment of the Court delivered by Gould V.P. on 22nd November, 1983 it appears that Mr. Koya had concentrated on submissions that the Regulation 4(d) was ultra vires, and that the subdivision applications had some other informalities in them. It was noted in the judgment that these were the only arguments advanced and that no attempt was made to obtain a declaration of tenancy based on the Tribunal proceedings. The judgment rejected the attack upon the subdivision approval procedure and also upheld the Supreme Court finding of the validity of the Regulation.

The situation then was that the statutory tenancy had expired by affluxion of time, no rent was accepted after 1982, and applications for a declaration of the existence of a tenancy had been rejected by both courts. Notice to quit was given in August 1984 and the present summons was issued after the expiry of that notice. When the action came before Mr. Justice Dyke, that learned Judge traced the earlier history of the litigation, noting that the only significant development had been the change in registered proprietorship. He pointed to the onus on the (then) Defendant, who had shown no further right than previously and he accepted that the identical issues concerning the validity of the subdivision approval and the validity of the Exemption Regulation 4(d) had already been determined by Kermode J. and the Fiji Court of Appeal and the matter was res judicata.

Before us Mr. Koya seeks to have the order for possession stayed, so that he can argue an appeal in due course.

The observations concerning "the fruits of litigation" on the one hand, and "rendering rights of appeal nugatory" on the other hand are well known and need not be restated.

Mr. Koya, as we understand him, advances two matters in support of his claim that he has an arguable appeal and that the status quo should be maintained. He submits:-

(a) That the approval for subdivision, which was the basis for the application of the exemption by Kermode J. in 1982 lapsed after two years in late 1983, so that thereafter the land again came under the beneficial provisions of ALTA and a new statutory tenancy arose by virtue of Appellant's occupancy from late 1983 until mid 1984 when the Respondent commenced to take up proceedings against him.

(b) That the matter is not res judicata for he now wishes to submit an argument to the same effect - namely that the Regulation 4(d) is ultra vires but for different reasons not previously canvassed.

In respect of (b) we say immediately that that is just not good enough. Res judicata deals with the issue which was before the court on the previous occasion - not on the arguments which were advanced in support of the issue. If it were otherwise counsel could, given sufficient ingenuity, litigate the same matter between the same parties or their successors ad infinitum - indeed could deliberately create such a situation by refraining from putting forward all his reasoning at a hearing.

But we do not need to go that far, for the matter could be decided without considering the exemption Regulations and the res judicata argument. There is no doubt that after 1982 rent was no longer accepted and the right to occupy needed to be demonostrated by the appellant. He was refused a declaration of ALTA tenancy as at 1982/83. Since then rent has been refused, notice to quit has been given and proceedings taken.

The situation is now as it was when the summons came before Dyke J. He said:-

> "The Defendant has not shown any right or title to occupancy of the land or any facts that require hearing in open Court."

The appellant is still entitled to test the correctness of that conclusion at the appeal hearing and these present

observations do not and cannot prevent that exercise. But the circumstances are such that it would not be appropriate for this application to be granted, thereby further extending the delay which has already run for four years.

The application is dismissed with costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal