IN THE FIJI COURT OF APPEAL

Civil Appeal No. 34 of 1986

Between:

NARPAT SINGH
s/o Jagan Singh — Appellant

and

KUMAR V.J.(PTY) LIMITED — Respondent

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

Date of Hearing: 7th November, 1986
Delivery of Judgment: 14.11.86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal against an order for possession made against the appellant by Dyke J. under section 169 of the Land Transfer Act.

The land in question is 14 acres 2 roods 27 perches of freehold at Nasoso, Nadi. The appellant went into occupation as tenant in 1946 and paid rent regularly to the owner until 1969. In March 1970 he applied for a declaration of tenancy over this land under the Agricultural Landlord and Tenant Act which came into operation in 1967.

In October 1970 the owner, one Hubraji, transferred the land to Dharam Sheela, Daya Wati, Kripa Charya and Basant Kumar daughters and son of Parshu Ram Shukla. On 28th March 1972 a declaration of tenancy was granted to the appellant without objection from the owners but at their request it was ordered that no instrument of tenancy be issued until rent was fixed. There is nothing to show if such an instrument was ever given to the appellant.

In May 1981 the appellant made another application to the Agricultural Tribunal for another declaration of tenancy in respect of the same land. This time it was resisted and a defence filed asserting that a plan for subdivision of this land for residential purposes had been approved and ALTA no longer applied.

In October, 1982 the appellant commenced proceedings in the Supreme Court to seek 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 Waisovusovu" (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 and 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 third defendant was the Director of Town and Country Planning and defendants 4-7 the owners.

On 7th June, 1983 the action was dismissed by Kermode J. who rejected his claim to any of the declarations.

The learned Judge held that :

(a) The appellant was only an annual tenant.

(b) The approval by the Director of Town and Country Planning of the plan to sub-divide this land for residential purposes was not null and void.

(c) Regulation 4(d) of Agricultural Landlord and Tenant (Exemption) Regulations which exempts such land from sections 6, 7 and 13 of ALTA (which deal with the period of a statutory tenancy and extensions thereto) was also valid.

The effect of the decision was that the appellant did not have a current statutory tenancy and that, because the land had been approved for residential sub-division, he was not entitled to an extension under ALTA to any expired statutory term.

He appealed to this Court. Here, however, he abandoned his claim for declarations (a) and (c) through which he had sought to establish the existence of a

statutory period of tenancy and a right under ALTA to an extension. The following appears in this Court's judgment delivered on 22nd November, 1983 :-

> " Although in the Supreme Court the appellant sought declarations (which were refused) based on the proceedings before the Agricultural Tribunal, Mr. Koya, for the appellant, did not seek before this Court to re-agitate such questions. There remains only the declaration following: this was also refused.
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> '(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 of 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.' "

The Court upheld Kermode J's finding in favour of validity of both the approval of the plan to sub-divide and regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations.

There was no appeal to the Privy Council.

The second application to the Agricultural Tribunal (of May 1981) was not proceeded with and formally discontinued on 24th September, 1985.

On 10th September, 1985 the respondent in this appeal, Kumar V.J. (PTY) Ltd, to whom the land had in the meantime been transferred issued a summons under section 169 of the Land Transfer Act seeking an order for possession against the appellant.

The appellant filed an affidavit in which he claimed a statutory tenancy conferred upon him by the declaration in his favour of 28th March, 1972 which was still subsisting, he said, owing to the extension he would be entitled to under ALTA. He again challenged the validity of regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations but on a ground he had not argued in the earlier action before the Supreme Court or in the appeal before this Court. He also questioned the effect of the new approval given by the Director of Town and Country Planning to subdivide the land, the earlier approval given for 2 years having lapsed.

The learned Judge rejected the appellant's contention that he had a right to possession of the land and made the order sought by the respondent. He said :-

> " What the defendant is now asking this Court for is almost exactly what he asked from the Supreme Court in Civil Action No. 900 of 1982, and in effect he is asking this Court to decide that the Supreme Court in that case was wrong and that the Fiji Court of Appeal was wrong. The only difference is that the 4th, 5th, 6th and 7th defendants in that case have now passed title on to the present plaintiff, i.e. the plaintiff is the successor in title of the defendants in C.A. 900/82. Apart from that fact there is no argument raised by the defendant in his submissions or in his affidavits that was not before the court in C.A. 900/82, or could have been raised before that court.
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> So solely on the basis of issue estoppel and res judicata this Court cannot differ from the decisions of Kermode J in C.A.900/82 of the Fiji Court of Appeal. Even apart from that there is no reason to differ from the decisions and I could only adopt the reasoning given therefor. More particularly, in C.A. 900/82 the defendant raised the question of whether regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations was ultra vires the Act, and the Supreme Court and the Fiji Court of Appeal held that it was

> not. I am not aware what arguments the defendant raised before the Court of Appeal on this question, whether they are the same that he now raises, but that is irrelevant. There is a ruling by the Court of Appeal and that of course must stand. "

The only question before this court is whether the learned Judge was correct in holding that issue estoppel applied.

In the words of Lord Guest in Carl-Zeiss-Stiftung v. Rayner Keeler, (1966 2 All E R 536 at 565) on which there was general agreement :-

> " The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final and (iii) that the parties to the judicial decision or their privies were the same person as the parties to the proceeding in which the estoppel is raised or their privies. "

Mr. Koya does not quarrel with that well-established principle. He, however, relies on dicta in the same decision of the House of Lords which emphasize the need for flexibility in special cases. These are :-

> "It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel." (p.554)

and again -

> "All estoppels are not odious but must be applied so as to work justice and not injustice, and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."
> (p.573)

In support of his contention against the application of issue estoppel in the instant case he urges that :-

(a) the letter of approval from the Director of Town and Country Planning imposed several conditions making the approval conditional, not final;

(b) since the decision of the Supreme Court and this Court in the earlier action Counsel has discovered a judgment of the Supreme Court in another case (Sakina v. Nadi Bay Beach Co. 153 of 1977) which has held regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations to be null and void; and

(c) the approval of the Director of Town and Country Planning to the plan to subdivide the land for residential purposes was only for two years and lapsed. Another approval for another two years has since been granted leaving a considerable time gap between the two approvals. This, he says, is a significant piece of fresh evidence not available at the earlier proceedings.

As for (a) above, we find it devoid of merit. The conditions such as they were consisted largely of requirements to be satisfied during the implementation of the proposed plan which was to commence and continue without delay. They did not detract from the fact of approval. The question to be answered was whether the approval was such as would bring into operation regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations. We are satisfied that it was.

As for (b) above, conjuring up of a new ground or discovery of a new authority has never been considered to make an inroad into the well-established principles on issue estoppel. A party to an action must present his whole case at the same hearing and cannot be permitted to

return again and again to reagitate the same issue against the same party with new grounds or armed with a new authority. Sakina v. Nadi Beach Bay (supra) is a judgment of first instance and its eventual fate is unknown. Its validity is not an issue before this court and the learned Judge, quite properly, made no mention of it in his judgment. In any case, the judgment in Sakina was delivered on 13th May, 1981 and would have been available at the time of the Supreme Court action before Kermode J. if Counsel had chosen to rely on it. The appellant cannot be permitted to use it as a ground to attack again the validity of regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations, an issue already determined by the Supreme Court and the Court of Appeal in the earlier action.

As for (c), learned Counsel relies on Mills v. Cooper (1967 2 All E R 100 at 104) where Diplock L.J. said :-

> "This doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

The fresh evidence proposed to rely on relates to the approval granted by the Director of Town and Country Planning to the sub-division of this land for residential purposes. The first approval which the Supreme Court considered in the earlier action was granted on 26th October, 1981 for a period of 2 years and lapsed in October 1983 while the appeal was still pending before this court. After considerable negotiation another approval was granted for another two years on 26th June, 1985.

Mr. Koya submits that during the intervening period regulation 4(d) of the Agricultural Landlord and Tenant (Exemption) Regulations had ceased to operate and the land reverted to its status of an agricultural holding under ALTA and this, he says, would resuscitate the appellant's right as a statutory tenant. He, however, has two serious hurdles in his way. Firstly Kermode J, in the earlier action, decided that the appellant was an annual, not a statutory, tenant. Before the Court of Appeal, Mr. Koya abandoned his appeal against that definite determination. Secondly, the Subdivision of Land Act does not provide for the limiting of such approval to any specified period. That, obviously, is an administrative measure to ensure prompt implementation of the plan. What Dyke J. had before him was an approval under the same Act, to the same party's privy, in respect of the same land, for the implementation of the same plan.

Fresh evidence proposed to be relied upon must have a special character in order to reopen an issue closed by estoppel. In the words of Diplock L.J. in Hunter v. Chief Constable of Midlands and Another (1981 3 All E R 727 at 736) :-

" I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff LJ. He points out that on this aspect of the case Hunter and the other Birmingham bombers fail in limine because the so-called 'fresh evidence' on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Lord Cairns LC in Phosphate Sewage Co. Ltd v. Molleson (1879) 4 App Cas 801 at 814, namely that the new evidence must be such as 'entirely changes the aspect of the case'. This is perhaps a little stronger than that suggested by Denning LJ in Ladd v. Marshall (1954) 3 All ER 745 at 748 (1954) 1 WLR 1489 at 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz that the evidence 'would probably have an important influence on the result of the case, although it need not be decisive'.

The latter test, however is applicable where the proper course to upset the decision of the court of first instance is being taken, that is to say by appealing to a court with jurisdiction to hear appeals from the first instance court and whose procedure, like that of the Court of Appeal, Civil Division, is by way of a rehearing. I agree with Goff LJ that in the case of collateral attack in a court of co-ordinate jurisdiction the more rigorous test laid down by Lord Cairns LC is appropriate. "

We do not consider the fresh evidence relied upon by the appellant will change the aspect of the case at all, let alone change it entirely.

Mr. Koya made some mention of how and when the title to the land was acquired by the appellant but did not seriously challenge his position as a privy. We are

satisfied that there was sufficient evidence for the learned Judge to find privity between him and the owners who were defendants in the earlier action before Kermode J. no third party ever having been involved at any stage.

The sole issue before Kermode J. and this court in the earlier action was whether the appellant had the right to remain on the land as a statutory tenant of an agricultural holding under ALTA. It was decided against him. He is claiming the same right as his defence to the application for possession under section 169 of the Land Transfer Act. He is estopped from doing so.

The appeal is dismissed with costs to be taxed in default of agreement.

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Vice-President

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Judge of Appeal

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Judge of Appeal