IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0023 OF 95S
(Judicial Review No. 5 of 1993)

BETWEEN: PONSAMI AND TRUSTEES OF THE ESTATE OF VELIAMMA AND VELIAMMA — APPELLANTS

-and-

DHARAM LINGAM REDDY
CENTRAL AGRICULTURAL TRIBUNAL — RESPONDENTS

Mr. V. Kapadia for the Appellants
Mr. V. Mishra and Mr. S. K. Ram for the Respondents

Date and Place of Hearing : 14 February 1996 Suva
Date of Delivery of Judgment : 16 February 1996

JUDGMENT

This is an appeal from a decision by Byrne J ordering certiorari to call up and quash a decision of the central agricultural tribunal. It is appropriate to remind ourselves at the outset this is an application for judicial review because the proceedings both before Byrne J and in this Court have all too frequently resembled an appeal on the merits.

As at the previous hearings, the second respondent has not appeared and taken part in the appeal.

Before considering the appeal itself, we would mention one of the preliminary matters raised by counsel.

Counsel for the appellants sought to join Jai Krishna and Kumar Sami as interested parties. Their interest in this land has been apparent on the papers for some years and Mr. Kapadia agrees it will not affect the result whether they are joined or not. Mr. Mishra for the first respondent suggested their involvement amounts to a trick to enable them to appeal without leave and he suggested the appellants on the record are not the true litigants and may not wish to proceed at all.

We do not feel any useful purpose will be served by joining these men at this stage. We also accept the assurance of Mr. Kapadia as an officer of the Court that he is instructed both by the applicants and the surviving appellant and the latter has instructed him to prosecute this appeal.

The case has a long history including substantial spells of inactivity and, as a result, justice has all too clearly suffered. Both parties have initiated proceedings at various stages and in order to avoid confusion, we shall refer throughout to Ponsami, Veliamma and Veliamma as the appellants and Reddy as the respondent whatever their roles in the earlier proceedings.

The events with which we are concerned started on 12 December 1973 when the respondent entered into a share farming agreement with one Ponia Kutti to cultivate twelve acres of Native Lease No. 13196 comprising sugarcane contract 3044 at Tagitagi. The agreement was for three years but, in May 1975 and with a year of the agreement still to run, Ponia Kutti died. The

appellants were his administrators being a relative, his widow and mother. Following the death, the respondent continued to farm the land in accordance with the agreement until 1981 when he received a notice to quit from the appellants' solicitors.

On 9 February 1981 the respondent applied for a reference to an agricultural tribunal and, on 16 April 1981, issued a statement of claim seeking

(a) assignment of one half of the lease under section 18(2) of the Agricultural Landlord and Tenant Act (Cap.270) ("the Act");

(b) declaration of a tenancy under section 5(1) and 22;

(c) compensation for improvements under sections 21 and 42(2).

At the same time, apparently on the advice of his lawyers, he stopped farming the land but continued to live in the house he had built on it at the outset of the agreement.

On 3 September 1985 the agricultural tribunal gave a ruling in the respondent's favour under paragraph (b) of his claim as follows:

> *"I therefore declare that the tenancy created on the 12th December, 1973 shall be deemed to be a contract of tenancy for a period of ten years in accordance with Section 6(a) of the Agricultural Landlord and Tenant Act. I further declare that the applicant is entitled to an extension of this tenancy to a further period of twenty years commencing from the 11th December, 1983 in accordance with Section 13 of the Agricultural Landlord and Tenant Act."*

The appellants appealed to the central agricultural tribunal. On 13 November 1986 he ordered:

> *"The decision of the Agricultural Tribunal will be varied to the extent that the tenancy presumed under Section 4 of the Act, the presumption of which the Appellants are unable to rebut will be declared null and void and an order made for compensation under Section 18(2) of the act."*

On 29 January 1987, the respondent applied for leave to seek judicial review and for a stay of the central tribunal's order. Both were granted by Rooney J on 11 February 1987.

The case then went to sleep for some years until, in April 1992, Scott J declined to grant judicial review because of the respondent's delay in pursuing his application. That was appealed and, on 21 May 1993, this Court allowed the appeal and sent the matter back to the High Court with a direction to deal with the application for judicial review.

The hearing was before Byrne J and, on 28 March 1995, having granted certiorari, he quashed the decision of the central tribunal and ordered that the decision of the agricultural tribunal be reinstated.

The appellants challenge that decision on the following amended grounds of appeal:

> *"1. <u>THAT</u> the learned hearing Judge erred in law and in holding that the*

Respondent was not seeking compensation, and such holding could not be upheld on the grounds:-

(a) *That the application was absolutely clear the first Respondent was seeking tenancy or compensation, and there was no need to adduce fresh evidence before the Central Agricultural Tribunal since the hearing before it was based on the record of proceedings.*

(b) *That the Central Agricultural Tribunal was in the same position as the Agricultural Tribunal and was properly vested with all the powers of the Agricultural Tribunal, and it acted lawfully and within the scope of its powers and authorities.*

(c) *That obtaining of figures from Fiji Sugar Corporation Limited did not materially prejudice the first Respondent nor the granting of opportunity to cross examine Fiji Sugar Corporation Limited would have made any difference, since no mistake or wrong was shown in the figures so obtained.*

2. *THAT the learned High Court Judge failed to take into consideration that the first Respondent was given fair and proper hearing before the Central Agricultural Tribunal, and the Central Agricultural Tribunal was properly entitled to act as it did and to reverse the decision of the Agricultural Tribunal on the materials before it.*

3. *THAT the learned Judge was wrong in entertaining hearing and determining the application for Judicial Review without requiring the joinder of Kumar Sami and Jai Krishna, persons directly effected by the application.*

4. *THAT the High Court was wrong in granting relief to first Respondent having regard to inordinate, unreasonable and inexcusable delay. In any event the application for Judicial Review was a discretionary matter the Court ought to have refused to exercise its discretion in favour of the first*

Respondent.

5. THE Court ought not to have granted leave or any relief or remedy to first Respondent because he had not exhausted statutory relief or remedy available to him under Agricultural Landlord and Tenants Act.

6. THE High Court was wrong in not remitting the matter to Central Agricultural Tribunal to hear and determine evidence on compensation.

7. THAT the High Court was wrong in holding and or erred in so doing, namely-

(a) That the Agricultural Tribunal made its declarations under Sections 5 and 23 and not 18(2).

(b) That the Central Agricultural Tribunal was wrong in substituting its own discretion for that of the Agricultural Tribunal. (The Central Agricultural Tribunal acted perfectly well within its powers).

(c) The various holdings of the High Court in quashing or setting aside the judgment or decision of the Central Agricultural Tribunal."

At the hearing, Mr. Kapadia for the appellants did not take the grounds seriatim and we shall not do so. The decision in this case, as will appear, depends on the relative effect and purpose of sections 5 and 18 of the Act. Where we do not specifically refer to any ground of appeal, it should be taken to have failed.

The arguments presented at the hearing in the High Court appear to have failed to distinguish between an appeal on the merits and an application for judicial review based on excess of

jurisdiction and, with respect, the learned judge fell in part into the same error.

We consider the conclusions he reached in relation to judicial review are found in the following passages. At page 261 of the record:

> *"In my judgment it is clear that the Agricultural Tribunal made his declaration under Sections 5 and 23 and not Section 18(2). In this regard it is interesting to note the decision of the Fiji Court of Appeal in Civil Appeal No. 111 of 1985 Azmat Ali v. Mohammed Jalil and Native Land Trust Board the facts of which were in many ways similar to those of the present case.*
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> *At page 7 of its judgment the Court said:*
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> > *"The application was dealt with under section 18(2) of the Act and not under section 5 which, to us, seems odd. This is particularly so when there is no provision for a declaration of tenancy under section 18 the only declaration available on application being that of nullity of a contract of tenancy granted by the landlord. It seems to us that niether party was relying on the agreement of 1975 or claiming anything under it, its sole purpose being to prove that the appellant had been occupying and cultivating the land with the knowledge of the first respondent for more than 3 years for purposes of sections 4 and 5. In fact when the tribunal did come to declare a tenancy it did so exactly in terms of section 23(3) which relates only to a section 5 application."*
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> *It seems to me that these remarks are equally applicable to the instant case. It follows therefore in my judgment that the Central Agricultural Tribunal erred in awarding compensation under Section 18(2) and that the Tribunal at first instance was correct in declining to award compensation."*

And at page 263:

> *"I .... hold that certiorari should issue to quash the decision of the Central Agricultural Tribunal on the ground that he was wrong in law in substituting his decision for that of the Agricultural Tribunal. Also that the Central Agricultural Tribunal was wrong in law in carrying out an investigation and obtaining evidence or other factual material without reference to or without giving the Applicant an opportunity to correct, contradict or otherwise explain the materials obtained by the Central Tribunal on its own volition."*

By section 4 of the Act, a person in occupation of and cultivating an agricultural holding for not less than three years where the landlord has taken no steps to evict him shall be presumed to be holding the land on a tenancy unless the landlord can prove the occupation was without his consent.

In such a case, the person maintaining he is a tenant may apply to an agricultural tribunal under section 5 for a declaration that he is a tenant. Where the tribunal makes such a declaration, the tenancy is presumed to have commenced when the tenant first occupied the land. If such a tenancy agreement is not then executed by the parties, the matter may be referred to the tribunal to specify the terms of the agreement under the provisions of section 23.

Section 18(2) empowers the agricultural tribunal to declare a tenancy null and void and, having done so, to assign the land to a tenant or order compensation to the tenant and the section specifies such compensation is different from compensation for

improvements which is awarded under sections 40 and 42. However, the tribunal may only declare a tenancy null and void under section 18(2) if he considers that any landlord or tenant is in breach of the Act or of any law.

The agricultural tribunal had clearly declared a tenancy under section 5. He did not assign the land under section 18 because he made no finding of a breach of the Act or any law. Having declared a tenancy, he correctly did not deal with the claim for compensation for improvements under sections 40 and 42.

The central agricultural tribunal never cast any doubt on the finding of a tenancy. He stated: *"since the Respondent was able to fulfil the conditions of section 4 of the Act, he was entitled to the presumption that he was a tenant.... In my view it was too late for Dr Sahu Khan to say that Respondent left the land, whether in 1977 or 1979 or 1981 it matters not. He had already established a tenancy, and in my view, the widow and her witnesses were unable to rebut that."*

Having found the tenancy existed, the question of compensation or assignment under section 18(2) arose only if he found a breach of the law. Nowhere does he make such a finding but nevertheless continues later in his judgment:

> *"Dr Sahu Khan has argued strenuously that although a tenancy is presumed, and although the widow cannot show that the Respondent's occupation is without her consent, no order should be made for assignment of the lease. But if there is to be no assignment there must be compensation for the loss of*

tenancy, bearing in mind that it is a ten year tenancy, for when it came to be extended in 1983, I think that Section 5 of the Agricultural Landlord and Tenant (Exemption) Regulations would come into operation, seeing that Ponia Kutti died in 1975."

He then went on to consider the alternative remedies of assignment or compensation and, having decided in favour of the latter, called evidence to assess the proper sum. It was his failure to hear the respondent on that evidence which led to the third finding of Byrne J quoted above.

Mr. Kapadia suggests that there was a breach of a statute in relation to the tenancy and that the central agricultural tribunal found it to be such. The papers before the agricultural tribunal at the hearing of the reference, included a letter to the secretary of the agricultural tribunal from the Divisional Estate Manager (Western) of the Native Land Trust Board and dated 1 April 1981. It stated:

"The Board has no knowledge of the purported tenancy and will not agree to any subletting. No subdivision will be allowed without an application made to the Board by the lessee in the proper manner.

.....

The Native Land Trust Board wishes to advise that during the term of the lease, the Board has not consented to any dealing whatsoever between Dharam Lingam Reddy f/n Mutap Reddy and our lessee, nor is there any application for consent before the Board."

We do not need to decide whether or not that amounts to a breach under section 18 where the tenancy was presumed under section 4 and only declared at the time of the agricultural tribunal's decision in 1985. At that time when the decision was given the agricultural tribunal stated:

> *"Furthermore the Native Land Trust Board has no objection to the granting of a tenancy to the applicant."*

What is quite clear to this Court is that neither the central tribunal nor either of the parties addressed their minds to the need to establish a breach before applying any of the provisions of section 18.

Byrne J's second finding was based on the exercise by the central tribunal of a discretion to award that compensation which reversed a suggested exercise of the same discretion by the agricultural tribunal. That was derived from the following passage from the agricultural tribunal's decision:

> *"Dr Sahu Khan argued that if the Tribunal decides in favour of the applicant, then he said this is a proper case for compensation. I have considered and this Tribunal can exercise discretion and I have genuinely addressed myself to the matter before me and have come to the conclusion that this is not a case for compensation."*

With respect, despite the reference to the exercise of his discretion, the tribunal is clearly here simply rejecting the application under section 18(2) rather than considering it and

deciding as a result whether to award compensation. He had previously dealt, in detail, with the reasons why the respondent satisfied the conditions of section 4. That clearly related to the declaration under section 5. He then referred briefly to the application under section 18(2) before making his declaration under section 5.

We consider his remarks about discretion referred in fact to his rejection of the application under section 18(2) in toto.

Thus, although the suggested wrongful exercise of a discretion and consequential inquiry of the appropriate measure of compensation by the central tribunal were, in part, the foundation of Byrne J's reason to order certiorari, the central tribunal, once he accepted the existence of the tenancy but found no breach of the law, had no power to award compensation at all. Indeed the learned judge in the first passage quoted above so found. That was sufficient ground to make the order he did. The central tribunal is a statutory tribunal and is bound and limited by the terms of the statute. Having found a tenancy, his award of compensation under section 18(2) with no finding of a breach of the law was in excess of his jurisdiction. That was a proper ground for judicial review and this appeal must be dismissed.

Before leaving the appeal, we would mention two further matters:

1. In the passage from the central tribunal's judgment quoted above, a reference is made to Regulation 5 of the

Agricultural Landlord and Tenants (Exemption) Regulations which reads:

> *"5. The provisions of sections 6, 7, 13 and 45 of the Act shall not apply to any agricultural land held in trust under a will or on intestacy-*
>
> *(a) let or leased for a term not exceeding ten years, such letting or leasing to commence within a period of five years from the date of death of the deceased; or*
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> *(b) let or leased under such a trust subsisting at the commencement of the Act, such letting or leasing having an unexpired term not exceeding ten years from the latter date."*

The central agricultural tribunal appears to be suggesting that, because of that provision, sections 6 and 13 did not apply to the land which was the subject of the agricultural tribunal's decision. We are unable to agree with that view. Paragraph (a) of the regulation clearly is not relevant in this case. Paragraph (b) is concerned with land *"let or leased under such a trust"*. In this case the tenancy commenced before any trust (in this case arising from the grant of letters of administration of Ponia Kutti's estate). In our view there is no reason to construe paragraph (a) otherwise than literally in accordance with its terms. As so construed it can be seen to protect the estate against improper or improvident acts of the trustee. If it is given a broader meaning so as to extend to land let or leased before a trust comes into existence if the trust in fact does so, it appears to us to be capricious in its effect, to deprive tenants of accrued rights to the benefits conferred on

them by the Act and to serve no apparently useful purpose.

2. Mr. Kapadia submitted that Byrne J., having quashed the central tribunal's decision, should have remitted the matter to that tribunal for it to reconsider what decision it should make in the appeal to it. Consequently, even if we held that he was right to quash the decision, we should vary the order he made by ordering such remission. Undoubtedly this Court has a discretion to make such an order, as did the High Court (O.53 r.9(4)). However, that discretion must be exercised judicially.

The parties presented their respective cases fully to the central tribunal; having considered the evidence recorded by the agricultural tribunal, the central tribunal came to the conclusion that the agricultural tribunal had correctly held that the first respondent met the requirements set by section 4 of the Act for a declaration of tenancy to be made in his favour under section 5. That being so, no useful purpose would be served by our remitting the matter to the central tribunal to reconsider what decision he should make in the appeal to him. We should have to direct him to reconsider the matter in accordance with the findings of the High Court, in so far as we have upheld them. The relevant findings are that the central tribunal had no power, on the basis of the evidence, to make an order for compensation under section 18 of the Act and that he had correctly upheld the agricultural tribunal on the question whether the requirements of section 4 were met. In those circumstances, if the matter were

remitted to the central tribunal, he could not lawfully do anything other than affirm the agricultural tribunal's decision. The effect of quashing the central tribunal's decision is to reinstate the agricultural tribunal's decision (although it is questionable whether the High Court's power on granting certiorari extends to making a formal order for such reinstatement as did Byrne J).

We have come to the conclusion, therefore, that we should simply dismiss the appeal. We do so and we order the appellant to pay the costs of the first respondent, to be taxed if not agreed. As the second respondent has taken no part in these proceedings, we make no order for payment of his costs.

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal

I. R. Thompson

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Mr. Justice I. R. Thompson
Judge of Appeal

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Mr. Justice J. D. Dillon
Judge of Appeal