

IN THE FIJI COURT APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0053/94S
(High Court Civil Action No.5 of 1993)

BETWEEN:

SHYAM NARAYAN F/N MANOHAR NAND
ANIL CHANDRA F/N JAGANNATH
UDESHP KUMAR F/N NAND RAM

APPELLANTS

- and -

JON APTEP

FIRST RESPONDENT

- and -

THE ATTORNEY-GENERAL OF FIJI

SECOND RESPONDENT

Mr V. Mishra for the Appellants
Mr S. Rabuka for the Respondents

Date of Hearing: 9th February 1996
Date of Delivery of Judgment: 16 February 1996

JUDGMENT OF THE COURT

On the 21st of April 1993 the first Respondent as Supervisor of Elections sent a facsimile transmission to all Town Clerks stating in part as follows:-

" This is to advise that after considering all of the facts and the law relevant to market vendors, taxi proprietors etc. using council premises, I am of a view that they are generally not qualified to register as "tenants."

On the 28th of May 1993 the appellants applied to the High Court for a Judicial Review of those instructions issued by the first Respondent seeking orders and declarations that the Appellants and other market vendors were entitled to be registered and to vote in the forth-coming Ba Town elections.

That application was dismissed by Sadal J. on 25 of June 1993 and it is from that judgment that the Appellants now appeal.

The preliminary issue that arises is whether the High Court had jurisdiction to consider the declaratory proceedings when the First Respondent had merely expressed "*..... a view that.....(market vendors at Ba) are not qualified to register as tenants.*" Put another way did the internal communication addressed by the First Respondent to the Town Clerk of Ba provide the foundation necessary for the Appellants to launch Judicial Review proceedings. The record does not disclose whether the Appellants actually applied to register as electors. There is no doubt that if they had and registration had been refused then their application to the Court would have been justified. In the alternative there is no doubt that the First Respondent could have sought the authoritative guidance of the Court with regard to the registration entitlement of the Appellants.

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The Appellants obviously considered their perceived entitlement to vote in the 1993 Ba Town Council elections as an issue of some importance; and this more so when they represented as well about one hundred other market vendors.

Taking all those factors into consideration it was no doubt in everyone's interests that the question should be decided by the High Court. The Appellants were granted leave to proceed with Judicial Review with the consent of all the parties.

The question of voting entitlement and which persons were qualified to enrol and vote in the Ba Town Council elections, is governed by Section 11(1) of the Local Government Act (Cap 125). That Section states -

"Every person of or over the age of twenty-one years who is a citizen of Fiji and who is the occupier or owner of land within the municipality shall be entitled to be enrolled as an elector."

The Appellants do not suggest that the qualification they claim is based on the ownership of land. Rather that their right is that of an "occupier" of land as market vendors within the municipality boundaries of Ba.

The Local Government Act provides two definitions of occupier - firstly Section 2 states:-

4.

"occupier" includes any person legally in actual occupation of land or premises without regard to the title under which he occupies and in the case of premises subdivided and let to lodgers or various tenants, the person receiving the rent payable by the lodgers or tenants whether on his own account or as agent for any person entitled thereto or interested therein."

The second definition of "occupier" as set out in Section 11(4)(a) of the Local Government Act states:-

" A person shall be an occupier for the purposes of this section if -

- (a) he has, during the three months immediately preceding the date of closing of the electoral roll in the year in which he applies for registration been in joint or several occupation as a lawful tenant of land within the municipality or of land included in the municipality by virtue of an extension of its boundaries;"

Section 11(4)(a) providing as it does the qualification criteria for electoral purposes is the definition applicable to this present case. The critical question is not whether the Appellants are occupiers of stalls at the market at Ba - rather are the Appellants lawful tenants of those stalls they occupy in terms of section 11(4)(a)?

The determination of that question requires us to consider the Ba Town By-laws set out in Section 122 of the Local Government Act. Part VII of the By-laws deals with the market but does not provide any documentation as such in order to identify a market vendor's entitlement to either tenancy or a lease or a

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licence etc. Rather there are 29 different By-laws which deal with the overall operation of the market by the Council and the market master but which do not deal with the individual rights to which the Appellants as market vendors claim they are entitled.

By-Law 35 States:-

"35. The market shall be under the immediate management and control of the Market Master who shall be appointed by and be responsible to the Council."

The other By-laws deal with the implementation of the management and control that By-law 35 vests in the market master.

Mr Mishra relied principally upon By-law 48 to support the Appellants claim. He noted that they did have exclusive possession of their stalls and that as a consequence of that By-law they could sublet their particular areas if they had consent of the market master. He said that to "sublet" denoted an essential element of a tenancy which confirmed the Appellants' status as "lawful tenants" within the provisions of subsection 11(4)(a).

By-law 48 states:-

" No stall holder shall exchange sublet surrender or part with the possession of his stall or share his stall with another vendor or person except with the permission of the Market Master."

6.

By-law 48 clearly states, contrary to the way in which Mr Mishra couched his submission, that a stall holder cannot "*.....exchange sublet surrender or part with possession of his stall....*". Of course he can with the market master's consent. But then a stall holder can with the market master's consent make alterations to his stall (By-law 44); sell by auction (By-law 49); deal in unwholesome products (By-law 53); enter the market outside the hours specified (By-law 59); leave unsold goods in the market (By-law 62); all of which activities without the master's consent are prohibited. Accordingly the reference to "sublet" in By-law 48 is not in our opinion evidence by itself of a tenancy nor support for the Appellants' claim that as stall holders they have a tenancy from the Council.

Mr Mishra also relied on the evidence that some of the market charges were paid weekly in advance as evidenced by the affidavit of Shyam Narayan. He submitted that such a payment established that a weekly tenancy had somehow been created. However, the market charges are fixed by the Fifth Schedule attached to the By-laws. That Schedule states: -

" Market Charges

1. *Stalls other than stalls for the sale of fish, shell fish, poultry or live stock - a charge per stall per day or part thereof....."*

In our opinion the charges fixed by the Fifth Schedule even if paid in advance by a stall holder cannot and do not in this instance create a weekly tenancy as suggested.

7.

The essential elements that go to make up a tenancy and which the Appellants must establish to support their appeal were fully considered in the case of Radaich v. Smith (1959) 101 CLR 209. At page 222 Windeyer J. stated -

" What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right to exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long established law."

In the present case the Appellants do not have that exclusivity of possession so necessary to create a tenancy. Rather they have an entitlement based on and limited by the By-laws of the Town of Ba.

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Mr Mishra recounted to us the historical background and changing influences affecting markets in Fiji today. He said that originally stall holders would attend markets once a week or once a month when and if their produce was ready to be marketed. Such sporadic attendance he suggested fitted in with the intention of market By-laws when they were originally drafted. Now he said vendors generally attended their stalls on a daily basis. As a consequence he suggested that those changing influences about which he spoke should be taken into account and more a liberal interpretation of the By-laws adopted. However, we are required to interpret the By-laws as they are. Mr Mishra's submissions are issues for the Legislature if it is considered that changing influences justified an amendment to the By-laws.

Mr Rabuka for the Respondents relied on a number of authorities to establish that the Appellants were not lawful tenants and as a consequence were not entitled to register or to have voting rights. He referred in particular to Ram Prasad v. Dr B.R. Lomaloma, the Director of Lands and the Attorney-General of Fiji in Civil Appeal No. 7 of 1989, a previous decision of this Court. The issue to be decided in that case was whether the Appellant held under a lease or a licence. The Court's conclusion is interesting -

" We do not see how what was entered into as a licence agreement by the Director under statutory provisions can somehow be converted into a lease which is governed by statutory provisions. It quite clearly was not."

In the present appeal the Appellants are bound by the Ba Town By-laws and the limitations that those By-laws impose on all market vendors. Those By-laws do not establish the creation of a tenancy arrangement between the Council and the market vendors. Rather they identify that each vendor has a licence to occupy subject to the conditions set out in Part VII of the By-laws.

That licence in our opinion does not convert the market vendor into a "lawful tenant" within the provisions of Section 11(4)(a) of the Local Government Act.

Having reached that conclusion it is not necessary for us to consider further the "administrative law grounds" set out in the detailed and comprehensive submissions presented by counsel for the Respondents.

Accordingly as the Appellants are Licensees only they are not entitled to register and vote in Ba Town Council Elections.

The Appeal is dismissed. Costs are awarded as for one Respondent only. If the parties cannot agree costs are to be fixed by taxation.

G. Ward

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Justice G. Ward
Judge of Appeal

I. Thompson

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Justice I. Thompson
Judge of Appeal

J. Dillon

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Justice J. Dillon
Judge of Appeal