

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0042 OF 2002S
(High Court Civil Action No. HBC0157 of 2000/L)

BETWEEN:

GYAN PRAKASH

Appellant

AND:

LAKSHMI PRASAD

Respondent

Coram:

Gallen, JA
Smellie, JA
Ellis, JA

Hearing:

Tuesday, 13th May 2003, Suva

Counsel:

Dr. M.S. Sahu Khan and Ms S. Sahu Khan for the Appellant
Mr. V.M. Mishra for the Respondent

Date of Judgment: Friday, 16th May, 2003

JUDGMENT OF THE COURT

The respondent in these proceedings Lakshmi Prasad s/o of Ram Narayan Pande acting on behalf of his father's estate (of which he is executor) instituted proceedings by way of summons to show cause pursuant to section 169 of the Land Transfer Act Cap. 131 to regain possession of a freehold ten acre cane farm. The land concerned had been the subject of an agricultural tenancy to the father of the appellant in these proceedings. The respondent alleged that the agricultural tenancy under which the appellant had

obtained possession of the land had expired at the end of 1999. The High Court has a special jurisdiction under part XXIV of the Land Transfer Act to hear applications summarily.

Both appellant and respondent filed affidavits which were before the Court and which provided the evidentiary material on which the application proceeded.

In order to justify an order for possession under the Act the respondent was required to satisfy the provisions of section 169 of the Land Transfer Act. That section is in the following terms:

“169. The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-

- (a) the last registered proprietor of the land;***
- (b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;***
- (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.”***

The Judge in the High Court noted that the appellant did not dispute that the respondent was the last registered proprietor of the land in terms of section 169(a) or that the respondent was a lessor where the term of the lease had expired. Accordingly the obligation to show cause why he should not give up possession passed to the appellant.

The procedure contemplated is comparable to that which occurs in summary judgment proceedings and is dealt with by the provisions of section 171, which applies where the person in possession does not appear, and section 172 which applied in this case because the appellant took steps to oppose. In such a case the obligation on the person in possession, in this case the appellant, is to prove to the satisfaction of the Judge a right to the possession of the land.

In accordance with this procedure the Judge first considered a contention raised by the appellant that he was entitled to a grace year under the provisions of the Agricultural Landlord and Tenant Act Cap.270 (ALTA) to harvest his crops so as to allow him to continue possession until the end of the year 2000.

The Judge in the High Court came to the conclusion that the appellant could not in the circumstances rely upon that particular contention for two reasons. The first was that the evidence before the Judge established that the appellant had not paid all of the outstanding rent by the end of the tenancy. The second which the Judge considered decisive of the question was that entitlement to the grace year was in terms of the section "at the option of the landlord." It was clear in the circumstances of this case that the respondent did not consent. It was the conclusion of the Judge that the appellant had not satisfied the onus of proof upon him under the provisions of the Land Transfer Act and there is nothing in the material placed before us to show that the Judge was wrong in coming to that conclusion.

The appellant however relied upon a contention that the parties had entered into a settlement agreement to resolve outstanding issues between them which entitled him to retain a portion of the land concerned, on which certain houses had been erected.

There was a considerable background involving litigation between the parties, to which the Judge referred. The appellant had claimed the right to the benefit of the unexpired portion of the tenancy of the land to which his father had been entitled at the date of his death. The Judge found that the respondent had refused to accept the appellant as a replacement tenant as a result of which the appellant had applied to the Agricultural Tribunal, which made a declaration of tenancy in his favour. This decision was taken on appeal first to the Central Agricultural Tribunal and then on Judicial Review to the High Court and finally to the Court of Appeal. The appellant was successful in all these appeals.

The respondent then applied to the Agricultural Tribunal for reassessment of rent. This application was finally concluded in a hearing on the 27th April 2000 by a consent order. The appellant contended that he and the respondent had been having discussions with the view to settling outstanding matters between them. These outstanding matters were stated to be

- (1) compensation to be paid to the appellant by the respondent in respect of three substantial houses that have been erected on the land
- (2) reassessment of rent and

- (3) in vacating the balance of the land with the exception of the 1 acre site on which the houses were built.

It was the contention of the appellant that all matters in contention between them had been settled by a detailed agreement which involved the appellant vacating nine acres of the land with the respondent agreeing to hold one acre as trustee for the appellant until a subdivision had been completed to enable the issue of a separate title. The appellant abandoned a claim of \$150,000.00 compensation for the houses and on the issue of the separate title would pay to the respondent the sum of \$25,000.00, to include the costs of subdivision and legal costs. He contended that the rental would be reassessed as a lump sum figure stated to be between \$5,000.00 and \$10,000.00, that the respondent would have all necessary documents executed within the 14 days of the 27th April 2000 and that the appellant would not institute legal proceedings to make any claim in respect of the compensation claims already referred to.

These contentions were asserted in an affidavit filed by the appellant in support of his opposition to the possession orders sought by the respondent.

In support of his contention that the matters of dispute between himself and the respondent had been settled, the respondent relied upon the consent order made by the Agricultural Tribunal on the 27th April 2000 which provided for payment of what was described as rent arrears.

On the same day, that is the 27th April 2000, the appellant issued a bankruptcy

notice against the respondent seeking to recover a sum in excess of \$12,000.00 which was said to have been owing in respect of unrelated litigation in which the appellant had obtained a judgment against the respondent and which was said not to have been satisfied. This throws doubt on a contention that all matters between the parties had been settled.

In separate proceedings the appellant sought orders against the respondent

- (a) that the respondent held the certificate of title the subject of these proceedings as a trustee for the appellant in relation to one acre of the land being part of the 3 house sites and the balance for the respondent
- (b) damages including general damages aggravated, punitive and exemplary
- (c) such further or other relief as to the Court seemed just.
- (d) costs.

Those proceedings were issued on the 1st June 2000 and depended on allegations that the respondent had failed to honour the agreement on which the appellant relied to prevent an order for possession in these proceedings.

The appellant did not ask the Judge in the High Court to make final and substantive rulings on the factual allegations upon which he relied but did contend that he had put sufficient material before the Judge to justify the determination of the questions in

issue between the parties in substantive proceedings. It was the allegation of the appellant in the High Court and in this Court that he had raised sufficient material to show cause in terms of section 169 why he should not give up possession to the applicant until the matters in issue between the appellant and the respondent had been resolved in substantive proceedings and that it was inappropriate for the factual questions in issue to be resolved by way of affidavit.

The Judge in a careful and detailed judgment considered a number of factors raised by the affidavits. They led him to the conclusion that the appellant had failed to satisfy him that the claim made by the appellant had sufficient substance to justify a conclusion that for the purposes of the Land Transfer Act the appellant was entitled to possession of the land.

It is unnecessary for us to deal with these matters in detail. It is enough to say that the Judge was concerned there was no evidence to satisfy him that any subdivision for the purpose of the agreement had ever been approved by the Local Authority. He considered that any compensation for improvements in respect of the land was covered by section 40 of the Agricultural Landlord and Tenant Act.

The appellant had also relied upon promissory estoppel. The Judge noted that such a claim depended upon the provision of sufficient and credible evidence which had not been produced. The Judge also considered that the onus of proof of allegations of fraud had not been met.

The Judge then considered carefully what reliance could be placed upon the allegations of an agreement of settlement. He noted that no evidence had been provided as to any surrounding circumstances, with no details produced of when and how the agreement had been reached, where it was discussed, how many meetings had taken place, whether any notes were made of its terms, who was present and whether it was made with the knowledge of the legal advisers to the parties who had been involved in the extensive litigation between them.

In the circumstances the Judge came to the conclusion that it was an appropriate case for summary judgment and that on the material before him the respondent was entitled to an order for possession, which he made.

Dr. Sahu Khan appearing for the appellant submitted that this was a case which depended upon the establishment of the factual situation and where there was a dispute as to the surrounding facts it was inappropriate for any conclusion to be arrived at on conflicting affidavits, where the parties were not orally examined and cross-examined. He maintained that there were a number of circumstances which justified a conclusion that the respondent had not thrown doubt on the contentions of the appellant. In particular he relied upon an acknowledgement in the affidavits that there had been discussions between the parties which he contended supported the assertions of the appellant that the parties had discussed a resolution of their differences and arrived at an agreement. He contended that the Judge ought not to have taken into account the provisions of the Subdivision of Land Act in the absence of proof it was applicable to the land in question. He submitted that the Judge's interpretation of section 40 of the Agricultural Landlord and Tenant Act

was too narrow and that the Judge had not adequately taken into account the customary manner of living of extended families in Fiji.

His most substantial submission however relied upon an allegation that the agreement coupled with the fact that the appellant remained in occupation of the houses on the land was sufficient to establish a defence of promissory estoppel against an action for ejection.

Mr Mishra by contrast contended that the Judge was right in the approach which he had taken. He maintained that under the statutory provisions which apply to a tenancy of the kind under consideration here, the only remedy available to the appellant was a claim for compensation from the Agricultural Tribunal and that the mere assertion of a claim based on promissory estoppel could not be regarded as sufficient to justify the refusal of an order for possession.

We are satisfied that the Judge was right in the conclusion which he reached. It is unnecessary for us to examine in detail the questions raised by the parties. There is ample authority to the effect that a mere assertion of a defence is insufficient to prevent the making of a summary judgment.

In view of the particular provisions contained in the Land Transfer Act as well as the considerations which arise from the concept of indefeasibility of title under that Act the necessity to provide a greater degree of proof is inescapable.

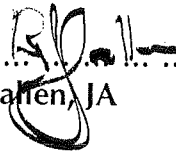
We agree with the Judge that the contentions of the appellant in this case amount to no more than assertion and moreover assertion which is not backed up by the details which would have been expected in a case where the parties were so much at arms length had been so much involved in litigation and been represented by legal advisers in close proximity to the time the alleged agreement was entered into. It is for the Judge to decide whether there is sufficient prima facie plausibility in any contentions to justify a further enquiry. A appellate court ought not to interfere in such an exercise of discretion unless it is manifestly wrong increasing which here it plainly was not Eng Mee Yong and Others v. Letchumanan [1980] A.C. 331.


We note too the submissions of Mr Mishra that the relief to which the appellant would be entitled if he had established his claims might well be limited to compensation under the provisions of the Agricultural Landlord and Tenant Act. Mr Mishra conceded that there is no question of limitation which would deprive the appellant of his right to apply to the Land Tribunal for compensation and he is able if chooses to do so to pursue his independent claim against the respondent for damages. The outcome of that claim would of course be dependent upon the appellant succeeding in a establishing the contentions upon which he relies.

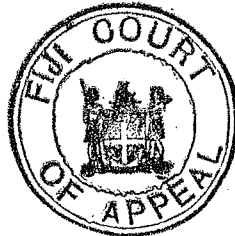
It is therefore our conclusion that the appellant cannot succeed, that the Judge was right in the conclusions to which he came, and the appeal must be dismissed.

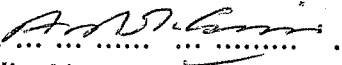
Formal Orders:

1. The appeal is dismissed.
2. The respondent is entitled to costs which we fix at \$500.00.


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Gallen, JA


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Smellie, JA




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Ellis, JA

Solicitors:

Messrs. Sahu Khan and Sahu Khan, Ba for the Appellant
Messrs. Mishra Prakash and Associates, Suva for the Respondent