

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

CIVIL APPEAL NO. ABU0091 OF 2005S
(High Court Civil Action No. HBJ 007 of 2004S)

BETWEEN:

SARBAN SINGH

Appellant

AND:

RAM UDIT

Respondent

Coram:

Ward, President
Wood, JA
McPherson, JA

Hearing:

Monday, 20th November 2006, Suva

Counsel:

Peter Corkery]	
S Maharaj]	for the Appellant
]	
Dr Sahu Khan]	for the Respondent

Date of Judgment: Friday, 24th November 2006, Suva

JUDGMENT OF THE COURT

- [1] Santa Singh was the registered proprietor in fee simple of some 177 acres of freehold land situate at Queen's Road, Naboro. He died in, it seems, about 1966. It can be inferred that he left a will appointing his widow Parvati as his executor. There is an endorsement on the titles register recording her as having on 8 November 1966 been registered "as Executrix" by transmission on death. Under s.9 of the Succession Probate and Administration Act, all property to which the

deceased is entitled vests in the executor to whom probate is granted. We do not have before us the probate or a copy of it on which the Registrar of Titles acted to make that endorsement; but it is a reasonable inference that Parvati was appointed trustee as well as Executrix of the will of her late husband.

- [2] For the like reason it is possible to infer that the appellant Sarban Singh was a beneficiary under his late father's will of a share or interest in the land. At all events, on the same day 8 November 1966 on which his mother Parvati was registered as proprietor by transmission, the appellant was registered as transferee from her "as Executrix" in respect of an undivided one third share in the land.
- [3] On 1 March 1975 Parvati executed a lease of the land in favour of Ram Udit, who is the respondent to this appeal. The lease was for a term of 20 years, at an annual rental of \$300, with some provision for increases the detail of which can be disregarded.
- [4] It is said that at the date at which Parvati granted the lease to the respondent Ram Udit on 1 March 1975, she was trustee of the land, and accordingly that she exceeded her power as trustee in granting a lease to him for a term of 20 years. This is said to follow from s.23(1) of the Trustee Act, which provides that a trustee in respect of property vested in him may:

"(e) grant a lease ... of the property for any term not exceeding –

(i).....

(ii)..... ten years."

That being so, it was submitted that the 20 year lease of 1 March 1975 was illegal and void as being contrary to s.23(1)(a) of the Trustee Act.

- [5] It is, we consider, clear that, standing by itself, s.23(i)(e)(ii) of the Trustee Act does not have the effect contended for. Section 23 is facultative; or as Jiten Singh J

described it in the judgment appealed from, it is an empowering provision. Its function is to confer on a trustee authority to dispose of trust property or otherwise deal with it in that way where power to do is not conferred by the trust instrument. That this is so is shown by s.3(2) of the Act, which provides that "the powers conferred by or under this Act on a trustee are in addition to the powers given by the provisions of this or any other Act and by the instrument (if any) creating the trust." Section 23(i)(e)(ii) therefore did not restrict Parvati's leasing power as trustee to ten years, but added that power to any power of leasing she already possessed under the trust instrument.

- [6] What power did she possess under the trust instrument? The trust instrument was the document appointing Parvati as trustee, which was the will of her late husband Santa Singh. That is so because s.2(1) of the Act defines "trust" to include "the duties incidental to the office of personal representative", and "personal representative" to mean "the executor" of a deceased person. Since we do not know the terms of Santa Singh's will, or whether it contained any and what powers of leasing, it is not possible to determine that, in leasing to Ram Udit for 20 years in 1975, Parvati exceeded her powers as trustee. There is no reason why we should assume that her only power to lease derived from s.23(i)(e)(ii) and that the will conferred no more ample power. It is the appellant Sarban Singh who asserts that to be so, and he accordingly bears the onus of proving it.
- [7] But, says the appellant, the provision contained in s.23(i)(e)(ii) of the Trustee Act is to be read with s.59(3) of the Agricultural Landlord and Tenant Act, commonly referred to as ALTA. That Act attained prominence in the present dispute in 1993 after the appellant and Parvati informed Ram Udit that his lease would not be renewed or extended beyond its expiry date in 1995. Ram Udit thereupon instituted proceedings in the Agricultural Tribunal for a declaration of tenancy. Parvati having on 26 May 1975 transferred an undivided half share in the land to the appellant Sarban Singh, the proceedings in the Tribunal were brought against him and later extended to include the other children, to whom Parvati had

transferred her own remaining undivided half share on 16 June 1993. They are the second to sixth respondents to this appeal.

- [8] Section 4(1) of ALTA creates a presumption of a tenancy in favour of someone who is in occupation of and is cultivating an agricultural holding and has continued to do so for a period of not less than three years. If that is established and the landlord has taken no steps to evict the occupier, the onus is on the landlord to prove the occupation was without his consent, in default of which a tenancy is presumed to exist under the Act. Although s.4(1) speaks of a presumption, it ceases to be rebuttable once the landlord fails to satisfy the onus of proof under the subsection of proving the absence of his consent. Section 5(1) of ALTA enables a person claiming to be a tenant to apply to the Tribunal for a declaration that he is a tenant under a tenancy, which is deemed to have commenced when the tenant first occupied the land, in this instance on 1 March 1975.
- [9] It is settled by a decision of this Court that the right to a tenancy arises not by virtue of any agreement but independently by force of the statutory provision in s.4, although s.23(3) of the Act also requires a contract of tenancy to be entered into. See Re Azmat Ali (1986) 32 FLR 30, at 37 [1986] FJCA 8, at 8 – 9. See also Reddy v Ponsamy (1982) 28 FLR 69, at 77. In addition s.13 of ALTA provides that a tenant holding 'under a contract of tenancy' shall be entitled to be granted a single extension for a period of 20 years.
- [10] In addition to the tenancy declaration, Ram Udit applied to the Tribunal for a determination of his right to an extension under s.13. As to this, the word "tenant" is defined in ALTA to mean a person "lawfully holding land under a contract of tenancy." It is at this point that we come at last to the basis of the appellant's submission that Ram Udit's claim to rights as tenant under ALTA is illegal, void and unenforceable. It is founded on s.59(3) of ALTA providing, so far as material, that

“(3) Nothing in this Act shall be construed or interpreted as permitting an application to the tribunal in respect of a contract of tenancy which was or is made in contravention of any law.”

[11] The appellant submits that the lease to Ram Udit of 1 March 1975 was ‘in contravention of’ s.23(i)(e)(ii) of the Trustee Act, and so was illegal, so that no rights were capable of flowing from it whether under ALTA or otherwise.

[12] We have already disposed of this proposition in what we have said about the absence of evidence in the form of the will to show that the Parvati did exceed her powers under the trust instrument when she granted the 20 year lease on 1 March 1975. In any event, as we have said, the provisions of s.23(i)(e)(ii) are facultative or empowering of a trustee and are not restrictive. Taken with s.3(2) of the Act, and even apart from it, their natural meaning is not to limit but to enlarge, if needed; the leasing powers of a trustee. What the appellant seeks to do is to read s.23(i)(e)(ii) as imposing an affirmative prohibition against granting a lease in excess of 10 years. The appellant finds in s.2 of the Interpretation Act a meaning of “contravene” that is as follows:

“‘contravene’ in relation to any requirement or condition prescribed in any written law.... or any ... authority granted by or under any written law, includes a failure to comply with that requirement or condition.”

In effect, the appellant reads the ten year limitation in s.23(i)(c)(ii) as prescribing it a “condition” of the exercise of the statutory or other leasing power of a trustee that the lease is not to exceed 10 years, and, if it does, it is prohibited and illegal in law and equity.

[13] This is, in our view, a contention impossible to sustain. A lease granted in excess of the power of a trustee is not necessarily void for all purposes or against all persons.

A lease granted beyond power may be voidable in equity at the behest of the beneficiaries, but not if the lessee took his title from the trustee *bona fide* and without notice of the trust: cf Malpas v Auckland (1827) 3 Russ 273; 38 ER 578. That would not be the result if the lease were rendered illegal or completely void. By the same token, a beneficiary may, by knowing of the lease and acquiescing in its continuation, be estopped from challenging its validity at a later date. There is some evidence to suggest that Sarban Singh knew of the lease after he turned 21 but that he did nothing to have it set aside. In addition Dr Sahu Khan relied on s.18(2) and s.18(3) of ALTA as providing a complete statutory answer to the claim of illegality, citing in that regard what was said in Reddy v Ponsamy at 79.

[14] The issue of illegality was raised by the appellant at the hearing before the Agricultural Tribunal and again on appeal from it to the Central Agricultural Tribunal. Both of those tribunals accepted the appellant's proposition that the lease to Ram Udit was illegal and void, which was the conclusion that the learned primary Judge held to be wrong in law. We consider that his Lordship was correct in reasoning that there is nothing in the Trust Act or in ALTA, either separately or in conjunction, to prohibit a trustee from granting a lease for more than ten years or to make it illegal. On any view, the lease to Ram Udit would have been good to the extent at least of Parvati's half share in the land, which she held in her own right and did not dispose of to her other children until 26 May 1975, which was after the lease was executed.

[15] The learned Judge accordingly ordered that certiorari should go to quash the decision of the Agricultural Tribunal dated 25 June 1998 and of the Central Agricultural Tribunal dated 26 March 2004. We with respect agree with Jiten Singh J that the two Tribunals made an error of law in rejecting Ram Udit's application on the ground of illegality through contravention of s.23(1) of the Trustee Act, or s.59

of ALTA read with s.23(i)(e)(ii) of the Trustee Act. That error was central to the rejection in those Tribunals of Ram Udit's applications to them, and certiorari is therefore available in respect of it: see *Re Azmat Ali* (1986) 32 FLR 30, at 41, in which a declaration issued to the Central Agricultural Tribunal from the Court of Appeal.

- [16] Earlier, another complaint made by the appellant was about the use in the tribunal of the wrong form of application. It was not pursued in the Court of Appeal; but, in any event, this defect, if it was one, was not of itself a bar to the exercise of the jurisdiction of the Tribunal under ALTA. See *Gunanendra Dutt v Parvati* (Central Agricultural Tribunal, KA Stuart J; 24 October 1980).
- [17] Apart from that, the only remaining point on appeal is the presence in s.61 of ALTA of a privative clause in the form:

“(1) The proceedings, hearing, determination, award, certificates or orders of the central agricultural tribunal or of a tribunal shall not be called in question in any court of law....”

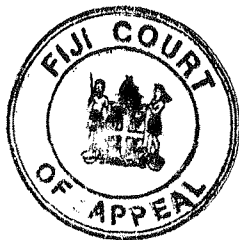
The impact of a clause in precisely this form, so far as material, was considered and determined by the House of Lords in *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 AC, 147. The effect of it, briefly stated is that exclusionary provisions like s.61(1) do not extend to protecting an error of law that affects the jurisdiction of a tribunal to make the determination it did. In this instance, the result of the error of law about the illegality of the lease, which was committed by both tribunals, was to induce them wrongly to refuse jurisdiction to hear Ram Udit's application. It was not merely an error committed in the course of validly exercising their undoubted jurisdiction to hear and determine matters committed to them by ALTA, but a rejection altogether, and for a reason erroneous in law, to perform that duty.

[18] In a strict technical sense under the old law, the appropriate remedies would have been:

- (1) certiorari to quash their decisions;
- (2) prohibition to prevent their enforcement; and
- (3) mandamus to compel them to perform that duty according to law.

[19] Under the more modern form of procedure by judicial review, it is not uncommon simply to make an appropriate declaration, which was what was done in Anisminic and in a sense by the Court of Appeal in Re Azmat Ali (1986) 32 FLR 30, at 41.

[19] We consider that his Lordship was correct in the order he made here, and that the appeal should be dismissed with costs of the appeal fixed at \$750.



W Ward

Ward, President

J Wood

Wood, JA

B. McPherson

McPherson, JA

Solicitors:

Suresh Maharaj and Associates, Suva for the Appellant
Sahu Khan and Sahu Khan, Ba for the Respondent