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

CIVIL APPEAL NO. ABU0072 OF 2005S
CIVIL APPEAL NO. ABU0087 OF 2005S
(High Court Civil Action No. HBJ012 & 13 of 2004S)

BETWEEN:

RANA PRATAP AND RAM NARAYAN

Appellants

AND:

VIJAY KUMAR LAL

Respondent

Coram: John Byrne, JA
Randall Powell, JA
Thomas Hickie, JA

Hearing: Friday, 4th July 2008, Suva

Counsel: Dr Sahu Khan for the Appellants
S K Ram for the Respondent

Date of Judgment: Wednesday, 9th July 2008, Suva

JUDGMENT OF THE COURT

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1. Rana Pratap and Ram Narayan ("the appellants") applied to the Agricultural Tribunal under section 5 of the Agricultural Landlord & Tenant Act Cap 270 ("the Act") claiming as tenants against Vijay Lal ("the respondent").

2. The predecessor of the appellants, Ram Garib, being the father of the second appellant, had a twenty (20) year tenancy under the original landlord, Brij Lal, the father of the respondent, from 30 June 1969 until 29 June 1989.

3. The appellants had been in occupation of the land since 1986 but had not obtained a tenancy agreement.

4. In the period since 1986 the respondent claimed that neither he nor his father had received any rent. The evidence of the appellants said they had paid rent during that period to a firm of solicitors, Stuart Reddy & Co, later Young & Associates

5. In 1993 the respondent had his father prepare a notice to evict the appellants which gave them three (3) more seasons after which they had to leave the land ("the Notice"). There was a dispute, unresolved on the evidence, as to whether the Notice was ever served on the appellants.

6. In 1995 the respondent became the head leaseholder by transfer from his father and in 1996 he purported to evict the appellants pursuant to the Notice.

7. The appellants obtained an injunction preventing their eviction and filed an application in the Agricultural Tribunal ("AT") for a declaration of tenancy. AT heard the application in March 1997 and delivered its decision three years later.

8. On 23 March 2000 AT held that appellants were not entitled to an extension of their tenancy, holding that their tenancy expired on 31 December 1998. It did hold that the appellants were entitled to their respective houses together with a quarter acre land each upon payment of $18,000 each for the same.

9. The appellants appealed to the Central Agricultural Tribunal ("CAT") arguing that AT had erred in its construction and application of section 4 of the Act. On 13 April

2004, CAT upheld the appeal. However they did not declare a tenancy under section 4 but held that *"there is sufficient evidence to show that the appellants are the respondent's tenant and under section 13 of (the Act) entitled to an extension of 20 years from 30 June 1989 to 30 June 2009"* extended the tenancy to 30 June 2009.

10. The respondent and the appellants, appealed to the High Court and on 29 July 2005 Finnigan J in HBJ012 of 2004 quashed the decision of CAT and reinstated the decision of AT.

11. The appellants were seeking from the tribunals a declaration that they were entitled to a tenancy in their own right and not an extension of the 1969 tenancy. As stated above they claimed a tenancy by virtue of the operation of section 4 of the Act which provides:

> *"Where a person is in occupation of land and is cultivating an agricultural holding and such occupation and cultivation has continued before or after the commencement of this Act for a period of not less than three years and the landlord has taken no steps to evict him, the onus shall be on the landlord to prove that such occupation was without his consent, and if the landlord fails to satisfy such onus of proof, a tenancy shall be presumed to exist under the provisions of this Act."*

12. If a section 4 tenancy had come into being then, by virtue of section 6 of the Act, which provides that any tenancy created after the commencement of the Act shall be deemed to be a contract of tenancy for a term of not less than 30 years, the tenancy would run from 1986 to 2016.

13. The appellants did not ask either AT or CAT for an extension of a tenancy but as has been said that is how CAT approached the matter, dealing with the application pursuant to section 13(1) of the Act which provides:

> *"Subject to the provisions of the Act relating to the termination of a contract of tenancy, a tenant holding under a contract of tenancy created before or extended pursuant to the provisions of this Act in force before the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976, shall be entitled to be granted a single extension (or a further extension as the case may be) of the contract of tenancy for a period of twenty years".*

14. In HBJ013 of 2004 the appellants argued that the decision of CAT which purportedly granted an extension of the tenancy from 30 June 1989 to 29 June 2009 be quashed as beyond its powers. Finnigan J opined that CAT was *"going too far when it linked a termination date to its finding that the Applicants had a tenancy. It was not asked to do so"*. However in view of his decision in HBJ012, quashing the decision of CAT finding a tenancy at all, he did not need to decide the question raised by the second appeal.

15. The appellants appeal from the two decisions of the High Court. They claim that once CAT decided that there was sufficient evidence that the appellants were the respondent's tenant by operation of section 4 of the Act, CAT had no jurisdiction but to grant a tenancy of 30 years from 1986, a tenancy expiring in 2016.

The First Appeal: ABU 0072 of 2005

16. The trial judge held that CAT had made an error of law in the exercise of its jurisdiction in (1) not establishing that the appellants had previously claimed, before coming to AT, that they were tenants pursuant to section 5(1) of the Act; and (2) in proceeding without evidence of a request by the appellants to the respondent for a written tenancy agreement pursuant to section 23(1)(b) of the Act and (3) in overlooking that the respondent had not consented to them remaining on the land but in fact had tried to remove them pursuant to section 4(1) of the Act

17. It is necessary for this Court to consider the three supposed errors of law that the trial judge found CAT made in the exercise of its jurisdiction.

The First Error - Section 5(1) of the Act

18. The trial judge held that CAT had made an error of law in the exercise of its jurisdiction in not establishing that the appellants had previously claimed, before coming to the Agricultural Tribunal, that they were tenants pursuant to section 5(1) of the Act.

19. Section 5(1) of the Act provides that:

> *"A person who maintains that he is a tenant and whose landlord refuses to accept him as such may apply to a tribunal for a declaration that he is a tenant and, if the tribunal makes such a declaration, the tenancy shall be deemed to have commenced when the tenant first occupied the land."*

20. The appellants submit that to bring an application to the tribunal it is not even necessary to claim a tenancy, citing ***Suraj Bali v Hardei*** CAT Appeal No. 4 of 1980 as authority for the proposition that *"occupancy, as long as it is accompanied by cultivation, is sufficient to create a presumption of tenancy."*

21. That may be, but in any event the trial judge's finding that there must be evidence of a formal claim for tenancy before an application is made to the tribunal is an unwarranted gloss on section 5(1) of the Act. The section properly construed means simply that an applicant to the tribunal must claim he is a tenant, and the landlord must refuse to accept his claim, when the application is made. That clearly was the case here. Moreover there was ample evidence of such claim and refusal in the period prior to the commencement of the application in 1997.

22. In our opinion the trial judge erred in holding that CAT could not proceed to declare a tenancy without establishing they the appellants previously claimed they were tenants.

The Second Error - Section 23(1)(b) of the Act

23. The trial judge held that CAT erred in law in proceeding without evidence of a request by the appellants to the respondent for a written tenancy agreement pursuant to section 23(1)(b) of the Act

24. Section 23(1)(b) of the Act provides that:

> *"Where .. (b) in any case coming within the provisions of section 5, the tenant if he has first requested the other party to the tenancy to have the contract evidenced by an instrument of tenancy or by an instrument in the prescribed form, as the case may be, and no such contract has been executed, may refer such matter to the tribunal of the agricultural district in which the holding is situated."*

25. The appellant says that section 23 is not a preliminary to making an application under section 5. They say that the section 23(1)(b) only comes into play after the tribunal makes a declaration of tenancy under section 4.

26. The respondent contends to the contrary but in this Court's opinion the construction of the sections contended for by the appellants is correct. The structure of the Act is that a person claiming to be a tenant may approach the tribunal by virtue of section 5. He may seek a declaration that he is a tenant by virtue of section 4 or he may seek an extension of an existing tenancy by virtue of section 13. If the tribunal declares he has a tenancy by operation of section 4, or is entitled to an extension by virtue of section 13, then it is necessary by virtue of section 23 to request a contract before the tribunal can make further orders.

27. In our opinion the trial judge erred in holding that CAT could not proceed to declare a tenancy without evidence of a request under section 23(1)(b) of the Act.

The Third Error - Section 4(1) of the Act

28. The trial judge, in finding that CAT had erred *"in overlooking that the respondent had not consented to them remaining on the land but in fact had tried to remove them pursuant to section 4(1) of the Act"*, has assumed facts which were contested by the parties and which the respondent, in accordance with section 4(1) of the Act, bore the onus of proving.

29. In 1997 the matter proceeded before AT on the basis of Agreed Facts which included that the appellants had been in actual occupation of the land *"in his own right"* from 1986 and that the *"farm had been cultivated with sugar cane all the time from 1986 up to date."*

30. The oral evidence included that:

- in 1993 the respondent prepared the Notice for his father to give to the appellants;
- the Notice allowed the appellants three years to continue cultivation at the end of which they were to leave;
- the respondent did not know whether his father gave the Notice to the appellants;
- from April 1993 until July 1996 no steps were taken to evict the appellants.

31. The appellants' case is that pursuant to section 4(1) of the Act they established that they had had been in occupation of the land for three years after 1986, that they had cultivated the land in that period and that no steps had been taken to evict them within that three year period (1986 to 1989).

32. The respondent says firstly that steps taken to evict a claiming tenant can take place after the three year period and secondly that his father's failure or refusal to collect the rent is evidence that the occupation was without the landlord's consent.

33. In the opinion of the Court the only workable construction of section 4(1) is that steps to evict an occupier must be taken within any three year period of occupation and cultivation. Once the three year period is up the occupant has a statutory tenancy and subsequent steps to attempt to evict the occupier can be of no relevant effect.

34. We are reinforced in this opinion by the decision of ***Soma Raju v Bhajan Lal*** Civil App 48 of 1976 which establishes that where an occupier of land becomes a tenant and the land is transferred to a third party, that assignee takes subject to the statutory rights of the tenant.

35. Refusal to accept rent could amount to evidence that the occupation was without consent, but in the circumstances of this case, where the landlord was entitled to rent until 1989 anyway pursuant to the original lease, and where it was paid to the respondent's solicitors, the failure as the trial judge describes it, "to *pick up any rents*", is equivocal. In fact CAT found there was *"no evidence that the appellant at any stage refused to pay rental or that there was any demand for rental by the respondent."*

36. The onus is on the landlord to establish lack of consent and in our view the trial judge erred in finding that CAT overlooked such evidence.

The Second Appeal: ABU 0072 of 2005

37. Section 22(1)(j) of the Act provides that *"in respect of its agricultural district, a tribunal may, upon the application of a landlord or tenant or an agricultural holding - ....(j) decide any dispute between a landlord and tenant of agricultural land relating to such land and the provisions of the Act ...* ***Provided that the tribunal shall not adjudicate upon the length of the term contained in any contract of tenancy or extension thereof"***.

38. It follows from what has been said in relation to the first appeal that the appellants were entitled to a declaration of tenancy pursuant to section 4 of the Act and accordingly CAT erred in purporting to fix a term that is only consistent with an extension of lease under section 13.

39. The appeals are allowed.

40. The Orders of the Court are:

    a. Appeals ABU0072 and ABU0087 of 2005S are allowed

    b. High Court appeal ABJ012/2004 is dismissed

    c. High Court Appeal HBJ013 of 2004 is allowed

    d. The respondent to pay the appellants' costs of these proceedings and in the High Court proceedings, the total costs of which we fix at $5,000.00.

Byrne, JA

Powell, JA

Hickie, JA

Solicitors:

Sahu Khan and Sahu Khan, Ba for the Appellants
Samuel K Ram, Ba for the Respondent