IN THE COURT OF APPEAL, FIJI
[APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 0086.2015
(High Court File No. HBC 0037.2012)

BETWEEN	:	**MOHAMMED SALIM**
		Appellant
AND	:	**I-TAUKEI LAND TRUST BOARD**
		Respondent
Coram	:	**Chandra, JA** **Lecamwasam, JA** **Amaratunga, JA**
Counsel	:	**Mr. A. Ram for the Appellant** **Ms. L. Komaitai for the Respondent**
Date of Hearing	:	**4 May 2017**
Date of Judgment	:	**26 May 2017**

JUDGMENT

Chandra, JA

[1] I agree with the reasoning and conclusions of Lecamwasam JA.

Lecamwasam, JA

[2] This is an appeal filed by the appellant against the judgment of the learned High Court Judge at Labasa dated 27th October 2015. Briefly the facts are as follows:-

(i) The plaintiff filed the statement of claim, claiming general damages and special damages being loss of income and loss of profits as a result of the

defendant's failure to grant him a lease of half of the land comprised under the Native Lease No. 10725.

(ii) The plaintiff is the executor and trustee in the estate of his deceased father, Fakir Mohammed, under whose will the plaintiff became the sole owner of the disputed land.

(iii) Fakir Mohammed was the original lessee under Native Lease No. 10725 which was covered by sugarcane contract No. 2008 Wailevu. The original term of the lease expired on 30th June 1986 followed by one statutory extension of 20 years which was valid up to 30th June 2006. By virtue of Fakir Mohammed's last Will, the plaintiff/appellant became the sole beneficiary of the leased land, leaving his two brothers destitute. One of his brothers namely Aziz made an application to the Agricultural Tribunal in which the plaintiff and the ITLTB were made respondents, the parties have settled the dispute before the Agricultural Tribunal, on the following terms:

(i) That the Native Land No. 10725 be subdivided to create the two equal separate lots by a dividing line approximately as shown on the sketch plan attached and initialled by the parties;

(ii) The applicant shall be allocated a separate lease by the First Respondent or the lot aligned to the east of the dividing line;

(iii) The second respondent will be allocated a separate lease by the 1st respondent or the lot aligned to the rest of the dividing line;

(iv) The applicant and the 2nd respondent shall apply to the Sugar Tribunal for two separate contracts to be allocated to the individual lots;

(v) The parties accept that on the survey the separating boundaries slightly alter but it is always the intention of the parties that no lot shall be less than 10 hectares."

(vi) Until the subdivision and the allocation of the new Contracts the Applicant and the Second Respondent shall farm the house lease according to the boundaries now agreed.

(vii) The Second Respondent shall enable the Applicant to take advances from the FSC Limited up to two thirds of the estimated net proceeds of the Applicant's crops and within one week of any

payments of cane proceeds are made by the Corporation, the Second Respondent will enter into accounts with the Applicant and pay to him the whole of his share of proceeds less all advances and share of ground rent.

(viii) The Second Respondent will pay the Applicant the sum of $1,200.00 and supply three loads of river gravel as compensation for the foundation of existing dwelling and the Applicant will remove the dwelling other than the concrete foundations and the floor.

(ix) The Applicant will remove his dwelling within six months of today's date.

(x) The Second Respondent will pay to the Applicant the sum of $1000.00 in full settlement of all accounts between them and in particular relating to the estate of FAKIR MOHAMMED.

(xi) All rent arrears to 31st December 1991 be paid by the Applicant.

(xii) Each party to bear his own costs.

[3] Although the parties have agreed on the above conditions, until 30th June 2006 separate leases have not been effected. However subsequent to the expiry of the original lease the respondent granted a lease of the whole land to the wife of Aziz namely, Khatoon Bi on 11th March 2008.

[4] Since the time of settlement before the Agricultural Tribunal, the plaintiff had been communicating with the respondent to effect the settlement entered before the Agricultural Tribunal, which the Respondent had failed to do. As the respondent did not cooperate with the plaintiff/appellant to carry out the above settlement, the plaintiff/appellant filed action No. 35 of 2006 before the High Court seeking execution of the above settlement. But the learned High Court Judge acting under section 4 (4) of the Limitations Act Cap.35 declared that the action was time barred.

[5] Aggrieved by the judgment of the above case the plaintiff/appellant filed an appeal before the Court of Appeal on 11th of March 2008. Incidentally, on the same day the respondent, ITLTB granted the subject matter of this dispute, ie. the entire 20 acres to Aziz's wife, Khatoon Bi leaving the plaintiff without an inch of land out of the disputed subject matter. The Court of Appeal held against the respondent. It seems that the

respondent had not adverted the attention of the Court of Appeal to the fact that it had already divested the subject matter to Khatoon Bi on the 30th June 2006. If it had done so, the Court of Appeal would have considered an alternative to the order of specific performance. By the time the Court of Appeal made the order, the respondent had already given the lease in favour of Khatoon Bi, hence the issue of obeying the order of specific performance was not possible or practical.

[6] I do not agree with the views of the learned High Court Judge in rejecting the appellant's application in High Court Action No. 35 of 2006 under Section 4 (4) of the Limitation Act. As held in **Central Trading Company v Chandra Kanta**, (FLR Vol.23 1977) as follows;

> *"...Limitation Act 1971 S.4(4) did not apply to an application for leave to issue a writ of execution, but only to the right to sue on a judgment which were quite distinct."*

Therefore in my view what the plaintiff had wanted was to get the order of settlement of the Agricultural Tribunal put into effect. Section 4(4) may apply in a case where plaintiff attempts to file an action after the limitation period. However, under any circumstances the settlement entered into between the parties is binding on the parties whether it is within the limitation period or not.

[7] Therefore, even if the plaintiff/appellant was barred from filing an action out of time, the respondent in any event cannot take refuge in the claim that the action is out of time because, whether it is out of time or not, respondent being a party to the settlement continues to be bound by the terms of the settlement. Therefore it was up to it to honour the settlement and not to escape under the cover of the judgment of the High Court which was later overruled by the Court of Appeal.

[8] Thereafter, the plaintiff/appellant filed HBC 37 of 2012 before the learned High Court Judge at Labasa claiming general and special damages against the defendant which was rejected by the High Court. The present appeal is against the said judgment of the learned High Court Judge. Following are the grounds of appeal filed by the appellant:

1) *The learned trial Judge erred in law and in fact in re-litigating and substituting a judgment contrary to the Court of Appeal judgment.*

2) *The learned trial Judge erred in law and in fact in recording that the appellant did not nominate a Surveyor when the appellant did so and other defendant for survey instructions.*

3) *The learned trial Judge erred in law and in fact in failing to understand the judgment of the Court of Appeal dated 16th March 2009 and especially as to the grant of the new lease to the appellant by the respondent.*

4) *The learned trial Judge erred in law and in fact in holding that the Court of Appeal never ordered the respondent to grant the appellant a 30-year lease or the subject property.*

5) *The learned trial Judge erred in law and in fact in holding that the sole issue is whether the respondent failed to comply with the tribunal order as ordered by the court when the Court of Appeal had already adjudicated on the matter and made the final order.*

6) *The learned trial Judge erred in law and in fact in attempting to substitute the agricultural tribunal orders dated 6th November 1992 and stating the applicant (Aziz) "was never a tenant of the defendant."*

7) *The learned trial Judge erred in law and in fact in holding that it was the plaintiff's responsibility to attend to the survey when plaintiff exhibits "P12" located on page 34 of the agreed bundle of documents clearly showed that the respondent was requested by the appellant to issue survey instructions to the appellant's surveyor and never issue instruction to the appellant's surveyors but admitted that "they were now preparing necessary work to entertain the above ruling" being "P13" located on page 35 of the agreed bundle of documents.*

8) *The learned trial judge erred in law and in fact in holding that it was unacceptable for the appellant to not surrender the lease when the Court of Appeal had already adjudicated on the issue.*

9) *The learned trial Judge erred in law and in fact in holding that "the two pieces of the original land would thenceforth be held by the two brothers, one each for the remainder of the original lease and misinterpreting, Finnigan, J in* ***Govind Prasad v the Native Land Trust Boad*** *(No. 55/2006) Lautoka Action No. HBC 145 of 2002.*

10) *The learned trial Judge erred in law and in fact in holding that the Agricultural Tribunal's Order and the Court of Appeal's order did not require the Respondent to give each of the two brothers a fresh new lease for a term of 30 years.*

11) The learned trial Judge erred in law and in fact in failing to understand the workings and effect of ALTA.

12) The learned trial Judge erred in law and in fact in holding that an agreed subdivision of the existing lease did not entitle a grant of a fresh 30 years lease under Section 6(b) of ALTA.

13) The learned trial Judge erred in law and in fact in holding that the Respondent had not breached the Agricultural Tribunal's orders or the Court of Appeal orders were made in 2009, well after the expiry of the original lease in 2006.

14) The learned trial Judge erred in law and in fact in holding a contrary position to the Court of Appeal and misinterpreting the whole of the Agricultural Tribunal Order and Court of Appeal order.

15) The learned trial judge erred in law and in fact in holding that the appellant pay the respondent's costs summarily assessed at $2,500.00.

16) The learned trial judge erred in law and in fact in holding that the appellant's cause of action is based on an alleged breach of contract when orders of both the Agriculture Tribunal and Court of Appeal were not complied with by the Respondent.

17) The learned trial Judged erred in law and in fact in finding that the appellant did not do anything at all towards obtaining a sub division of the land.

18) The learned trial Judge erred in law and in fact in holding that item 6 of the Agricultural Tribunal orders would apply in that the two brothers would continue to farm under the original lease of the remainder of the lease when the orders contemplated continued farming until new leases were granted.

19) The learned trial Judge erred in law and in fact in holding that there was no loss on income suffered by the Appellant when adequate evidence was tendered as to the loss of income and damages suffered and would have suffered by the appellant as a result of the respondent's non-compliance with the Court of Appeal orders.

20) The learned trial Judge erred in law and in fact in holding that there was never an intention of fresh leases being given and the orders only contemplated actions within the original lease term.

21) The learned trial Judge erred in law and in fact in holding that there was no evidence of any loss of income arising naturally from the breach of contract or that it was in the contemplation of the parties

when the losses occurred from a deliberate non-compliance of the Court of Appeal orders.

22) The learned trial Judge erred in law and in fact in holding that it was the responsibility of the appellant and not the respondent in carrying out the orders of the Court of Appeal and Agricultural Tribunal and that fresh leases with terms of 30 years were never contemplated.

23) The learned trial Judge erred in law and in fact in holding that the Court of Appeal orders and the Agricultural Tribunal Orders contemplated occupation and cultivation of the existing original terms of the lease only and there was no obligation on the Respondent to grant a new lease to the Appellant.

24) The learned trial Judge erred in law and in fact that there was no proof of the Appellant's loss of income.

25) The learned Trial Judge erred in law and in fact in not allowing damages for pain and suffering despite evidence to the contrary.

26) The learned Trial Judge erred in law and in fact in failing to understand and effect and purpose of both the Agricultural Tribunal Orders and the Court of Appeal orders and failed to follow both the orders, and particularly the Court of Appeal orders.

27) The Appellant reserved the right to alter or add further grounds of appeal on the availability of the copy record.

[9] On a careful consideration of facts in this case, it is apparent that the respondent, ITLTB had not at any point of time displayed any keen interest to enforce the settlement. The responsibility of carrying out the survey cannot be fixed on just one party. The learned High Court Judge had erred in holding that it was the plaintiff's responsibility to attend to the survey. May be a result of the misinterpretation of the above clause which reads; *"shall not subdivide the land without the written consent of the lessor"* The clause does not impose the obligation of attending to the survey on the lessee. It merely refers to the requirement of written consent of the lessor, in the event of subdivision. However, as the respondent was a party to the settlement before the Tribunal and the respondent itself had agreed to the terms of the settlement, I reiterate that the respondent is bound by the settlement.

[10] The appellant had demonstrated his interest in complying with the settlement quite manifestly through his correspondence to the ITLTB. He had even gone so far as to nominate the survey firm, by his undated letter of November 2005, ie. before the expiry of the original lease, which was replied then by the ITLTB by an undated letter referring to the Agricultural Tribunal decision as follows:

> *" ... The board is now preparing work to entertain the above ruling and at the same time to surrender the existing Native Lease No. 12958."*

Thereby giving hope upon hope to the plaintiff/appellant that he would be given a lease of the land.

[11] Although the ITLTB speaks of surrender, there is nothing in writing to prove that it had taken steps to inform the appellant of the requirement formally in writing. If such a requirement existed, the respondent should have enlightened the Agricultural Tribunal of such a requirement. Having been a signatory to the settlement, it was incumbent on the part of the respondent, ITLTB to have informed not only the Tribunal but also the 2nd Respondent (before the Tribunal) - Salim. When considering the conduct of the respondent it was such that if surrender was given the plaintiff would have been left without any evidence of title and thus deprived of his rights to the land long before he lost his rights in 2008.

[12] Considering all the evidence, it is apparent that the respondent (ITLTB) had not done anything to comply with the settlement. Above all ITLTB had given the plaintiff/appellant false hope by its conduct. ITLTB had by a letter dated 14.08.2002 informed surreptitiously the Fiji Sugar Corporation (FSC) that the ITLTB had cancelled the native lease of the plaintiff and urged the FSC to cancel the Sugar Contract. However, the above cancellation of the native lease was later denied by "P11" an undated letter written in August 2002.

[13] The said letter of alleged cancellation of the Native Lease had been issued to the detriment of the plaintiff/appellant and favouring Khatoon Bi and thereby ITLTB deliberately acted against the plaintiff/appellant. If there was no surreptitious and

malicious conduct on the part of the ITLTB, it could have/should have facilitated the subdivision long before the expiry of the original lease. It had ample time to carry out the settlement of the tribunal if it was so inclined. However the appellant has not claimed any damages against the respondent on its malicious and deliberate inaction.

[14] At the Agricultural Tribunal, they have settled the matter on the terms stated before according to which the intention was to give a separate lease for the remainder of the original lease. As per proviso to Section 22 which reads thus:

> *"Provided that the tribunal shall not adjudicate upon the length of the term contained in any contract of tenancy or extension thereof";*

[15] According to this provision, the Agricultural Tribunal did not possess any power to extend the length of the term of the original lease or to interfere with the length of the existing lease. Therefore it is clear that the settlement could only have been given effect during the subsistence of the original lease only and not to go beyond that. Therefore the learned High Court Judge has correctly observed that the settlement was only for a separate lease and not for a new lease. In his judgment, the learned High Court Judge, rejected the claim of general damages stating there is no basis whatsoever for the plaintiff to claim for any loss after the expiry of the original lease.

[16] I hold that the High Court Judge was correct in taking that stance since the plaintiff had claimed damages for the period commencing 1st July 2006. The plaintiff/ appellant to succeed in any claim after 1st July 2006, he must first be given a lease of land by the respondent. No doubt the plaintiff must have had a reasonable expectation to be given a new lease. However, in the absence of such a lease, he cannot claim future damages.

[17] Issuing of a new lease is the prerogative of the respondent, on the expiry of the original lease there was no obligation to issue a new lease to the plaintiff and plaintiff alone. It was entirely at the discretion of the ITLTB to decide as to the issuance of leases. However, in this case conduct of the respondent is such that it had created a reasonable expectation in the mind of the plaintiff in securing a new lease.

[18] This is augmented by the correspondence between the appellant and the respondent as especially demonstrated in "P13". Thereby, the respondent at different times since 1992 made the plaintiff/appellant believe that he would be the recipient of a new lease. In spite of all these assurances, the respondent, well informed of the fact that there was a dispute between the appellant and his brother, Aziz and that the plaintiff has shown continued interest in the land, had given the new lease to Aziz's wife, Khatoon Bi. Having slept over the matter since 1992 up to 2008 this is indicative of bias or partiality towards Khatoon Bi and an adverse prejudice against the appellant. Failure to grant a lease of half the land at least is ample proof of malice on the part of the respondent.

[19] Further, the Respondent takes the position that there has to be an application for a new lease to be given. Yet, it had not proved to the satisfaction of Court that there was an application by Khatoon Bi. Thereby countering its own position, failure on the part of the respondent to comply with the settlement entered before the Agricultural Tribunal and giving out the entire land by the new lease to Khatoon Bi cannot be condoned under any circumstances.

[20] The plaintiff/appellant was deprived of getting a new lease due to the malicious conduct of the respondent towards the plaintiff/appellant. It is unfortunate that the plaintiff/appellant has not moved court for damages on this basis.

[21] Although it is within the legitimate right of the respondent, ITLTB to decide on the issuance of a new lease, in this case the outrageous oppressive and deliberate act of the respondent detrimentally affected the rights of the plaintiff. The respondent being a government entity has exhibited scant respect towards the orders of a judicial body and caused detriment and loss to a party in the manner as revealed in this case.

[22] It was the respondent's lackadaisical and indolent attitude that contributed to the failure to execute the settlement of the Tribunal. In a scenario such as this, it is not only fair and just, but also a must in equity that the appellant should be compensated. Had the appellant pleaded damages in respect of the wrongful act of the respondent, plaintiff would have succeeded. However, there is no application for damages on such basis.

[23] Finally, has the appellant had moved court (as per the statement of claim) only for future special and general damages from 1st July 2006, ie. After the expiry of the original lease, this Court is unable to grant any reliefs and the judgment of the High Court is affirmed and I would dismiss the appeal.

[24] Once an appeal is dismissed, it is customary to order costs by the appellant to the respondent but in view of the malicious, oppressive and outrageous conduct of the respondent towards the appellant, I would not order costs.

Amaratunga, JA

[25] I had the opportunity of reading the judgment of Lecamwasam JA. I agree that the appeal should be dismissed, without costs.

[26] The grounds of appeal and facts are stated in the judgment of Lecamwasam JA and I do not wish to reiterate the same.

[27] The Plaintiff and his late brother Aziz had a dispute over an agricultural lease. The lessee of the said land was their late father and he had bequeathed the same to the Plaintiff in his last will. Late Aziz went before The Agricultural Tribunal where ITLTB (Defendant) who was the lessor, was also made a party to the said application before the Agricultural Tribunal.

[28] It is admitted fact that parties before Agricultural Tribunal agreed to subdivide the agricultural lease N.L. 10725 for two equal lots.

[29] The clause 4 of N.L. 10725 contained provisions for subdivision of the lease.

[30] When the parties entered in to a settlement in 1991 to subdivide N.L. 10725, the initial lease granted in 1956 for 30 years had lapsed in 1986 and an extension was granted

under said lease till 2006. It was five years after the extended period that dispute between the two brothers were amicably settled. So, it is axiomatic that subdivided leases in accordance with the settlement in Agricultural Tribunal, will only be for the reminder of the period of N.L. 10725.

[31] Plaintiff and his late brother disputed over the agricultural lease N.L 10725 and it was resolved by a settlement for subdividing the said lease. So the **area as well as the period** of the subdivision should derive from N.L 10725.

[32] In my judgment subdivision of any existing agricultural lease cannot insist statutory minimum period of 30 years, from the date of subdivision or grant of subdivided leases in terms of Section 6(b) of the Agricultural Landlord and Tenant Act (ALTA).

[33] The minimum period for lease did not apply to subdivision as it was only a subdivision of the existing lease which was allowed under conditions contained in the said lease.

[34] The Defendant had requested for partial surrender of N.L. 10725 or cancellation of said lease by total surrender in order to issue fresh leases for subdivided lot, but the Defendant had not done so.

[35] The said request for partial surrender of N.L 10725 was made by Defendant in its correspondence made in August, 2002, in reply to Plaintiff's solicitor's letter of 22nd August, 2002.

[36] The said letter addressed to the solicitor of the Plaintiff, had clearly indicated that '*responsibility of subdividing*' was with Plaintiff and his late brother and regretted that '*nothing had eventuated*' for nearly 10 years from the settlement. The Defendant had also indicated that '*despite various attempts*' by NLTB, Plaintiff had refused to execute a surrender and this was the reason for the delay in the execution of the settlement.

[37] There was no evidence of denial of the facts stated in the said letter by the solicitors for the Plaintiff. According to the evidence presented there was not even a reply to said letter and next correspondence by the solicitors was in 2005, which was penultimate year before the expiration of the lease.

[38] In the circumstances one cannot only blame Defendant for the failure to execute settlement for subdivision of lease before its expiration in 2006.

The Orders of the Court are:

1. *Appeal dismissed.*
2. *No costs.*

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Hon. Mr. Justice Suresh Chandra
JUSTICE OF APPEAL

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Hon. Mr. Justice Susantha Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice Deepthi Amaratunga
JUSTICE OF APPEAL