DHARAM LINGAM REDDY

v.

1. PON SAMY
2. VELIAMMA (d/o THANDRAYAN)
3. VELIAMMA (d/o RAJ MUDALIAR)

[COURT OF APPEAL—Gould, V. P., Spring, J. A., Henry, J. A.]

Civil Jurisdiction

Date of Hearing: 17 March 1982
Date of Judgment: 2 April 1982

Landlord & Tenant share farming agreement—Whole agreement to be read—not employment agreement—Pending hearing before Agricultural Tribunal circumstances indicated adjournment, not order for possession.

K. N. Govind and M. S. Khan for the Appellant
M. S. Sahu Khan for the Respondents

Appeal against order for possession made by the Supreme Court in respect of an area of 12 acres of agricultural land at Tagi Tagi, Tavua.

The respondents had issued out of the Supreme Court at Lautoka a summons under section 169 of the Land Transfer Act 1971 seeking possession of the area at Tavua, occupied and cultivated by the appellant. On 12 June 1981 an order was made by the Court directing appellant to give up possession of the property which was part of the land in Native Lease No. 13196, the term of which was 30 years from 1 June 1961 and comprised a total area of 24 acres 3 roods being Lot 8 Lubulubu Division Tavua; Veerabhadra Mudaliar and Ponia Kotti Mudaliar were the original lessees thereunder and held the land as tenants in common in equal shares.

In 1969 Veerabhadra Mudaliar died and probate of his will was granted to Pon Samy the 1st named respondent. On 12 December 1973 appellant entered into an agreement with Ponia Kutti Mudaliar (Mudaliar) in respect of the latter's one half share or interest in the above recited land (being the land the subject of this litigation). In 1975 Mudaliar died and letters of administration of his estate were granted to the 2nd and 3rd respondents as administratrices. Respondents claim the agreement was a contract of employment and that appellant was a bona fide employee of Mudaliar. Appellant entered into possession of the 12 acres owned by Mudaliar's estate: cultivated the land and erected three houses thereon to a value he claimed of $8,500; he planted fruit trees and dug drains to a value of $2,000: appellant occupied and cultivated the land from December 1973 up till the present order (see below).

On 16 January 1981, respondents served a notice to quit on appellant demanding possession of the lands. This was disregarded. On the 16 February 1981 appellant applied to the Agricultural Tribunal (Tribunal) established under the Agricultural

A Landlord and Tenant Act (Cap. 270) (ALTA) for relief under s. 18(2) thereby seeking an assignment of the lands which he had occupied and cultivated upon the basis that a tenancy was presumed to exist under ALTA in his favour in respect of these lands.

Alternatively appellant had sought a declaration of tenancy under section 5(1) of
B ALTA claiming he was a tenant of the 2nd and 3rd respondents. On 26 March 1981 respondents were directed by the Tribunal to file a defence within 21 days.

In the statement of defence, respondents claimed the applicant was a full time bona fide employee employed by Ponia Kotti Mudaliar and in that capacity the applicant had been cultivating the Farm No. 3044.

C Alternatively the applicant had no right, title or interest under the Agricultural Landlord and Tenant Act by virtue of Agricultural Landlord and Tenant (Exemption) Regulation 1967.

On 20 March 1981 respondents issued proceedings out of the Supreme Court at Lautoka under section 169 of the Land Transfer Act. The learned Judge at first instance made an order for possession in their favour.

D

The issue between parties arose upon an agreement which the appellant had entered into on 12 December 1973 with Mudaliar in respect of the latter's share in the land. The respondents claimed this was an agreement for employment for 3 years, that his right to reside upon it had been terminated in 1978 at the end of the cane crushing season and that the appellant had been requested to vacate the land
E but refused.

The court considered the terms of the written agreement and noting in it provisions which they described as unusual in a contract for an employee or labourer. The Court was satisfied that it evidenced an independent contract whereby appellant had managerial and other responsibility. The use of the word "wages" in it was incongruous when document as a whole was considered.

F

Held: Upon a consideration of the whole it was share farming contract; that such an agreement did not necessarily confer an interest in land.

Under ALTA, occupation of and cultivating of agricultural land for not less than
G 3 years if without objection from the landlord could raise a rebuttable presumption of tenancy. The landlord had the onus of proof that such a person was there without his consent failing which a tenancy was to be presumed (ALTA s.4 (1)).

Appellant may well have been able to bring himself within the provisions of s.4(1) (supra).

H S.18(2) envisaged a declaration by the Tribunal that a tenancy was null and void: yet s.18(2) by use of the words "any tenant" could have included not the appellant.

S.18(3) of the ALTA permitted an application for relief to have been made by the appellant to the Tribunal which in its sole discretion could have declared that a contract of tenancy was presumed to exist.

When the Supreme Court considered the application by respondents for order for possession an issue was pending before the Tribunal which could have been decided in the appellant's favour resulting in there being presumed a tenancy of the land whereas the order for possession could have resulted in the right (if any) of the appellant to obtain relief being denied.

The learned trial Judge should have refrained from making an order for possession and should have stayed the proceedings pending the outcome of the application before the Tribunal.

Order for possession set aside.

Proceedings in the Supreme Court to stand adjourned pending the final determination of appellant's application under the proceedings of the ALTA.

Cases Referred to:

Davidson v. Daysh [1932] G.L.R. 160.
Day v. Edwardes 83 L.T. 548.
Edwardes v. Barrington 85 L. T. 650.
Kulamma v. Manadan (1968) 2 W.L.R. 1974.
Azmat Ali v. Mohammed Jalil 28 FLR 31.
Maxwell v. Keun (1928) 1 K.B. 643.

SPRING, Judge of Appeal.

Judgment of the Court

The respondents issued out of the Supreme Court at Lautoka a summons under section 169 of the Land Transfer Act 1971 seeking possession of an area of 12 acres (approximately) of agricultural land at Tagi Tagi, Tavua, occupied and cultivated by the appellant. On 12th June 1981 an order was made by the Court directing appellant to give up possession of the property which was part of the land in Native Lease No. 13196, the term of which was 30 years from 1st June 1961 and comprised a total area of 24 acres 3 roods being Lot 8 Lubulubu Division Tavua; Veerabhadra Mudaliar and Ponia Kotti Mudaliar were the original lessees thereunder and held the land as tenants in common in equal shares.

In 1969 Veerabhadra Mudaliar died and probate of his will was granted to Pon Samy the 1st named respondent. On 12th December 1973 appellant entered into an agreement with Ponia Kotti Mudaliar in respect of the latter's one half share or interest in the above recited land. In 1975 Ponia Kotti Mudaliar died and letters of administration of his estate were granted to the 2nd and 3rd respondents as administratrices. Respondents claim the agreement was a contract of employment and that appellant was a bona fide employee of Ponia Kotti Mudaliar. Appellant entered into possession of the 12 acres owned by Ponia Kotti Mudaliar's estate: cultivated the land and erected three houses thereon to a value he claims of $8,500: he planted fruit trees and dug drains to a value of $2,000: appellant occupied and cultivated the land from December 1973 up till the present time.

A Respondents claim appellant entered the lands as an employee for three years from 1st January 1974; they state he "forcibly" built a thatched roof and tin wall house, but deny the value claimed by appellant; respondents maintain that the appellant's employment and his right to reside upon the land was terminated at the end of the 1978 cane crushing season; that on many occasions appellant has been requested to vacate the land, but has refused. On 16th January 1981, respondents B caused a notice to quit to be served on appellant demanding possession of the lands. Appellant disregarded this notice; on the 16th February 1981 appellant applied to the Agricultural Tribunal established under the Agricultural Landlord and Tenant Act (Cap. 270) (hereinafter called ALTA) for relief under section 18(2) thereof seeking an assignment of the lands which he had occupied and cultivated upon the basis that a tenancy was presumed to exist under ALTA in his favour in respect of these lands. Appellant cited the Native Land Trust Board as 2nd respondent in these C proceedings.

In the alternative appellant sought a declaration of tenancy under section 5(1) of ALTA claiming he was a tenant of the 2nd and 3rd respondents. On 26th March 1981 respondents were directed by the Tribunal to file a defence within 21 days.

In the statement of defence respondents denied appellant was a tenant of respondents; further they claimed and we quote paragraphs 2 and 8 thereof: D

Paragraph 2 reads:

"THAT the Applicant was full time bona fide employee employed by Ponia Kotti Mudaliar son of Veerabadra Mudaliar and in that capacity the Applicant was cutivating the Farm No. 3044."

Paragraph 8 reads:

E "THAT in any event the Applicant has no right, title or interest under the Agricultural Landlord and Tenant Act by virtue of Agricultural Landlord and Tenant (Exemption) Regulations 1967."

On 20th March 1981 respondents issued proceedings out of the Supreme Court at Lautoka under section 169 of the Land Transfer Act.

F Affidavits were filed by appellant and annexed thereto were copies of documents filed with the application to the Tribunal; the respondents also filed affidavits; no oral evidence was called; the matter was decided solely on the evidence contained in the affidavits. The learned judge in the court below after considering the affidavits and the written agreement made an order for possession under section 172 of the Land Transfer Act in favour of respondents. Appellant appeals to this Court and the grounds of his appeal are as follows: G

"1. THAT the learned trial Judge erred in law in arriving at the conclusion that the Appellant has no right to stay on the land in question and therefore no useful purpose would be served by staying the proceedings.

2. THAT the learned trial Judge erred in law in his interpretation of section H 18 subsection 2 of the Agricultural Landlord and Tenant Act, in particular, by ignoring the fact that the Tribunal could, for breach of the terms of the lease, order that the lease be cancelled and that the whole or part of the land be assigned to the Appellant, as has been done by the Tribunal in

numerous cases of this nature. The breach of covenant of the lease here is the fact that without the consent of the Native Lands Trust Board, the Respondents gave the land in question for sharefarming and further gave possession of the same to the Appellant. A

3. THAT the learned trial Judge erred in law as it appears from the Judgment, in as much as he did not consider the effect of section 4 subsection 1, in particular, where it relates to the person being in occupation and cultivation of an agricultural holding for a period of three (3) years and the effect of the same. B

4. THAT in view of the pleadings before the Court, the learned trial Judge erred in law and in fact in deciding in a summary manner on a matter which is a function of the Tribunal especially created for this purpose by the Legislature." C

While we do not propose to deal with each of the grounds of appeal seriatim, we shall cover all the matters raised in the grounds of appeal in the course of this judgment.

Mr Govind in arguing ground 1 submitted that the learned judge was in error in concluding that appellant had no right to remain in possession of the land, and, in refusing to stay the proceedings until the application before the Tribunal had been determined. Counsel submitted that there appeared to be two reasons which caused the learned judge to make the order for possession; firstly he considered the agreement disclosed the relationship of employer and employee and that is should not be construed as a tenancy agreement as it did not evidence the relationship of landlord and tenant. Secondly that even if the Tribunal was minded to construe the agreement as an unlawful lease or as a licence such construction would be wrong because of the various prohibitions contained in ALTA—namely section 45 in the case of a sublease, and section 55 in the case of a licence. D E

Mr Govind conceded that while the written agreement did not constitute a tenancy at common law the application of the provisions of ALTA, to the facts, clearly showed that a tenancy under ALTA existed.

Mr Sahu Khan submitted that the written agreement clearly expressed the intention of the parties that they intended to enter into a contract of employment; the agreement could not be construed as a tenancy agreement either at common law or under ALTA. That if the submission of appellant was correct and the provisions of ALTA resulted in a tenancy being presumed under the Act such tenancy would be unlawful by virtue of section 45(1) thereof which provides: F

"45(1) Subject to the provisions of subsection (2), the sub—letting of the whole or part of an agricultural holding after the commencement of this Act is prohibited." G

Mr Sahu Khan submitted further that the provisions of ALTA did not apply by virtue of section 2 *(a)* of the Agriculural Landlord & Tenant (Exemption) Regulations which reads:

"2. The provisions of the Act shall not apply:— H

(a) to any agricultural land:—

(i) occupied by or let to any person by reasons solely of his being a full-time bona fide employee of the landlord."

A We turn now to consider the agreement dated 12th December 1973:

AN AGREEMENT made this 12th day of December 1973 BETWEEN PON KUTTI MUDALIAR son of Veerabadra Mudaliar of Tagi Tagi, Tavua in the Dominion of Fiji, Cutivator (hereinafter together with his executors administrators and assigns referred to as "the Owner") of the one part AND DHARAM LINGAM son of Muttap Reddy of Tagi Tagi, Tavua in Fiji Cultivator (hereinaf-
B ter together with his executors adminstrators and assigns referred to as "the Cultivator") of the other part.

NOW THEREFORE THIS AGREEMENT WITNESSETH as follows:—

1. That the Owner will employ and the cultivator will serve the employer as his labourer, the Cultivator shall:—

C *(a)* devote all his time and attention in cultivation of the owner's Farm Number 3044 situate at Tagi Tagi Sector comprised and described in Native Lease Number 13196 known as Lot 8 Lubulubu situate at Tagi Tagi, Tavua in Fiji and shall at all proper times plant and grow cane there in a proper husbandlike and workmanlike manner and cultivate the said farm and do such other work as is customary on the sugarcane farm.

D *(b)* manage, and properly look after the farm, subject to the direction and supervision of the owner, and do such work on the farm as the owner may require.

(c) the cultivator shall perform and provide all manual labour required on the farm and the owner shall not be required to pay or cultivate anything towards the manual labour.

2. All costs and charges for manure, harvesting and cartage and crushing of cane
E shall be deducted by the sugarmill and borne by both the parties equally. Save and except the expenses mentioned herein expressly no other or further expenses or each shall be borne by the owner.

3. This agreement is for a term of three years (3) but at the end of three years the parties may by mutual consent extend it for a further term.

4. Should the cutivator fail to cultivate the farm properly and to the satisfaction of
F the owner, the owner may terminate his agreement by giving him six months notice and pay his proportion of wages.

5. As remuneration of the cultivators work and labour the cutivator shall be entitled to one half of the net cane proceeds of crops planted and grown by the cultivator. Should either party terminate and determine the engagement as aforesaid in such case the amount of remuneration shall be the estimated net
G proceeds of cane then standing on the farm plus one half of all unpaid proceeds of cane harvested prior to that date.

6. All rice sugar and other goods purchased against the proceeds of the farm shall be divided equally and costs charges shall be borne by both the parties equally.

H 7. It is hereby agreed and declared by the parties that the owner shall pay the land-rent in respect of this land.

8. This agreement shall be in force from 1st day of January 1974.

9. Any dispute or difference between the parties hereto shall be referred to Mr G. P. Shankar of Ba Solicitor whose decision shall be final and binding on both the parties.

In witness whereof the parties hereto have hereunto set their hands the day and the year first hereinbefore written.

SIGNED by PON KUTTI MUDALIAR as owner in my presence and I certify that I have read over and explained the contents hereof to him in the Hindustani language and he appeared fully to understand the meaning and effect thereof. (HLTM) Pon Kutti Mudaliar

SIGNED BY the said DHARAM LINGAM in my presence and I certify that I have read over and explained the contents hereof to him in the Hindi language and he appeared fully to understand the meaning and effect thereof. (HLTM) Charam Lingam .....

Mr Sahu Khan argued that the agreement was a contract of employment whereby the 2nd and 3rd respondents (as personal representatives of the estate of Ponia Kotti (Mudaliar) as "owners" employed the appellant as "cultivator". He relied upon the opening recital "that the owner will employ and the cultivator will serve the employer as his labourer". In the alternative. Mr Sahu Khan stated appellant claimed he had an interest in the land which claim failed he submitted as:

(a) appellant was not a tenant: and
(b) if he was held to be a tenant then his occupation was unlawful as the Native Land Trust Board had not consented to the sublease; and section 45 of ALTA prohibted any subleasing of agricultural land (subject to certain exceptions which did not apply in this case).

Mr Govind submitted the true nature of the contract was sharefarming agreement and relied on *Davidson v. Daysh* [1932] G.L.R. 160 which dealt with the question whether a sharemilker under a sharemilking contract was a "worker" within the meaning of the Worker's Compensation Act 1922. Frazer J. said at p. 162.

> "We are therefore thrown back upon the language of the document itself. The description of the plaintiff as 'the employee' is not conclusive, for the intention of the document must be gathered from its contents as a whole."

It is necessary to examine the whole intent and purpose of the agreement and the effect thereof must be determined accordingly.

In *Daly v. Edwardes 83 L.T. 548* Lord Alverstone C. J. said:

> "'You must look at the agreement as a whole..... I do not think that this kind of case is ever to be decided by looking at the mere expressions of particular clauses, or by considering the covenants and shutting one's eyes to what the general effect of the whole document is' ".

A Williams L. J. at p. 551 said:

> "In my judgment, although the lawyers have chosen to dress up this grant of a licence, or this grant of a privilege, in the dress of a lease of land, yet when one comes to look closely at the provisions of the document it is plain that it is really a grant of a privilege and licence merely masquerading as a lease."

B In the House of Lords (sub nom) *Edwardes v. Barrington* 85 L.T. 650 Lord Halsbury at p. 652 said:

> "I do not deny that the documents themselves present a beautiful confusion of thought and language by the gentlemen who have contrived them, which was calculated to create the difficulties which all the judges who have had to deal with this matter have expressed. Those who drew up the documents have used words inappropriate to the particular thing with which they were dealing. But
> C they are not words of art, and it is frankly and most properly conceded that we must, if we can, find out from the language of the instrument, having regard to the relations between the parties and the object which was on the face of the instrument apparent, what were the real intentions of the parties.

Under the agreement appellant was to devote all his time and attention to the cultivation of the owner's farm and to plant and grow cane thereon; to do such other
D work as is customary on a sugar cane farm: to provide at his own cost all manual labour required on the farm: all costs and charges for manure, harvesting cartage and crushing cane were to be deducted by the millers and borne equally by the parties. It was expressly provided no other, or further expense, was to be borne by the owner. The agreement was to continue for 3 years from 1 January 1974 and appellant's remuneration was to be one half of the net proceeds of the cane planted
E and grown by appellant. The owner was to pay the rent to the Native Land Trust Board—(no doubt a measure designed to keep the Native Land Trust Board in ignorance as to what was happening).

Admittedly, appellant was to manage and look after the farm subject to the direction and supervision of the owner and perform such work as the owner required: in our view this provision is unusual in an employment contract as an employee or
F labourer does not normally have the responsibility of management: appellant lived upon the land, but we are not told whether 2nd and 3rd respondents were living thereon or, if not, whether they were able to supervise the farming operations.

All additional manual labour was to be provided by appellant at his own expense—a most exceptional clause to find in an agreement which defined appellant merely as a labourer: one half of all manures, harvesting, cartage and
G crushing charges was to be paid by appellant—again a most unusual provision as such a burden is not normally assumed by a mere labourer under a contract of employment: should appellant fail to cutivate the farm satisfactorily the owner was empowered to terminate the agreement by giving six months notice.

Having considered the whole of the document we are satisfied that it evidences an independent contract whereby appellant has the management of the sugarcane farm: appellant is responsible for the planting, growing cartage and crushing of the
H cane at such times and in such manner as he sees fit provided that the work is done satisfactorily and the owner has the right to supervise. The mode of remuneration that appellant is to receive one half of the net proceeds from the sale of cane is typical of an independent contract to perform specified services. The agreement mentioned "wages" in Clause 4 thereof but the use of such word is incongruous when one looks at the document as a whole.

In *Halsbury's Laws of England* 3rd Edn. Vol. 28 at p.22 it is stated: A
"The test which distinguishes an independent contractor from a servant or agent is the degree of control which the employer is entitled to exercise. An independent contractor is one who is not bound generally to obey such orders as his employer may from time to time give, but is free to act as he thinks fit within the terms of his contract.

We have dealt with this agreement at greater length than may be thought B necessary, but it is a fallacy to assume that every agreement or contract purports to be a contract of employment simply because the words "owner" and "cultivator" or "employer" and "employee" are used: such a document is not necessarily a contract of employment as these words do not affect the question as to the true construction of the agreement.

We are satisfied, having given the matter careful consideration, that appellant C was not a bona fide employee of the owner and the agreement was not a contract of employment creating the relationship of master and servant as Mr Sahu Khan would have us decide.

Further having read the record we are satisfied that neither the agreement nor the evidence support the view that the land was being "occupied by appellant by reason solely of his being a full time bona fide employee of the landlord" within the D meaning of the Agricultural Landlord & Tenant (Exemption) Regulations 1967.

What then was the relationship of appellant and the 2nd and 3rd respondents? No evidence was called in the Court below; the only evidence before the Court was the affidavits filed by the parties and the copies of the proceedings filed in the Tribunal. From a study of the agreement and the record we are firmly of the opinion that the agreement was a sharefarming contract. The Privy Council decided that a sharefarming agreement does not E necessarily confer on the sharefarmer an interest in land; see *Kulamma v. Manadan* [1968] *2 W.L.R.* 1974. Kulamma's case was decided before ALTA was enacted and dealt with the effect of section 12 of the Native Land Trust Act on a sharefarming contract.

In order to resolve this matter it is necessary to examine in some detail the provisions of ALTA. F

Section 4(1) reads:
"4(1)—Where a person is in occupation of 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 G such onus of proof, a tenancy shall be presumed to exist under the provisions of this Act....."
Appellant had been in continuous possession of the land since December 1973 and had been actively cultivating the same up till the present time.

Under ALTA the fact that a person is in occupation of, and cultivating agricultural land and has done so for not less than 3 years without objection from the landlord thereof raises a rebuttable presumption of tenancy. Section 4(1) of ALTA H places upon a landlord the onus of proving that a person occupying and cultivating his land for not less than 3 years is there without his consent: if he cannot, then a tenancy is presumed. This is a somewhat startling concept as it will be obvious that some occupiers may be elevated to the status of "tenants" when they have no title at common law.

A From the evidence it is apparent appellant may well be able to bring himself within section 4(1) of the ALT with the result that a tenancy may be presumed to exist.

The Act defines a *"contract of tenancy"* as—

" 'contract of tenancy' means any contract express or implied or presumed to exist under the provisions of this Act that creates a tenancy in respect of agricultural land or any B transaction that creates a right to cultivate or use any agricultural land."

A tenancy presumed to exist under ALTA by virtue of section 4(1) of the Act may offend against the provisions of the Native Land Trust Act or the Crown Lands Act in that the consent of the Native Land Trust Board or (where required) the Director of Crown Lands respectively has not been obtained to a tenancy presumed to exist C under ALTA: in such a case the tenancy is unlawful because if offends against one or other of the above statues. Likewise section 45 of ALTA (supra) prohibits the subletting of the whole or part of an agricultural holding.

The definition of "tenant" was amended by Parliament in 1976 by the insertion of the words "a person lawfully holding"; the definition of which now reads:

D "'tenant' means a person lawfully holding land under a contract of tenancy and includes the personal representatives, executors, administrators, tenant or any other person deriving title from or through a tenant."

Every tenancy presupposes a tenant and if the last mentioned definition is applied to the definition of "contract of tenancy" it would mean that a tenant under a contract of tenancy as defined in ALTA would mean only a lawful one.

E Section 18(2) of ATLA reads:

"18(2)—Where a tribunal considers that any landlord or tenant is in breach of this Act or of any law, the tribunal may declare the tenancy or a purported tenancy granted by such landlord or to such tenant as aforesaid, null and void and may order such amount of compensation (not being compensation payable under the provisions of Part V) paid, as it shall think fit, by the landlord or F by the tenant, as the case may be, and may order all or part of the agricultural land the subject of an unlawful tenancy to be assigned to any tenant or may make any determination or order that a tribunal may make under the provisions of this Act."

If the definition of "tenant" in section 2 of ALTA was applied to section 18(2), it would appear to make nonsense of its provisions.

G It is clear, however, that where there is a particular enactment and a general enactment in the same statute and the latter taken in its most comprehensive sense would override the former the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute of which it may properly apply. This is one application of the maxim *generalia specialibus non derogant Halsbury's Laws of England 3rd End. Vol. 36 p. 467* states:

H "If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that

provision: and if, therefore, such an enactment, though inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is\prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general."

However, sense is made of section 18(2) when the above maxim *generalia specialibus non derogant* is applied to the wording thereof.

The opening words of the subsection themselves postulate a landlord or tenant in breach of the Act or of any law and give power to make certain orders in relation to that tenancy. How then can it be said that because of that breach of the Act or law the tenancy is not a tenancy and the tenant not a tenant and that therefore the section has no application.

The words "any tenant" in section 18(2) include in our view, on the facts of this particular case, the appellant who is by virtue of section 4(1) of ALTA presumed to hold a contract of tenancy albeit, that such tenancy is unlawful by virtue of statute in that the consent of the Native Land Trust Board has not been obtained and because it offends against section 45 of the ALTA. By virtue of section 18(2) appellant is empowered to seek relief from the Tribunal in accordance with the provisions of ALTA. Section 18(2) is intended, in our opinion, to protect persons who innocently become tenants by virtue of ALTA in circumstances which are unlawful in that the consent of the Native Land Trust Board and (where requisite) the Director of Crown Lands is lacking. There is no suggestion that consents required from the Native Land Trust Board or the Director of Crown Lands could be dispensed with by the Tribunal.

Mr Sahu Khan submitted that section 59(3) of ALTA precludes any application being made to the Tribunal in respect of any contract of tenancy which is in contravention of the law.

Section 59(3) reads:

"59(3)—Nothing in this Act shall be construed or interpreted as validating or permitting an application to the tribunal in respect of a contract of tenancy which was or is made in contravention of any law."

However, section 18(3) reads:

"18(3)—Any application to a tribunal for a declaration, for compensation or for the ordering of the making of an assignment or other order or determination under subsection (2) may be made notwithstanding the provisions of subsection (3) of section 59 but nothing contained herein shall be deemed to permit the ordering or making of an assignment in breach of the provisions of the Subdivision of Land Act or which would otherwise be unlawful."

In the circumstances of this case we are satisfied that section 18(3) permits an application for relief being made by appellant to the Agricultural Tribunal.

Our function on this appeal is restricted, however, to the questions whether, on the facts of this particular case, the learned judge was correct in making an order for possession under section 172 of the Land Transfer Act 1971: and whether the learned judge should have granted a stay of proceedings in respect of the proceedings in the Supreme Court, pending the determination by the Tribunal of appellant's application.

A Section 172 of the Land Transfer Act reads:

"172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit:

B

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled..."

Under this section the judge is required to dismiss the summons if it is proved to his satisfaction that the person or persons to whom it is directed has a right to posses-
C sion of land.

The appellant after receiving the notice to quit, but prior to the issue of the proceedings under section 172 of the Lands Transfer Act, filed an application with the Tribunal pursuant to the provisions of ALTA. It was common ground that the Tribunal may in its sole discretion declare that a contract of tenancy is presumed to exist in respect of the lands occupied and cultivated by appellant and may make an
D order assigning a tenancy in respect of those lands occupied by appellant subject of course to the consent of the Native Land Trust Board being forthcoming. Did appellant have a "right of possession". Appellant as we have said may come within the provisions of section 4(1) of ALTA. When the landlord—the definition thereof in the Act embraces 2nd and 3rd respondents—took steps to obtain possession the appellant exercised his right under ALTA to apply to the Tribunal for relief under section 18(2).

E

While appellant would not be able to prove an instant right to possession of the lands as at the date of hearing of the summons for ejectment he would in our view be able to show that he had a right by virtue of section 4(1) of ALTA to seek relief under the Act: this could result in him being confirmed in possession of the land and having a lease thereof assigned by the Tribunal pursuant to the provisions of section
F 18(2) subject of course to the necessary consent from the Native Land Trust Board being forthcoming: the application for relief is solely within the jurisdiction of Tribunal.

In our opinion upon respondents taking proceedings for possession of the lands appellant exercised the right given to him under ALTA to seek relief as above mentioned. Accordingly at the time the Supreme Court considered the application by respondents for an order for possession an issue was pending before the Tribunal which, if decided in favour of appellant,
G could result in a tenancy of the lands being presumed in his favour. It was a matter solely for the Tribunal.

However the making of an order for possession, at that stage, could result in the right of the appellant to obtain relief being defeated which would occasion substantial injustice.

H Counsel for respondent submitted that all the appellant had was a mere "hope" that he might obtain possession and that unless appellant could immediately show "cause" an automatic order for possession should follow. We do not agree. Section 172 (supra) includes the words "or he may make any order and impose any terms he may think fit". These words are of wide application and would enable the judge to make any order which the dictates of justice so required.

In *Azmat v. Mohammed Jalil* 28 FLR 31 heard during the present session of this Court we have dealt with the relative positions of the Supreme Court and the Tribunal in circumstances not dissimilar from the instant appeal and we adopt what we said there in this regard. A

The adjournment of a hearing by any court is *prima facie* a matter for the exercise of that court's discretion; normally an appellate court will not lightly interfere with the exercise of such discretion; however, where the exercise of such discretion may result in substantial injustice to any party then it is clear that the appellate court can and should review the exercise of that discretion. *Maxwell v. Keun* [1928] 1 K.B. 645. B

The learned judge stated in his judgment that the agreement of 12th December 1973 neither constituted a tenancy agreement nor a sublease, nor a licence, but that if the Tribunal held that the agreement was either a tenancy agreement or a licence then it was prohibited either by section 45 (in the case of it being held to be a tenancy agreement or "an unlawful lease); or by section 55 of ALTA (if it was held to be a licence). In his judgment the learned judge said: C

> "Hence even if the agreement on application of the Tribunal were wrongly construed by the Tribunal as an unlawful lease or as a licence the defendant cannot have the land subdivided with a tenancy of a portion allocated to him by the Agricultural Tribunal under section 18 of ALTA." D

In the Court below the learned judge did not construe the agreement as a sharefarming agreement which, in our respectful opinion, was its true nature; accordingly he failed to concern himself with the applicability of section 4(1) of ALTA and the consequences that would flow therefrom in the event of the Tribunal deciding that section 4(1) was referable to appellant's case. In our opinion the learned judge should have weighed and considered the effect of section 4(1) of ALTA in relation to the facts of this case. E

Accordingly for the reasons we have given we are firmly of the opinion that the learned judge should have refrained from making an order for possession and stayed the proceedings pending the outcome of the application before the Tribunal.

F

In reaching this conclusion we do not in any way wish to trespass upon the domain of the Tribunal or in any way attempt to determine any of the matters which are solely within the powers of, and exclusive to, the Tribunal. Our function on this appeal is purely to determine whether the orders made should stand.

For the reasons given this appeal is allowed: the order for possession made in the Supreme Court set aside; the proceedings in the Supreme Court stand adjourned pending a final determination in accordance with the provisions of ALTA of appellant's present application. G

The order for costs in the Supreme Court is set aside: the matter of costs in the Supreme Court will be in the discretion of the judge at the re-institution of those proceedings.

Leave is reserved to either party to apply to the Supreme Court in respect of any or all of the foregoing orders or in respect of any other matters arising therefrom. Respondents to pay appellant's cost in this Court to be taxed if not agreed. H

Appeal allowed; proceedings in the Supreme Court stayed.