IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Juricdiction
Action No. 203 of 1975

Between:

IMAM HUSSAIN s/o Nur Buksh — Plaintiff

and

SHIU NARAYAN s/o Hanuman — Defendant

Dr. M.S. Sahu Khan & Mr. S.D. Sahu Khan, Counsel for the Plaintiff
Mr. G.P. Shankar & Mr. S.R. Shankar, Counsel for the Defendant

JUDGMENT

This action arises out of a transaction whereby the plaintiff endeavoured to buy a Native lease containing 39 acres 3 roods from the defendant. The sale indicated by the pleadings and the evidence is a somewhat involved one, not made less so by the fact that the pleadings are not helpful. The writ was issued on 16th December, 1975 and the statement of claim annexed to it alleged that on 20th August, 1974 the plaintiff agreed to buy from the defendant for $12,000 the land leased by the defendant from the Native Land Trust Board and referred to above and embodied that agreement in instructions given to the solicitors now representing the defendant and at the same time signed an application to the Native Land Trust Board, for consent to the sale. The Statement of Claim further alleges that the plaintiff was given permission and allowed to build a house on the land but in February 1975 the plaintiff was given notice to leave the land. However, on 9th March 1975 a "panchiyat" which is a local arbitration, was held as a result of which the plaintiff and the defendant settled their differences and the plaintiff agreed to pay $16,000 for the land and their respective solicitors signed a new set of instructions drawn up by the defendant's solicitor Mr. G.P. Shankar. A new application for consent was drawn up and sent to the Native Land Trust Board, which approved the application subject to the parties agreeing to an increase of rent from $80 a

year to $280 a year. The Plaintiff accepted the increase and subsequently the defendant's solicitor notified the Board that the increase would be accepted. But in October the defendant's solicitor advised the Board that both parties wished to resile from the transaction although the plaintiff says that that allegation so far as it related to him was untrue. The plaintiff's allegation as made out in his statement of claim is that he has been in occupation of the land since August 1974.

The defence alleges that there was no final or conclusive agreement for sale and that the application for consent did not contain all the terms of the agreement but only what was necessary to obtain the Board's consent. It also denies that possession was given to the plaintiff and says that what buildings were put up by the plaintiff were put up 'forceably' by him and I take this to mean that they were put on defendant's land without defendant's consent. Then it alleges that the plaintiff was notified that the defendant had withdrawn consent, but gives no particulars as to when he was so notified. Then it says that the plaintiff did agree to buy the land for $16,000, but that no consent was given to that sale, and it says further that although the plaintiff accepted the increased rent proposed by the Native Land Trust Board the defendant did not. The defence also alleges that the plaintiff agreed with the defendant that the defendant was to retain his land, and that the proposed sale was not to go on, but here again no particulars were given as to when that happened. It also alleges that the plaintiff was 'forceably' (sic) staying on the land whatever that may mean, and goes on to say that there was no enforceable or valid agreement. The defendant also counterclaimed alleging that the plaintiff is a trespasser on the land and asking for relief.

It is to be noted that neither the defence nor the counterclaim at any stage plead that the agreement if there was an agreement was terminated. The defendant's entire case is that there was no agreement.

The plaintiff in his evidence was most insistent

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that he was not in possession of the land as a purchaser, notwithstanding his averment in his statement of claim, but no objection was taken until towards the end of the defendant's cross-examination, when I ruled that it was then much too late to take objection to that line of evidence. Apart from that his evidence was what might have expected from a farmer who was buying land in Fiji. Notwithstanding his denials I am quite satisfied that he entered upon this land as a purchaser. He bought building materials from the defendant and I am sure that both parties knew at that time that plaintiff proposed to build a house, although the evidence on that subject was scanty. I am further satisfied that he bought 40 bags of manure from the defendant at each sale and I am satisfied again that the intention of both parties was that the manure was to be used on the land. There was no explanation as to why the defendant's solicitor, when he was acting for both parties, failed to send the application for consent forward, nor why he accepted the instructions of the defendant to defer the sending of the application without reference to the plaintiff, as I am satisfied was the case. The evidence led me to conclude that the defendant repented of his bargain quite early in the piece and that this was the cause of the delay. However the position appears to have been that the plaintiff went on to the land, defendant and his solicitor neglected to send in his application for consent and in February 1975 the defendant gave the plaintiff notice to leave the land. It appears that now certain neighbouring farmers got together and it was eventually agreed by the parties that the sale would go on but at $16,000 instead of $12,000 as had originally been agreed. Again the defendant's solicitor drew up heads of agreement which he called instructions. That was on 14th March 1975. Nobody gave evidence that those instructions were to be followed by a formal agreement. If that had been the intention evidence could have been given by the solicitor concerned. There was plenty of time to have drawn such an agreement before the arrangements finally broke down in October 1975. Those instructions of the 14th March 1975 also provided for the sale of some building materials and of a further 40 bags of manure.

They also provided for the defendant to give the plaintiff $500 a year in March of each year, and stated that the first $500 had already been paid. It appears that this particular sum of $500 was in fact $525 and that it was given by the defendant to the plaintiff on 9th February 1975, for which the defendant gave a Promissory Note backed by his brother. The defendant has since recovered judgment in the Magistrate's Court against the plaintiff for this sum although execution has been stayed. I am told that the firm of solicitors who prepared the letter of instructions on 14th March 1975 was also the firm which acted for the defendant in taking judgment on the Promissory Note. After the instructions were signed the defendant's solicitor on 20th March 1975 sent the documents to the Native Land Trust Board. The Board did nothing until 29th April when they asked for an increase of rent to $280 per year. This was very properly communicated by the defendant's solicitors to the plaintiff's solicitors, seeing that the plaintiff would be paying the enhanced rent. This request apparently caused the plaintiff some heart searching for although the defendant's solicitors' letter was dated 8th May, it was not until 31st July that the Plaintiff's solicitor wrote back agreeing to the enhanced rent, and it is rather curious that the defendant's solicitors did not sent that information to the Native Land Trust Board until 15th September. Perhaps it is desirable to set out the letter which the plaintiff's solicitors sent to the defendant's solicitors sent to the defendant's solicitors as well as the latter's letter to the Native Land Trust Board.

"SAHU KHAN & SAHU KHAN
Barristers & Solicitors

Our Ref: 9/8 31st July, 1975.

Messrs. G.P. Shankar & Co.,
Solicitors,
B A.

Dear Sir,

Re: Shiu Narayan & Imam Hussain

We refer to your letter dated the 8th day of May,

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1975 together with Photo copy of letter from Native Land Trust Board.

We understand that the consent is approved subject to our client giving a written undertaking to pay the enhanced rental of $280.00.

This is accepted by our client. Please find enclosed the undertaking as required.

We trust that you will have the documents sent for endorsement of consent as soon as possible.

Yours faithfully,
SAHUKHAN & SAHUKHAN

Per: (sgd.) S.D. Sahu Khan"

"

15th September, 1975.

The Magager,
Native Land Trust Board,
SUVA.

Dear Sir,

re: Sale and Purchase Agreement
Shiu Narayan to Imam Hussain
Your reference 4/4/983.

We thank you for your letter dated 29th April, 1975 and regret the delay in replying.

We forward herewith rental letter of acceptance from Imam Hussain which speaks for itself.

Could you let us have your consent within 7 days from the date hereof, please.

Yours faithfully,
G.P. Shankar & Co.,

Per: (sgd.)

The defendant says that the plaintiff's acceptance of the increased rent was only conditional, and I set out the plaintiff's letter of acceptance.

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The Manager,
Native Land Trust Board,
SUVA.

Dear Sir,

I, IMAM HUSSAIN son of Nur Buksh of Tagi Tagi in the district of Tavua in the Dominion of Fiji Cultivator do hereby agree and accept that I will pay the enhanced rental of $280.00 (TWO HUNDRED DOLLARS) once the consent is endorsed and the land is question is being transferred to my name and then the enhanced rental of $280.00 is to sale effect from 1st July, 1975.

Yours faithfylly,

(Sgd.) Imam Hussain "

Now, quite obviously that letter contains conditions. However, it is clear that it was accepted by the defendant as his solicitor sent it forward to the Board with the request that the consent be expedited. The letter does, of course, support the defendant's case to the extent that it indicates that in the mind of the defendant at least no consent had yet been granted. I will have to return to this aspect of the case. It is perhaps not surprising that the plaintiff's solicitors should have been somewhat concerned at the absence of a reply to their letter of 31st July to the defendant's solicitors, and on 3rd October they wrote to the solicitors asking for a reply. Their letter refers to a conversation with a clerk in the office of the defendant's solicitors who on 1st September appears to have told plaintiff's solicitors that the papers had been sent to the Native Land Trust Board, but to have suppressed the information that they had been sent only the preceding day. That letter was replied to on 10th October when the defendant's solicitor disclosed that the defendant wished to resile from the arrangement for sale and stated further that the plaintiff had been told of that decision when he called at the defendant's solicitors' office on 30th September. If true that would appear a somewhat questionable action on the part of defendant's solicitors from a professional point of view. The proper course for the defendant's solicitors to have adopted was to make no

communication whatever to the plaintiff but to advise him to go and see his own solicitors. The plaintiff denies that he was ever told by the defendant's solicitor that defendant intended to resile from the contract. The Court was told by the secretary of the Native Land Trust Board that on 25th September the Board was sent a telegram purporting to come from the defendant's solicitors. It read "Reference 4/4/983 letter of 29/4/75, Shiunarayan to Imam Ali Shiunarayan instructs to withdraw application for consent to dealing rental not acceptable to our client, who no longer wishes to transfer the land. Please withdraw consent to transfer documents and return to our office. Letter follwoing. G.P. Shankar & Co." I may say that the "letter follwoing" was not produced, nor is there any reference to it in succeeding correspondence. The Native Land Trust Board replied to that telegram by letter dated 16th October when they told the defendant's solicitors that the increase of rent would stand and on 26th November they told the plaintiff's solicitors that the transaction had been "cancelled through G.P. Shankar's office who were acting for the parties". Perhaps there is some excuse for the Board thinking that the defendant's solicitors were acting for both parties, since all communications had been with the defendant's solicitors. The next thing that happened was that a registered lease was issued to the defendant. That was apparently signed on 30th September, and witnessed by Mr. G.P. Shankar, and was eventually registered on 10th November, 1975 under number 14868. Two things are noticeable about that lease. The first is that the rent fixed in the lease is the old rent of $80, not the new rent of $280, and the second is that there is nothing to show that the plaintiff or his solicitor was aware that the new lease had been issued for on 17th October the plaintiff's solicitor wrote a letter to the Board asing about the lease.

The parties each gave evidence. The plaintiff called the secretary of the Native Land Trust Board, the defendant called the Lautoka Manager of the Board. It was apparently intended that he should give evidence as to the policy of the Board contrary to that given by the secretary, but when counsel informed me that he had no

reason to believe the secretary of the Board was not telling the truth, I refused to hear the Lautoka manager on the subject of the Board's policy. The defendant also called a neighbouring farmer to testify as to the present condition of the farm which is the subject of the litigation.

It is quite clear that the plaintiff thought he was buying the farm from defendant and although he realised that his tenure didnot begin until the consent of the Board was given, there is no doubt that he went onto the land in August 1974 and was still there when the dispute about price arose in March 1975, and he continued to be there. Between August and March he had built a house and his sons had come to help him work on the land. However the plaintiff said that he did not regard the land as his until consent had been given to the sale by the Native Land Trust Board, and he regarded the sugar cane in the same way. I think, however, it is pertinent to observe that he occupied the land from August 1974, and when the new instructions were signed in March 1975, there was no question of the plaintiff receiving any credit for the work he had done although no consent had been applied for. There is no question but that whatever cultivation the plaintiff had done between August and March would redound to his credit in the way of cane moneys from the farm to be applied the purchase price. The defendant said that after the instructions were signed in August 1974 the plaintiff began to cultivate the land and in 1975 plaintiff and his son both worked in the cane and that would appear to lend some support to the plaintiff's contention that his occupation was only pending the consent of the Native Land Trust Board but I do not think that is at all conclusive. Plaintiff admits a house was built in December 1974. The plaintiff also agreed that from 1974 up to now the sugar cane production of the farm has decreased each year and said that was because he got no manure. I accept that and I think that was one of the defendant's means of putting pressure on the plaintiff to go. I am quite satisfied that from August 1974 the plaintiff was occupying the land by virtue of the agreement for sale which he had made with the defendant and I do not accept

that there was any arrangements made between the parties for him to be on the farm otherwise than as a purchaser.

Both the plaintiff and the defendant agreed that the first instructions given on 20th August 1974 were superseded by the instructions given on 14th March 1975 and it is therefore to the instructions given on 14th March 1975 that the Court must look to regulate the relations between the parties. Mr. S.R. Shankar contended that those instructions were simply an agreement to make an agreement. Dr. Sahu Khan, on the other hand submitted that the instructions were in fact an agreement and it becomes necessary to examine the instructions. I think that it is desirable to consider this matter at this stage, because if I come to the conclusion that there was no concluded agreement, the action will fail and there will be no need to consider the question of the consent of the Native Land Trust Board which was canvassed before me at great length.

It is convenient here to set out the terms of the instructions dated 14th March, 1975. It is headed 'Intructions' and then continues:

"Vendor: SHIU NARAYAN s/o Hanuman of Tagitagi, Tavua Farmer.

Purchaser: IMAM HASSAIN s/o Nur Buksh of Tagitagi, Tavua Cultivator

Property Native Lease land being Lot 3 - Tagitagi Sub-Division containing 40 acres, situated at Tagitagi, Tavua. Cane contract No. 3054.

The following improvements are sold with the land:

| | |
|---|---|
| (a) One pair fo working bullocks | $600.00 |
| (b) 1 Decree Plough | $100.00 |
| (c) 1 harrow | $ 40.00 |
| (d) Yoke, chain, pin | 50.00 |
| (e) 40 bags, sulphate of Amonia | $300.00 |
| (f) 4 coil barbed wire | $150.00 |
| (g) Building materials | $200.00 |

(sgd.) Imam Hussain (sgd.) Shiu Narayan

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| (h) Bulldozing work done | $900.00 |

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| (i) Well | $ 50.00 |
| (j) Road built | $130.00 |
| 11 acres ratoon | $3,000.00 |
| **Price:** Sixteen thousand dollars | ($16,000.00) |

**Mode of Payment:-**

(1) $400 - deposit within 7 days of Native Land Trust Board's consent.

Purchaser to plant and grow sugar cane on the land. Vendor is to receive all proceeds to satisfy purchase price. Purchaser is to produce at least cane equal to basic quota allotted to the land. The purchaser shall do so until 31.12.1979 when the whole purchase price or so much owing shall be fully paid.

No interest until 31/12/79.

If full price is not paid by 31.12.1979, the Vendor shall forefeit all moneys paid by the Purchaser and the Purchaser shall be required to vacate the land.

(sgd.) Imam Hassain
(sgd.) Shiu Narayan

Fundamental condition of the sale is that that purchaser shall produce and deliver to FSC Limited at least 400 tons of sugar cane each year. Failure to do so will be treated as fundamental breach going to the root of the contract and vendor shall in that case rescind the contract. This condition is to be in force only for so long as purchase money is owing.

All rent of the land shall be borne by the purchaser. It shall be paid by the vendor and debited to the purchaser.

The vendor undertakes to pay out of cane moneys $500 - to the purchaser but the vendor shall deduct rent moneys paid to Native Land Trust Board therefrom and pay balance to the purchaser. The first $500 - less rent money has been paid to the purchaser. The next payment shall be paid in March, 1976, and thereafter in March each and every year.

All cane already harvested belong to the vendor and he shall be entitled to all cane proceeds.

Dated this 14th day of March, 1975.

Witness:

(sgd.) Imam Hussain
(sgd.) U. Mohammed
(sgd.) G.P. Shankar
(Solicitor)

(sgd.) Shiu Narayan

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There are three preliminary observations to be made. First, nowhere in the instructions is there any mention made of the sale being made subject to the consent of the Native Land Trust Board. Secondly, because as I have said earlier, an application for consent was signed by the parties either at the same time as, or very close to the signing of the instructions, I think it proper to regard the instructions and the application for consent together. Thirdly, the application for consent quite clearly asks for consent to a sale and purchase agreement. I therefore propose to consider the matter on the basis that the instructions and the application to consent are to be construed together. I should perhaps say that the persons who drew the documents which form the basis of this action did not give evidence, nor did the parties advert to their own intention. I am quite sure that both parties here recognised that the consent of the Native Land Trust Board was necessary to the completion of this sale. This was not a case where the final conveyance was to be a transfer of the defendant's lease with a mortgage back. The lease was not to be transferred before 31st December 1979. It was clearly a case where either there was to be a sale and purchase agreement drawn up when the consent became available or the written instructions were to form the basis of the arrangement between the parties. The only purpose of having the instructions written out at length and signed by the parties could have been to protect one or other of them if one resiled from his arrangement after an application for consent was signed. Since the instructions were written out by the vendor's solicitor, and he has continued to act for the defendant vendor throughout I think that it is a fair inference that the purpose of the instructions was to protect the vendor. It is perhaps significant that at no time was any intention evinced of preparing an agreement for sale and purchase in respect of either set of instructions. The defendant said that when he signed the instructions he intended them to be a binding agreement, and he also said that so far as he was concerned all the conditions had been agreed upon. No authorities were cited to me on this subject. I made no criticism of counsel. Each

probably considered the matter clear beyond argument. I have however found it of some difficulty. The law is clear, and is set out in Rossdale v Denny (1921) 1 Ch. 57, 59 where Russell J said

> "The authorities are unanimous in this, that the question is one entirely depending on the/construction of the documents. If upon the true construction of the documents the reference to a formal contract amounts to an expression of a desire on the part of one or the other of the parties, or both, that their already complete contract should be/reduced into a more formal shape, then the fact that no such contract has been executed is no defence to the action, but the original and complete contract survives and may be enforced. If, on the other hand, the true construction of the documents is this, that either the offer or the acceptance was conditional only, then the non-execution of the formal contract affords a defence to the action upon the ground that the parties really did not intend to be bound until a formal document had in fact been executed."

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It was put in almost the same words by Parker J in Von Harzfeldt-Wilddnburg v Alexander (1912) 1 Ch. 284, 288 when he said

> "It appears to be well settled by the authorities that if the documents or letters replied on constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will be carried through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract."

The passage which I have found most helpful is contained in the judgment of Lord Blackburn in Rossiter v Miller (1879) 3 Appeal Cases 1124, 1151 where the learned Law Lord says:

> "So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties,

"in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

It would seem that here the negotiations were complete. All that was required was the consent of the Native Land Trust Board. I think that this is shown by the fact that when the consent was given, no suggestion is made of further negotiation. If indeed there was a further document to be signed - and the tenor of the correspondence suggests that there was not - it was simply a sale and purchase agreement settling out the terms of the instructions of 14th March, 1975. In my view the negotiations ended with those instructions which signified the final mutual assent of the parties.

I then pass to consider the consent. The letter from the Board on 29th April contains the sentences ". . . please note that this (the application for consent) "is approved subject to the parties concerned accepting in writting an enhanced rental of $280 with effect from 1st July 1975." That letter was written to the defendant's solicitors and was apparently passed on without comment to the plaintiff's solicitors, who on 31st July 1975 accepted the condition. On 15th Septembr the defendant's solicitors sent on to the Board without comment the plaintiff's letter of acceptance, and asked for the consent. In view of the Board's first letter that was unnecessary, for the consent wasalready granted. It seems to me to matter not what form the consent took, and whether or not it was conditional. It was granted. If conditional, the condition was accepted. The defendant took the point it were/that he had not consented to the increase in rent. I do not think it is open to him to take that point. His attidude was that it was a matter for the plaintiff having acted on that basis, I do not think the defendant

can be heard to say now that he did not consent to the increase. I think that as between himself and the plaintiff, the defendant is estopped from setting up that defence, see Central London Property Trust v High Trees House (1947) K.B. 130.

There is however another point arising under section 94 of the Real Property 18 of 1971, and the evidence of the manager of the Native Land Trust Board to the effect that no point was ever pressed about fines for licences to assign. Section 94 is to the following effect:

> "94. In all leases containing a covenant, condition or agreement that the lessee shall not, without the licence or consent of the lessor, assign, underlet, part with the possession or dispose of the demised premise or any part thereof, that covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of any such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent."

He said that in view of that section of the Act although attempts were made to secure a penal rent, they were not pressed and could not well be pressed.

The final question to be considered so far as the plaintiff's case is concerned is whether in this case the transaction must be struck down as being in contravention of the Native Land Trust Board Act section 12. That section so far as it is material, is as follows:

> " 12.(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

The defendant's contention is that although the arrangement of August 1974 was perfectly valid when it was made, it became unlawful because the plaintiff did not pay his rent because he entered upon the land as a purchaser. He further says that the transaction continued to be unlawful when the new arrangements of 14th March 1975 was entered into. Dr. Sahu Khan submits that the situation is saved by the fact that the plaintiff's occupation was conditional upon the Board's being granted, and that everyone knew and recognised this.

I think that the first thing about this contention is that both parties knew that any sale of the land was subject to the consent of the Native Land Trust Board and they both signed an application for consent which they realised had to be obtained before their sale agreement would have any efficacy. Although the defendant now says that the plaintiff entered into possession of the land and exercised the powers of a purchaser, that is quite contrary to his pleading which insists that he retained the legal possession of the land as against the plaintiff. The plaintiff on the other hand would have one believe that he was a mere labourer who did not assume any proprietorial privilages until consent was granted. I cannot accept either of those extreme positions. I think that the plaintiff was there as a purchaser and behaved himself as such. He built a house on the land in December 1974 although it may very well be that the house is removable. Moreover, the sale of the chattels was absolute, and not conditional, and he would have cultivated the land more adequately had he received the manure which the defendant sold him but failed to deliver. The question is whether all this is affected by the fact that undoubtely the sale was subject to the Board's consent. That possession and even payment of rent is not necessarily inconsistant with a conditional contract is shewn by D'Silva v Lister House (1971) 1 Ch. 17, 29. In this connection also I would, with respect, adopt the words of Mills Owen C.J in Fong Lee v Mitlal & Ram Kissun (1965) 12 FLR 4, 11 where he says

"If parties contract to effect a dealing in native land in terms which recognise that the dealing is not to be carried into effect contrary to the provisions of the Ordinance, then, in my view, they do not merely by entering into the contract 'deal' with the land without consent. Clearly in such a case no breach of the statutue is contemplated; the parties are recognising and insising upon compliance therewith and they are expressly contracting in terms negating any 'dealing' in the event of consent not being given."

In view of the recognition by both parties of the necessity for consent I do not think that the licence to occupy given by the defendant to the plaintiff, coupled with possession, was such a dealing as to contravene the statute. Both Chalmers v Pardoe (1963) 3 AER 552 and Sumintar v Jai Kissun Civil Appeal No. 18 of 1970 (pages 382 - 400 of the cyclostyled Fiji Reports for 1970) dealt with transactions which had been substantially performed. In the latter Gould V.P. says at page 391 "If an agreement is signed and held inoperative and inchoate while the consent is being applied for, I fully agree that it is not rendered illegal and void by section 12. Where then, is the line to be drawn? I think on a strict reading of section 12 in the light of its object an agreement for sale of native land would become void under the section as soon as it was implemented in any way touching the land without the consent having been at least applied for." Mr. Shankar submits that such a stage was reached when the plaintiff went into occupation while the argument about paymentof the rent went on. On this subject I do not believe the defendant, I think that no arrangement was made about payment of the rent, and that the question did not arise until some time after the August instructions were signed. When it did, the defendant knew that the plaintiff was a labourer and had nothing, while he himself had collected all the cane moneys from this land. It may very well be that as regards the agreement of August 1974 the plaintiff's occupation was illegal, but that state of affairs was terminated when the parties entered into a new agreement whereby the defendant received an enhanced purchase price and the parties agreed to apply for the consent of the Native Land Trust Board to their bargain. From 14th March 1975 plaintiff's occupation related to the agreement of that date, to which, as I say, the parties intended to seek

the due consent of the Board. In my view there was here no contravention of the Native Land Trust Act Cap. 114. I do not accept Mr. Shankar's contention that once the plaintiff's occupation was illegal it continued to be illegal although a new agreement was made. Perhaps I should mention here that Dr. Sahu Khan relied upon Law v Jones (1973) 2 AER 437/444 as indicating that the agreement superseded the first. However I mention it only to say that as a general authority Law v Jones was not followed in Tiverton Estates v Wearwell Ltd. (1974) 1 AER 209, and was indeed disapproved.

Dr. Sahu Khan submits that as the case stands, he is entitled to a decree for specific performance and he cites Hasham v Zenab (1960) A.C. 317. I think that this will depend upon whether the plaintiff can shew that he is willing and able to perform the contract. See Fry on Specific Performance 6th ed. para. 923. He certainly averred that in his Statement of Claim, but his evidence fell considerably short of it. The contract provides for payment of a deposit of $400 when the consent became available. The plaintiff says that he had the money but the defendant would not come and get it. He is not of course bound to do so. Defendant did not pay the money into Court nor did he even pay it to his solicitors. Again he has made no attempt to produce sugar cane to the extent of the tonnage of the contract. I do not think that on the evidence he can be said to have made out a case for specific performance. See Australian Hardwood Company v Railway Commissioner (1961) 1 AER 737. Measures Limited v Measures (1910) 2 Ch. 284 is also in point, for although it is not quite impossible for the plaintiff to perform his part of the contract and to pay the deposit of $400 and by a long stretch of imagination produce 400 tons of cane in 1978 and 1979 to put himself in a position to settle by 31st December 1979, it would appear to me that the breaches are so considerable as not to entitle plaintiff to the other which he seeks. For that same reason my conclusion is that the plaintiff has made out no case for damages.

And so I turn to the counterclaim. The case has

been fought by the defendant upon the basis that there was no agreement. I am loath to allow him to raise any other point. I think, however, that I must consider that letter of 10th October 1975. It must be now be set out:

G.P. SHANKAR & CO.
Barristers & Solicitors

P.O. Box 144
BA, FIJI.

10th October, 1975.

Messrs. Sahu Khan & Sahu Khan,
Barristers & Solicitors,
B A.

Dear Sir,

re: Shiu Narayan Vrs Imam Hussain

We are in receipt of your letter dated 3rd October 1975 concerning Native Land Trust Board consent in respect of transfer of Native Land Trust Board land in favour of Imam Hussain.

We are instructed to inform you that our client Shiu Narayan now no longer wishes to transfer his Native Land Trust Board land to Imam Hussain, who was informed per letter dated 24th Febraury 1975, and further when he called personally at this office on 30th September 1975. We understand from Imam Hussain that he also no longer wishes to have the land transferred from Shiu Narayan.

In the above circumstances, our client has informed the Native Land Trust Board that he does not wish to proceed with the transfer and consequently all documents have been cancelled.

We are in process of informing Imam Hussain to give up vacant possession of the land he presently occupies.

Yours faithfully
G.P. SHANKAR & CO.,

Per: (sgd.) C. Datt "

Normally, sale and purchase agreement provides for notice to be given a forfeiture. So in Lakshmijit v Sherani (1973) 3 ABR 737. Pacific Hotels and Development v Edwin Enterprises Limited No. 300 of 1975 (1976 cyclostyled reports Volume II page 996). But here no notice is provided for.

There is nothing in our Property Law Act which covers the point. Perhaps a section like section 118 of the New Zealand Act is also desirable here. In Vyse v Wakefield (1840) 151 E.R. 485, 489, Chief Baron Abinger says:

> "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing on a specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it."

Defendant knew the deposit should have been paid. I am quite unpersuaded that he was either ready or willing to pay it. I think that the agreement was properly terminated, and the defendant will therefore be entitled to succeed on his counterclaim. In the result then the plaintff fails in his claim for specific performance. The defendant succeeds in his counterclaim to the extent that he is entitled to possession, an order which I make with reluctance only because it is necessary to dispose of the rights of the parties and avoid further litigation. In view of the way in which the defendant conducted his case - on the basis of agreement or no agreement - he is not entitled to cost, and there will be no order.

LAUTOKA,
7th March, 1978

(sgd.) K.A. STUART
JUDGE