

Between:

GANGA RAM s/o Ram Jiwan
HIRALAL s/o Ganga Ram

Plaintiffs

and

SHYAM NARAYAN s/o Ram Narain
ABHYAS NARAYAN s/o Ram Narain

Defendants

Mr. K.C. Ramrakha for the Plaintiffs

Mr. F.M.K. Sherani for the Defendants

D E C I S I O N

This is a summons by the defendants to strike out the amended defence to counterclaim filed in October, 1978 on the ground that the amended defence to counterclaim introduces an entirely new case for the plaintiffs from that upon which they had embarked at the commencement of the action and after its determination in favour of the defendants.

Very briefly the circumstances of this matter were these. The plaintiffs brought an action against the defendants in a writ filed on 23rd October 1970 claiming specific performance of a sale and purchase agreement allegedly entered into between the parties in or about the month of May 1968 with respect to land comprising Certificate of Title 8940 situate at Waila, Nausori and containing 3 acres 3 roods and 23 perches. The defendants denied in their defence the validity of the agreement and counterclaimed against the plaintiffs for vacant possession of the land in question which they hold as executors and trustees of the estate of Ram Narain s/o Behari Maharaj, deceased.

Following trial of the action, I gave judgment on 23rd May, 1975 for the defendants and this judgment was later confirmed

by the Fiji Court of Appeal. The counterclaim was however not adjudicated upon at both counsel's own request.

When the trial commenced on 26th April, 1974 the defendant's counterclaim as it then stood averred as follows:

"Defence to counterclaim The Plaintiffs deny each and every allegation contained in paragraphs 10, 11, 12, 13 and 14 of the counterclaim, and say that they have entered into valid agreement for sale and purchase of the said land, and are on the said land by virtue of the said agreement for sale and purchase and not otherwise."

In October 1978 before Mishra J. in Chambers counsel for plaintiffs sought and obtained without argument leave to amend defence to counterclaim in these terms:

1. THE plaintiffs admit that the defendants hold Certificate of Title 8940 "Davuilevu" (part of) being Lot 1 on Deposited Plan 2110 containing an area of 3 acres 3 roods and 23 perches.
2. THE said land is agricultural land within the meaning of the Agricultural Landlord and Tenant Act (hereinafter referred to as the Act).
3. BY registered Lease No. 70886 the first plaintiff Ganga Ram f/n Ram Jiwan held all the said land as lessee as the tenant for the space of five (5) years from the 1st day of July, 1960, and subsequently continued to occupy the said land after formal expiry of the said lease as a tenant holding over on an annual tenancy basis, and paid rent to the defendants in respect thereof. The second plaintiff resides on the said land as part of the family.
4. THE said annual tenancy has never been validly determined, and no notice to quit was ever served by the defendants on the plaintiffs.
5. THE plaintiffs therefore claim the protection of the Act, and say they are protected tenants, and now hold the land as protected tenants under the said Act."

Both Mr. Sherani and Mr. Ramrakha have submitted at length on the issue before me as to whether or not I should strike out the amended defence to counterclaim as set out above.

I think there can be no doubt that the amendment has in fact changed the original defence to counterclaim into one of a substantially different character and as such it would be difficult to justify its acceptance at this stage. It is a general rule of practice that no amendment would be allowed at the trial which would enable a party to set up an entirely new case or to change completely the nature of his case (see Halsbury's Laws of England (3rd Edition) Volume 30 paragraph 73).

In the whole of the circumstances of this case I am satisfied that it would be unreasonable and unjust to allow the amendment to stand.

Accordingly I order same to be struck out without any order as to costs.



(T.U. Tuivaga)
Chief Justice

Suva,
17th September 1980.