

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Jurisdiction
Action No. 237 of 1981

Between: MOHAMMED JALIL f/n Mohammed Hanif Plaintiff
- and -
AZMAT ALI f/n Akbar Ali Defendant

Messrs Sahu Khan & Sahu Khan, Solicitors for the Plaintiff
Messrs Govind & Co., Solicitors for the Defendant

J U D G M E N T

This is the plaintiff's application for possession of land under the Land Transfer Act 1971, Section 169. In his supporting affidavit he alleges that the defendant worked on the land as a labourer under an agreement dated 21st August, 1975. A copy of that agreement is annexed to the affidavit and it is as well to set it out in full:-

"AGREEMENT BETWEEN JALIL AND AZMAT ALI
CANE CONTRACT NO. 6612 FROM 1966 TO 1986

1. Ajmat Ali has no right to apply in government to own the land under the agreement on the area developed.
2. Ajmat has the agreement to develop the land for 10 years.
3. You will develop only 25 acres near the area of Subhan.
4. Small crop such as arhar, rice, corn, peanut - $\frac{1}{3}$ for M. Jalil.
5. First ploughing and harrowing only one time for 4 acres will be paid by Jalil.
6. First planting only for 4 acres labour paid by Jalil - $\frac{1}{3}$.
7. Wood and bamboo must be cut by Jalil's order Azmat - can use for his own.
8. Road maintenance - half & half.
9. Cane payment on nett money - half & half.
10. An average for one acre - 4 bags salt - 2 bags - natti.

- "11. Any dispute on land both owners must see and settle.
- 12. When Jalil will tell Ajmat to leave the land within 10 years of time, Jalil will have to pay all the amount for damage on work by Ajmat.
- 13. When Ajmat will leave the land ploughed 1st time on 4 acres Ajmat will have to pay for the ploughing. When planted not damaged.
- 14. On flat land only sugar cane must be planted.
- 15. Rent 1/3 share - Ajmat. 25 acres.
- 16. 1977 to 1987 singment of cane cutting would be hired to Anwar Ali. 6612 and 6749. Anwar Ali will get good well on gang rait only Jalil's share from Mr. Jalil.
- 17. Cane payment must be given within 8 days. After F.S.C. payment.
- 18. If Azmat leave the land between 10 years he won't get any damage.

Land owner: (Sgd.) Mohammed Jalil
 Sub owner : (Sgd.) Azmat Ali
 Witness: (Sgd.) San Ali"

The plaintiff's land situate at Ba is 194 acres. Of that area the agreement reveals that the defendant will be allowed to cultivate 25 acres.

In paragraph 5 the plaintiff complains that the defendant is in breach of his agreement and he now wants possession of the land cultivated by the defendant. He does not define the breach or breaches. To support his claim he points out that in any event the arrangement is unlawful in that no consent thereto was give by the Native Land Trust Board under Section 12 of the Native Land Trust Ordinance. He says that the defendant refuses to quit in spite of notices requiring him to do so.

In his affidavit showing cause the defendant alleges that he has cultivated the land as a tenant since 1975 and denies that he eger worked as a labourer for the plaintiff. He relies upon the agreement pointing out that it is for ten years and that he is not in breach of it but accepts that there was no consent thereto by the Native Land Trust Board.

3.

He reveals that he has filed an application to the Agricultural Tribunal which is to be heard on 26th August. The application is dated 21st April, 1980 and the plaintiff's application to this Court for possession was filed on 28th May, 1981. It may be that this action has been filed to forestall any decision which the Agricultural Tribunal may make in favour of the defendant. His application to the tribunal is for a declaration of tenancy under Section 18(2) of the Agricultural Landlord and Tenant Ordinance and an order for an assignment of it to him. Any decision of the Tribunal to create and assign a tenancy to the defendant could only be achieved by sub-dividing the land. Section 18(2) of the Agricultural Landlord and Tenant Ordinance reads:-

"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 amount of compensation (not being compensation payable under the provisions of Part V) paid, as it shall think fit, by the landlord or 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."

The defendant submits that this action should be stayed pending any decision of the tribunal. That application of the defendant indicates that he cannot point to an immediate and existing right to possession which is at once enforceable by this court. If I stay these proceedings it could suggest that I consider that if the plaintiff obtained an order for possession under Section 169 of the Land Transfer Act the Agricultural Tribunal, under Section 18(2) of the Agricultural Landlord and Tenant Ordinance could nullify this Court's order and grant a lawful tenancy to the defendant. I doubt if that is possible because Section 62(3) of the Agricultural Landlord and Tenant Ordinance forbids the tribunal to adjudicate upon an issue which this Court has decided. Moreover Section 62(4) indicates that where a situation such as this arises it is the tribunal not the Supreme Court which should consider a stay of proceedings.

If the plaintiff obtained possession under a writ of possession there would be nothing on which the defendant could found a claim before the Agricultural Tribunal.

It is conjectures of this nature which probably cause concern as to the powers of the Tribunal under Section 18(2) of the Agricultural Landlord and Tenant Ordinance. I understand from counsel that the tribunal has ignored Section 12 of the Native Land Trust Ordinance and has purported to create legal tenancies which originated in an unlawful disposition of land.

Dr. Sahu Khan strongly urges that in examining Section 18(2) one should pay careful attention to the definition of tenant in Section 2 of the Agricultural Landlord and Tenant Ordinance.

"'tenant' means a person lawfully holding land under a contract of tenancy....."

He argued that a person who holds land under an arrangement which is contrary to Section 12 of the Native Land Trust Ordinance is not a "tenant" because he does not 'lawfully hold' the land. He submits that Section 18(2) only applies to a "lawful tenant" who during his tenancy commits some breach which makes his tenancy unlawful. I am not inclined to accept that argument "in toto" because a breach does not make a lawful tenancy unlawful although it may give the landlord the right to determine the tenancy. Moreover, Section 18(2) refers to the tribunal's powers in regard to "the tenancy or purported tenancy" and supposedly a purported tenancy can scarcely have a "lawful tenant".

The parties are undoubtedly in breach of Section 12 of the Native Land Trust Ordinance and the agreement on which the defendant relies is null and void in that no consent was obtained from the Native Land Trust Board. The defendant contends that in spite of the illegality he may have some right to possession under the Agricultural Landlord and Tenants Ordinance.

Under Section 172 of the Land Transfer Act the defendant has to show an existing right to possession. His contentions do not show a right to possession which I can recognise and record by reference to any statute. What he says is that he has applied to the Tribunal for an order that the land be assigned to

him. It will still be necessary for him to persuade the tribunal that it should assign the land to him. Apparently he is not bound to succeed and he only hopes that the decision will be in his favour. In whose favour will the tribunal decide? What principles must the tribunal follow in arriving at a decision? I do not observe that any principles are set out in the ALTO; I do not know what considerations would move the tribunal to make a decision one way or the other. Consequently I cannot conclude that the defendant must succeed before the tribunal and it follows, I think, that I cannot honestly say that the defendant has shown that he has a right^{to}/possession. He has only shown that he has filed an application without anything to suggest that it deserves any success.

If there is some violent inconsistency between Section 12 of the Native Land Trust Ordinance and Section 18(2) of the Agricultural Landlord and Tenant Ordinance in relation to agricultural land how is it to be resolved?

It is contended by the defendant that Section 59(2) of the ALTO enables the tribunal to override the illegality of the contract in this case. Section 59(2) reads as follows:-

"(2) The provisions of sections 7,8,9,10,11 and 12 of the Native Land Trust Act and all regulations made thereunder shall be subject to the provisions of this Act."

If a disposition of land is illegal under Section 12 of the Native Land Trust Ordinance and if the tribunal has power under Section 59(2) of the Agricultural Landlord and Tenant Ordinance to ignore the illegality and to confirm the transaction what is the purpose of Section 12 of the Native Land Trust Ordinance in relation to agricultural land? If the tribunal can ignore "a section 12" illegality what is the purpose of Section 62(3) of the Agricultural Landlord and Tenant Ordinance which forbids a tribunal to exercise that power if the Supreme Court has declared the "tenancy" illegal?

6.

Section 59(3) of Agricultural Landlord and Tenant Ordinance reads as follows:-

"(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."

It appears to contradict Section 59(2) if no application can be made to the tribunal in respect of a tenancy made in contravention of any law. Absence of Native Land Trust Board consent makes the defendant's tenancy unlawful under Section 12 of the Native Land Trust Ordinance and hence under Section 59(3) of ALTO he would not on the face of it be entitled to ask the tribunal to allocate a tenancy to him.

However Section 18(3) of the Agricultural Landlord and Tenant Ordinance on the face of it appears to add to the confusion by enacting as follows:-

"(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 sub-section (2) maybe 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."

It would seem that although the tribunal may under Section 18(3) make a declaration in relation to a contract of tenancy which was made in contravention of Section 12 of the Native Land Trust Ordinance it cannot order an assignment of the tenancy because it would be unlawful.

What kind of declaration is it that a tribunal can make under Section 18(2) of the Agricultural Landlord and Tenants Ordinance? Sub-section (2) says:-

"(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 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."

There is no provision enabling the tribunal to declare that a tenancy which is null and void shall be good and valid. It can only declare that certain tenancies are null and void. It cannot for instance declare that notwithstanding the provisions of Section 12 of the Native Land Trust Ordinance a tenancy made in contravention of Section 12 shall be construed as lawful and effective.

If a court or tribunal is empowered to declare legal that which the legislature has declared illegal the statute creating such power should expressly say so in exact words and not leave it to be deduced that such a power must be intended.

I am not trying to point out to the Chairman of the Tribunal or to the Central Appeal Tribunal what they should do on receipt of applications of this nature.

In fact the learned chairman of Central Tribunal in Appeal No. 1/80 in the case of Ram Bilas has expressed views suggesting that he may concur in my observations. Since the defendant has asserted that he has some right to possession which can be enforced under Section 18(2) of the Agricultural Landlord and Tenant Ordinance it has been necessary to try and ascertain what that right is.

One may sympathise with persons such as the defendant but I think they enter into these arrangements with their eyes open. This kind of arrangement is a continual source of litigation in Fiji and has been for very many years. If it is complained that persons such as the plaintiff are guilty of sharp-practice one can reply that persons such as the defendant are aware of it but hope somehow to turn the illegal arrangement to their own advantage, and that in my view represents the position in the instant case.

I do not for one moment accept that the defendant may have been beguiled or misled into believing that he was entering into a lawful arrangement.

If the defendant has a right which he can assert before the tribunal why must it disappear as a result of any decision of this Court? This Court has no power to prevent the exercise by the tribunal of its lawful powers. If, as the defendant argues, the tribunal has certain unique powers in relation to agricultural tenancies they are presumably operative without reference to the ordinary Courts and nothing done by this Court take away the tribunal's powers. I cannot and indeed I would not wish to deprive the defendant of any right conferred upon him by ALTO. If he has a right to tenancy and if the tribunal has power to enforce that right under an illegal agreement I fail to see how a decision of this Court can render it useless.

If I accept the defendant's arguments then the position of the parties to an unlawful disposition of land under Section 12 of the Native Land Trust Ordinance is as follows:-

Once the alienor or disposer shows signs of wanting his land back then a race develops between the parties. The alienor rushes to the Supreme Court with its speedy summary remedy under Section 169 of the Land Transfer Act and endeavours to get possession on the ground of illegality. The alienee hurriedly files with the Agricultural Tribunal an application for a declaration under Section 18(2) of the Agricultural Landlord and Tenant Ordinance to be accompanied by the allocation to him of a lawful tenancy. Much depends on which proceedings are concluded first. Success in the Supreme Court deprives the Agricultural Tribunal from dealing with the application. The defendant appears to think that success in the tribunal for the defendant will deprive the plaintiff of his remedy in the Supreme Court. I would have thought that if a plaintiff has a right to possession which is enforceable in the Supreme Court it would be strange if a decision of the tribunal can defeat that right.

I do not accept that such a situation exists.

I have indicated that the position as I see it under Section 18(2) and (3) is that where there is a breach of the Agricultural Landlord and Tenant Ordinance or any law by tenant or landlord the tribunal may declare the tenancy null and void and may order land under an unlawful tenancy to be assigned to the tenant provided the assignment itself would not be unlawful.

The plaintiff's application succeeds. The defendant is ordered to give up possession and to pay the costs of these proceedings which I fix at \$300 excluding disbursements.

LAUTCKA,
14th July, 1981.

(Sgd.) J.T. Williams,
JUDGE