IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 1091 of 1982

IN THE MATTER of an Application for Possession of Land under Section 169 of the Land Transfer Act, 1971

Between:

DOUGLAS JAMES GOWING GARRICK of Suva, Estate Manager and HELEN LENA GARRICK his wife — Plaintiffs

- and -

LOTAN (father's name Durga) of Deuba, Fiji, Sawmill Operator — Defendant

D E C I S I O N

The plaintiffs have summoned the defendant, in pursuance of the provisions of Section 169 of the Land Transfer Act (Chapter 131) to show cause why he should not give up possession of the 29 acres 3 roods and 27 perches of land described in Certificate of Title No. 20544 of which the plaintiffs have been registered proprietors since 2nd July, 1981.

On 9th December, 1983, Mr. Koya, for the defendant, argued as a preliminary point that either the summons should be dismissed or these proceedings should be adjourned pending the determination of a current

application to an agricultural tribunal by the defendant under Sections 5 and 23 of the Agricultural Landlord and Tenant Act (Chapter 270) for a declaration of tenancy and an order to secure an instrument of tenancy.

As authority for the dismissal of a Section 169 summons Mr. Koya cited Caldwell v. Mongston (1907) 3 F.L.R. 58 and Ferrier-Watson v. Venkat Swami (Civil Action 29 of 1967 - unreported). I noted that the Fiji Court of Appeal had endorsed the power of dismissal in Jamnadas and Co. Ltd. v. Public Trustee and Prasad Studios (Civil Appeal No. 29 of 1972) in the following passage :

> "In the past, on earlier but similar legislation, the Supreme Court has held that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide them on summary proceedings of this nature, but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings by Writ of Summons. Instances quoted by counsel are Caldwell v. Mongston (1907) 3 F.L.R. 58 and Ferrier-Watson v. Venkat Swami (Civil Action 29 of 1967 - unreported). The power of the court to adopt this approach has not been challenged so it is not material to consider whether it arises under section 172 of the Act or from inherent power to reject as unsuitable procedure where another, comprehensive and better suited to the determination of controversial matters, is available."

I saw nothing in that passage to suggest that I must or should dismiss the summons and I declined to do so.

In relation to Mr. Koya's alternative submission that the proceedings should be adjourned, I noted that in three cases cited by him, Chandra Wati v. Gurdin (Civ.App.

No. 34 of 1980), Dharam Lingam Reddy v. Pon Samy and Ors. (Civ.App. No. 42 of 1981) and Amzat Ali v. Mohammed Jalil (Civ.App. No. 44 of 1981) the Fiji Court of Appeal had set aside a judge's order for possession made on a Section 169 summons and itself ordered that the proceedings before the judge be adjourned pending the determination of the defendant's application to an agricultural tribunal under the Agricultural Landlord and Tenant Act in respect of the land in question.

The defendant had alleged in paragraph 4 of his affidavit of 29th March, 1983, that on that day (over three months after the issue of the summons and over two months after it had been served on him) he had "caused an application to be lodged with the Agricultural Tribunal at Lautoka (Ref. No. C&ED 5/83) against the plaintiffs seeking from the said Tribunal a Declaration of Tenancy in respect of the said land under Section 5(1) of Agricultural Landlord and Tenant Act and for an Order to secure an Instrument of Tenancy under Section 23 thereof." That had not been denied by the plaintiffs.

In relation to Mr. Koya's submission, the three cases I have just mentioned seemed to me to be clear authority for the proposition that if there is, when a Section 169 summons comes on for adjudication by a judge of this court, already before an agricultural tribunal an application by the defendant which would confirm his possession of the land in question, the Section 169 proceedings should be adjourned pending the outcome of that application. I therefore asked myself whether the application before the tribunal could possibly confirm the defendant's possession of the land. I decided that it could not, and I accordingly declined to adjourn these proceedings pending the outcome of that application. My reasons are set out in the record.

That was in December 1983. Since then, these proceedings have been adjourned several times for reasons appearing in the record.

On 8th June, 1984, I heard counsels' argument as to whether the defendant had shown cause, as required by Section 169 of the Land Transfer Act, why he should not give up possession to the plaintiffs. Mr. Koya merely repeated his former argument that, because there was a current application before an agricultural tribunal by the defendant, I should adjourn these present proceedings pending the outcome of that application.

That application, counsel agree, is still before the tribunal. There is, to my mind, ample reason for saying that, if it ever proceeds, it is bound to fail.

The present proceedings before me, and the defendant's current application to an agricultural tribunal, relate to the 29 acres 3 roods and 27 perches of land described in Certificate of Title No. 20544 of which the plaintiffs have been registered proprietors since 2nd July, 1981. It was transferred to the plaintiffs on that date by the several registered proprietors of some 4832 acres of land described in Certificate of Title No. 3210 of which it was a portion.

It is common ground that, since 1946, the defendant has occupied an area of some 336 acres (part of the land described in that Certificate of Title No. 3210) which includes that area of 29 acres 3 roods and 27 perches.

It is also common ground that, on 24th August, 1977, an agricultural tribunal rejected an application by

the defendant under the Agricultural Landlord and Tenant Ordinance (now an Act, Chapter 270) for a declaration of tenancy in respect of that 336 acres.

A typewritten copy of the findings of the tribunal was tendered to me by Mr. Sweetman, counsel for the plaintiffs. Mr. Koya did not object to the accuracy of that copy but he objected that its contents were "irrelevant" and that it should not be considered by me for that reason. I rejected that objection. A certified copy has been subsequently obtained from the secretary of the tribunal. It shows that a document which the defendant tendered to the tribunal as a contract of tenancy was, in the tribunal's well justified view, a patent forgery. It also records the following findings, inter alia, of the tribunal :

(i) that the defendant had been from 1946 a tenant from year to year of that area of 336 acres,

(ii) that the defendant's tenancy from year to year had been terminated by a notice to quit dated 9th May, 1974 and

(iii) that section 4 of the Ordinance (which remains unaltered as section 4 of the Act) did not, in the circumstances, create a presumption of tenancy in favour of the defendant.

The defendant's appeal to the Central Agricultural Tribunal failed - that is also common ground.

The application to the tribunal and the appeal were resisted by the then proprietors of the land. On 2nd July, 1981, they transferred to the plaintiffs the

does indicate however that the Privy Council acknowledged that there were cases which justified the granting of a declaration instead of damages.

I consider the House of Lords cases I have referred to are authorities I should follow.

Relying on Vine's case, I would hold that the purported dismissal was irregular and damages in the instant case would not be an adequate remedy since the plaintiff is a specialist lecturer and academically over-qualified for an ordinary teaching position at primary or secondary level. He was on the permanent staff and could look forward to promotion and employment until he was 60 years of age. He would also lose the benefits of the University Superannuation Fund.

I am, however of the view that the purported dismissal by the Registrar was a complete nullity. On the facts before me it was prohibited by statute. Relying on McLelland's case, I hold on the facts that the appellant's employment was not validly terminated by the University and the University had in any event no power to dismiss since it had failed to take any of the preliminary steps required by Statute 19 or indeed the contract of employment.

I hold as a fact that the purported dismissal is a nullity

I grant the relief claimed in slightly amended form and declare that the notice of the 18th August, 1982, purporting to terminate the plaintiff with the University is void and of no legal effect.

The said Application was made under Section 169 of the Land Transfer Act Cap. 131.

5. THAT notwithstanding the decision of the Agricultural Tribunal made on the 24th August 1977 or the decision of the Central Tribunal on the 21st June 1978, the Applicant has been occupying and cultivating the said 29 acres 3 roods and 27 perches and the adjoining Agricultural Land with the consent of the Respondents. The Applicant has offered rent to the Respondents but they have refused to accept the same."

It will be seen that the defendant is now alleging that since 24th August 1977 (the date of the dismissal of his earlier application) he has been occupying and cultivating the land in question with the consent of the plaintiffs (the "respondents" to whom he refers in paragraph 5 of that statement of claim). He repeats that allegation in paragraph 10 of his second affidavit of 7th December, 1983.

Of course, the two plaintiffs could not both have consented before 2nd July, 1981. One of them, the first plaintiff, appears from the affidavits to have been one of the former proprietors of the portion of 29 acres 3 roods and 27 perches when it was part of the area of 336 acres but the second plaintiff was not, and was therefore incapable of consenting. However, the question whether both of the plaintiffs have consented to the defendant's occupation of the portion since 2nd July, 1981, when they became its registered proprietors, appears to be an issue which the tribunal might have to decide in relation to the defendant's current application.

Still, in my view, there is ample ground for saying that the current application is bound to fail.

Section 4(1) of the Agricultural Landlord and Tenant Act reads as follows :

> "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 such onus of proof, a tenancy shall be presumed to exist under the provisions of this Act:
>
> Provided that any such steps taken between the 20th day of June 1966, and the commencement of this Act shall be no bar to the operation of this sub-section."

That proviso, needless to say, does not apply in the circumstances of this case.

Section 5 enables a person who maintains that he is a tenant to apply to an agricultural tribunal for a declaration of tenancy.

It seems to me that, on a proper construction of Section 4(1), read together with Section 5, the intention of the legislature must be taken to be that if an applicant shows (i) that he has occupied and cultivated the land for a period of not less than three years immediately prior to making application under Section 5 for a declaration of tenancy and (ii) that the landlord has taken no steps to evict him prior to that application, the onus is then cast upon the landlord at the hearing of the application to prove that such occupation has been without his consent and that if (and only if) the landlord fails to discharge that onus a tenancy must be presumed to exist.

I do not think that an applicant can validly argue that the moment he has occupied and cultivated the land for three years, without the landlord having taken any steps to evict him during that period of three years, a presumption of tenancy arises. If, no steps to evict having been taken by the landlord, he fails to prove at the hearing of the application that the occupation has been without his consent, a tenancy must then (and not until then) be presumed to exist. Clearly, in my view, it is not until the landlord fails to discharge that onus at the hearing that the presumption matures.

In fact, the plaintiffs did take steps to evict the defendant before he made his current application to the tribunal. They issued the Section 169 summons in the present proceedings on 15th December 1982. As the defendant says in paragraph 4 of his affidavit of 29th March 1983, his current application to the tribunal was lodged that day, more than three months after the summons was issued.

The issue of the summons would necessarily, in my view, be fatal to the defendant's current application. It follows that the application could not possibly confirm his possession of the land to which these present proceedings relate and that I must respectfully reject his counsel's submission that these present proceedings should be adjourned to await the result of that application.

The defendant must show cause why he should not give up possession of the land, namely that 29 acres 3 roods and 27 perches of which the plaintiffs are the registered proprietors. His counsel having emphatically submitted that I am confined in my consideration of the matter to the affidavits, I have considered all of them.

The plaintiffs say, in effect, that the defendant has been a trespasser ever since his tenancy from year to year was terminated by notice to quit with effect from 31st December, 1974.

The defendant says that by reason of his occupation and cultivation of the land he has a right to a declaration of tenancy by an agricultural tribunal but I have ruled that his current application to a tribunal for a declaration of tenancy, made on the ground of that occupation and cultivation, is bound to fail.

In paragraph 3 of his affidavit of 29th March, 1983, the defendant says "... I have occupied and cultivated the same as the Plaintiffs' tenant" and "I am therefore entitled to a declaration of tenancy under Section 5 of the Agricultural Landlord and Tenant Act and for an order for an instrument of tenancy under Section 23 of the same Act." I take that to mean that he claims a presumptive tenancy under Section 4(1). I have ruled that, because of the Section 169 summons issued by the plaintiffs, a tenancy cannot be presumed under Section 4(1).

I take the defendant's application for an order for an instrument of tenancy to be tantamount to an admission that there is no such instrument. If he means that a tenancy has, without the assistance of Section 4(1) or an instrument of tenancy, been created, he has failed to specify its nature or term or how it was created. He does not deny that his former tenancy from year to year was terminated on 31st December, 1974 as alleged in paragraph 5 of the plaintiffs' joint affidavit of 15th December, 1982. He says vaguely in paragraph 10 of his affidavit of 7th December, 1983, "... I have been occupying and cultivating the said

29 acres 3 roods and 27 perches and the adjoining Agricultural Land with the consent of the Plaintiffs. I have offered rent to the plaintiffs but they have refused to accept the same." The plaintiffs do not admit such consent. On the contrary, the first plaintiff, in paragraph 10 of his affidavit of 9th December, 1983, "categorically denies" it.

I do not think that the plaintiffs' refusal to accept rent, which the defendant himself alleges, would necessarily mean that his occupation of the land was without their consent. Nor do I suppose that their refusal to accept rent would necessarily negative the creation of a tenancy. See footnote (c), page 407, Vol. 23, Halsbury's Laws of England, 3rd edition.

However, the defendant, upon whom the onus of showing cause is cast by Section 169, has, in my view, done no better than to show the possibility of a tenancy at will. Such a tenancy is determined by the service by the landlord of a writ for possession: Martinali v. Ramuz (1953) 2 All E.R. 892, C.A. and paragraph 1155 on page 508 of the volume of Halsbury to which I have referred above. In that case, Lord Denning said "It is elementary that a tenancy at will is determined by a demand for possession, not by a notice to quit. These tenancies at will were determined by the issue of a writ claiming possession which is itself a demand for possession." I take Martinali to be sufficient authority for ruling that the Section 169 summons which was issued by the plaintiffs on 15th December, 1982, and served on the defendant on 15th January, 1983, itself determined the defendant's tenancy at will (if he enjoyed such a tenancy at all).

For the reasons I have given, I hold that the defendant has failed to show cause why he should not give up possession to the plaintiffs.

I accordingly order the defendant to give up vacant possession to the plaintiffs of all of the land described in Certificate of Title No. 20544 within one calendar month from today.

I also order that he pay the plaintiffs' costs of these proceedings, to be taxed if not agreed upon.

R. A. Kearsley

(R.A. Kearsley)
JUDGE

Suva,

21st June, 1984.