

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

B E T W E E N

RAM SHANKAR S/O PACHU

Appellant

-and-

PAREKH HOLDINGS LIMITED

Respondent

CASE FOR THE RESPONDENT

Record

Pp.32-36

Pp.28-30

P.3

10 1. This is an appeal from a Judgment and Order of the Court of Appeal of Fiji (Gould V.P., Marsuch J.A. and Henry J.A.) dated the 19th day of July 1973 whereby the Court of Appeal of Fiji dismissed with costs an appeal by the Appellant herein (a Defendant at the hearing) from a Decision and Judgment dated the 30th day of January 1973 of the Supreme Court of Fiji (Tuivaga J.) whereby a Decision was given in favour of the Respondent herein that pursuant to the provisions of Section 169 of the Land Transfer Act 1971 the Respondent was entitled to recover possession of the land described in the Certificate of Title No.8663 being an area of 6 acres of Navua and ordering the Appellant herein to give up possession of the said land.

20

2. The principal question raised by the appeal herein is whether or not the Learned Trial Judge was entitled to adopt the procedure provided for by Section 169 of the Land Transfer Act 1971.

30

3. In his Summons for Ejectment, the Respondent required the Appellant and the other Defendants to the Summons namely Ram Sarup and Shanti Devi to show cause why they should not be ordered to give up immediate vacant possession to the Respondent of all that piece of land which was occupied then and described in Certificate of Title No.8633 as "Tokotoko" (Part of) Lot 46 on D.P. 1218. The said summons was supported by an affidavit sworn on behalf of the Respondent by Sashi Kant Parekh who

deposed that he was a director of the Appellant Company and that the Defendants to the Summons were in unlawful occupation of the said land.

P.5-7

4. The said Defendant Shanti Devi swore and filed an affidavit to support the contentions of the Defendants that they were entitled to remain in occupation on the said land. In her said Affidavit Shanti Devi deposed that the title to the said land had been vested in her before she had executed a transfer of the same to Craids Enterprises Limited who had then mortgaged it to the Bank of New South Wales and it had then been sold by the Bank of New South Wales under their powers as Mortgagees to the Respondent. The said Shanti Devi further deposed in her said affidavit that she was intending to amend an action that had been commenced in respect of her transfer of the said land to allege that the same was null and void for lack of consideration. The said Affidavit also alleges that the said land was subject to agricultural tenancies in favour of the appellant therein and the said Ram Sarup.

10

20

5. The said Summons for Ejectment came on for argument before Tuivaga J on the 9th day of January 1973 when Counsel who appeared on behalf of the Respondent submitted in relation to the said affidavit of Shanti Devi:

P.27

(a) that the allegation of fraud was irrelevant;

(b) that the said land was exempt from the provisions relating to agricultural tenancies by virtue of the Agricultural Landlord and Tenant (Exemption) Regulations 1967, Regulation 2 (2) and

30

(c) that the Fair Rents Ordinance was inapplicable because the said land was not a dwellinghouse within the statutory definition thereof.

Counsel who appeared on behalf of the Appellant submitted that the matter should go to trial in reliance on the provisions of Section 40 of the Land Transfer Act 1971.

40

Pp.28-29

6. On the 30th day of January 1973 Tuivaga J gave his Decision and held that possession of the said land should be given up as sought in the said summons. The Learned Judge found:

P.28,
-Ll.24-25

"this land was purchased by the Plaintiff from Craids Enterprises Limited, free from encumbrances!"

The Learned Trial Judge then concluded in reliance on Section 39 of the Land Transfer Act, the Appellant respectfully submits correctly, that:

10 "the only circumstance in which the title of the Plaintiff could be impeached would be on proof of fraud on its part. There is no evidence whatever that the Plaintiff acquired its registered title to the land through fraud. Although an allegation of fraud has been made by Counsel for the Defendants, it is quite clear that this allegation refers to Craids Enterprises Limited, who had purchased the land from the Defendants and is irrelevant to this application."

P.28,L 32-

P.29 L3

The Learned Trial Judge then ruled that possession should be given up to the Respondent of the said land on the 28th day of February 1973 by the Appellant and the other Defendants.

20 7. Notice of Appeal dated the 26th day of February, 1973 was given by the Appellant herein on his own behalf, and apparently also on behalf of the said Ram Sarup and the said Shanti Devi, giving notice that they were appealing against the said Judgment for an Order that the same be set aside and that a new trial be ordered and that the costs of the said trial and the appeal be paid into court to abide the result of the new trial. It is respectfully submitted that so far as the said notice purported to be on behalf of the said Ram Sarup and Shanti Devi, the same was invalid and the Court of Appeal were correct in impliedly so holding. The grounds of the said appeal were:

Pp.31-32

P.33,L1 43-44

30 "1. That the Learned Trial Judge erred in law in not making an order for a trial in open court of the issues raised by the Third Appellant/Defendant in her Affidavit in view of the fact those issues controverted the issues raised by the Plaintiff.

P.31,L.36
P.32,L.12

40 2. That the Learned Trial Judge erred in law and in facts in making an order for possession against the Appellant/Defendants when the land in question was an agricultural land and when there was an action pending before the Agricultural Landlord and Tenant Tribunal;

3. That the verdict is wrong in law and is unreasonable and cannot be supported having regards to the whole of the facts in this action."

8. The appeal came on for hearing before the Court of

Record

Appeal (Gould V.P., Marsuch and Henry JJ.A.) on the 2nd day of July 1973. Judgment was reserved until the 9th day of July 1973 when Gould V.P. gave the Judgment of the Court dismissing the Appeal of the Appellant herein.

Pp.33-35

In the said Judgment, Gould V.P. summarised the issues in the case and paid especial regard to the said affidavit of Shanti Devi. He stated that the Learned Trial Judge had made his order, relying upon the indefeasibility provisions of the Land Transfer Act. He further stated, it is submitted correctly, that as only Shanti Devi had sought to base her right to possession upon a question relating to the title to the land and she had not appealed, the issue of title was concluded in favour of the Respondent. The Respondent herein will further rely on the fact that the issue of title was not raised in the Appellant's Notice of Appeal to the Court of Appeal.

P.33, L1.35-39

10

P.34, L15-33

9. The Vice President then turned to the issue as to whether or not the Appellant was entitled to remain in possession of the land as an agricultural tenant. The Vice President commented that there was no evidence in support of the contention that an agricultural tenancy existed other than the said affidavit of Shanti Devi and the exhibits thereto. The Vice President summarised the issue before the Court of Appeal in this way:

20

"The question is whether evidence of this type, put forward in the way it was, is sufficient to show cause why the appellant should not be put out of possession."

30

10. It is respectfully submitted that the Vice President was correct in concluding that the absence of evidence as to the existence or non-existence of any tenancy was the issue in the appeal. It is further submitted that the Vice President was correct when he concluded that the evidence before the Court of Appeal of the existence of any tenancy was insufficient to support an arguable case for the Appellant. He so stated in the following words:

40

P.35, L12-24

"In order to show cause the appellant surely had to come forward with his own evidence, not hearsay, condescending upon particulars, showing that the land in question was in fact

agricultural land subject to the Ordinance in question, giving some details as to area, crops, parties, rent, and matters generally which would indicate at least a possibility that this claim might be supported.

10

It is not of course, and would not have been even if the appellant had provided evidence to the purport above-mentioned, the task of the Supreme Court or this Court to decide whether the appellant - would be entitled to a tenancy under the Agricultural Landlord and Tenant Ordinance; that is a question for the Tribunal established by the particular legislation. It is enough for present purposes to say that he clearly has not shown himself to have any claim as a common law tenant; nor has he, by the manner in which he has

20

chosen to put forward a case which at best can only be described as shadowy and suspect, shown sufficient cause to be permitted to remain in possession while he pursues his application to the Agricultural Tenancy Tribunal."

30

11. The Respondent respectfully submits that the passage cited above is in accordance with the law. Reliance is placed upon the provisions of Sections 169 to 172 of the Land Transfer Act, 1971. The material provisions thereof provide as follows:-

"169. The following persons summon any person in possession of land to appear before a Judge in Chambers to show cause why the person summoned should not give up possession to the applicant:-

(a) the last registered proprietor of the land;

(b) ...

(c) ...

40

170. The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.

171. ...

172. If the person summoned appears he may

Record

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:

Provided that the dismissal of the summons shall not prejudice the right of the Plaintiff to take other proceedings against the person summoned to which he might otherwise be entitled.

10

Provided also that in the case of a lessor against a lessee, if the lessee, before the date of the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons."

The Respondent respectfully submits that the effect of the said statutory provisions are such that the onus lies upon the Defendant to a Summons for Ejectment who must be able to prove some reasonable entitlement to occupy the land in respect of which the Registered Proprietor claims possession. The Respondent further submits that, as a matter of practice, unless an arguable defence can be shown by the occupier of the land, a judge ought to make an order such as was made in the instant case for possession to be given up. In the premises the appellant respectfully submits that the Learned Trial Judge was acting in accordance with the law in making the Order that was sought by the summons. Such an order being with the discretion of the Trial Judge, the Respondent respectfully submits that the same ought not now to be varied.

20

30

P.34, Ll-39-41

12. It appears from the judgment of the Vice President that it was submitted before the Court of Appeal that there was no evidence of any tenancy. Although this point was not dealt with expressly in the judgment of the Court of Appeal the Respondent submits that by implication the Court of Appeal accepted the same. The Respondent respectfully submits that there was evidence on which the Court of Appeal and the Learned Trial Judge could conclude that the Appellant had no arguable case that he was more than a mere licensee of the said land and accordingly not a tenant thereof. The evidence relating to this point is summarized in paragraph 15 below. The Respondent further respectfully submits that in any event the Appellant did not

40

adduce any sufficient evidence to suggest that any tenancy he might have would be capable of enjoying any form of statutory protection.

10 13. The Fair Rents Ordinance (Cap 241) which it appears was relied on before the Trial Judge only and not in the Court of Appeal, the Respondent respectfully submits, is not applicable to the claim as advanced in the affidavit of Shanti Devi. Section 2(1) of the said Ordinance provides:

20 "In this Ordinance unless the context otherwise requires... "dwelling-house" means any building or part of a building let solely for human habitation as a separate dwelling where such letting does not include any land other than the site of the dwelling house or the garden or other land within the curtilage of the dwelling house, and includes any part of a building so let in respect of which any part of the accommodation is shared by two or more persons."

30 In the premises the Respondent respectfully submits that as the land which is described in the Summons and in the affidavit of Sashi Kant Parekh as being an area of 6 acres and as it is also so described in the "Application for Reference to a Tribunal" which is exhibited to the affidavit of Shanti Devi, the same is not prima facie within the said definition and the alleged tenancy is not capable of being a tenancy protected under the said Ordinance. The Respondent further relies on Section 19 of the said Ordinance which prohibits the making of a judgment or order for the recovery of possession of a dwellinghouse except in certain cases. One case is set out in subsection 1(a) thereof which provides for an exception if:

40 "the lessee has failed to pay the rent.."

Accordingly for the Ordinance to operate an obligation to pay rent must be shown as an obligation on the part of the Appellant. Therefore the Respondent also respectfully submits that as there is no evidence of such an obligation the Appellant failed to show the benefit of the said ordinance applied to his occupation of the said land.

Record

14. The said Judgment of the Court of Appeal does not deal with the Respondent's contention that there was no evidence of the existence of any agricultural tenancy subject to the Agricultural Landlord and Tenant Ordinance (Cap 242). It is respectfully submitted on behalf of the Respondent that there is no evidence to justify a contention that the appellant has made out a prima facie claim to be a tenant protected within the meaning of the said Ordinance. The provision enabling a person to apply for a declaration of the existence of an agricultural tenancy is contained in Section 5 (1) of the said Ordinance. This provides:-

10

"A person who maintains that he is a tenant and whose landlord refuses to accept him as such may apply to a tribunal for a declaration that he is a tenant and, if the tribunal makes such a declaration, the tenancy should be deemed to have commenced when the tenant first occupied the land.

20

Provided that rent shall only be recoverable by process of law from the date of the application to the tribunal."

There is no evidence that the Appellant ever asked to be accepted as a tenant by the Respondent before an application was made for reference to a tribunal under the said Ordinance. The Respondent respectfully submits that the alleged tenancy would not in any event be within the scope of the said Ordinance by reason of the Agricultural Landlord and Tenants (Exemption Regulations) 1967 (Legal Notice No.96) which states by Regulation 2:

30

"The provisions of the Ordinance shall not apply:

(a) to any agricultural land:

(1) ...

(2) Occupied by any person under an agreement not to pay rent, whether in legal currency or in kind, or in labour, or in any other form whatsoever."

15. The Respondent so submits because there is no evidence of any of the appurtenances of a tenancy but merely of a family arrangement whereby the said Shanti Devi permitted the Appellant to join in using the said land. The Respondent relies on, firstly, the "Application for a Reference to a Tribunal" which states:

40

"My original landlord was maintained and supported by me in lieu of rent, her successors in title were tendered rent but they refused to accept."

P.22

and secondly the family relationship between the Appellant and the said Shanti Devi and Ram Sarup. The Vice President stated early in his Judgment:

10 "There is reason to believe that the three are related as we were informed that Shanti Devi is the daughter of Ram Shankar and that Ram Shankar and Ram Sarup are described in the proceedings as the sons of Pachu."

P.33, Ll 39-43

He added further on with regard to the answer on the "Application for a Reference to a Tribunal" which is cited above:

20 "It seems evident having regard to the history of the matter outlined above, that the "original landlord" must have been Shanti Devi, his daughter, as we were informed, or, as one affidavit on the file alleges, his de facto wife."

16. At the hearing of the appeal it appears from the judgment of the Vice President, Counsel submitted on behalf of the Respondent Company that by virtue of Section 3 of the Land Transfer Act 1971, a right to a tenancy under the Agricultural Landlord and Tenant Ordinance could not be enforced, as against a new Registered Proprietor of land and accordingly the Appellant could not enforce any right he might have against the Respondent. The Vice President was not prepared to accept this submission when it was made to him saying:

P.34, Ll 39-45

30 "To this last proposition we are unable to accede and if it arose, it is at least a highly important question which would have to be settled in an action and not by summary procedure under Section 169. In our opinion, however, the question does not arise."

P.34, Ll 45- P.35, L.1

40 It is respectfully submitted on behalf of the Respondent that the Vice President was correct when he stated that the question of whether or not an established agricultural tenancy was valid against a new registered proprietor of land did not arise for consideration in the instant case. If the Vice President should be held to be wrong in so holding that the question did not arise for consideration, the Respondent respectfully submits that the Vice President erred in holding that

the question could not be decided in an application by summons under Section 169 as the said question is a question of law that can be determined without evidence and as conveniently on a summons as at a trial.

17. The Respondent further respectfully submits, that if it is necessary to determine the question as to whether or not the provisions of Section 3 of the Land Transfer Act 1971 supercede the provisions in relation to the right to make an application for a tenancy under the agricultural Landlord and Tenancy Ordinance, the proposition made by Counsel for the Respondent before the Court of Appeal is correct. It is so submitted because Section 3 of the Land Transfer Act 1971 provides: 10

"All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this act or to any estate or interest therein." 20

and Section 59 of the Agricultural Landlord and Tenant Ordinance provides:

"Except as in this Ordinance expressly provided nothing contained in this Ordinance shall affect prejudicially any power, right or remedy of a landlord or tenant or other person, vested in or exercisable by him by virtue of any other Ordinance or by, under or in respect of any contract of tenancy or other contract." 30

18. On the 18th day of December 1974, an order made by Her Majesty in Council granted the Appellant special leave to appeal in forma pauperis.

Pp 37-38

19. The Respondent respectfully submits that this appeal should be dismissed for the following, among other,

R E A S O N S

1. BECAUSE the Appellant failed to show any arguable cause why an order for possession of the said land should not be made against him. 40
2. BECAUSE the allegation of fraud did not relate to the acquisition of the said land by the Respondent Company.

3. BECAUSE there was no evidence of any tenancy having been granted to the Appellant.
4. BECAUSE the provisions of the Fair Rents Ordinance and the Agricultural Landlord and Tenant Ordinance were inapplicable to any tenancy that might have been vested in the Appellant.
5. BECAUSE the provisions of the Land Transfer Act 1971 over-ride the provisions of the Agricultural Landlord and Tenant Ordinance and the Appellant is accordingly not entitled to apply for a declaration that he is a tenant under the ordinance.
6. BECAUSE there are concurrent findings of fact.
7. BECAUSE the Learned Trial Judge and the Court of Appeal were right.

10

NIGEL MURRAY

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N

RAM SHANKAR S/O PACHU Appellant

- and -

PAREKH HOLDINGS LTD. Respondent

CASE FOR THE RESPONDENT

NORTON ROSE, BOTTERELL & ROCHE,
Kempson House,
Camomile Street,
London EC3 7AN.

Solicitors for the Respondent

Ref: GHF/24/R.1940
Tel: 283-2434