22/79

IN THE PRIVY COUNCIL

NO. 9 of 1976

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

1. RAM NARAYAN s/o SHANKAR
2. VIJAY KUMAR s/o RAM NARAYAN

(Defendants)Appellants

and

RISHAD HUSSAIN SHAH s/o TASADUQ HUSSAIN SHAH

(Plaintiff)Respondent

(and Cross-Appeal)

RECORD OF PROCEEDINGS

Charles Russell & Co.,
Hale Court,
Lincoln's Inn,
London WC2A 3UL.

Solicitors for the Appellants.

Philip Conway Thomas & Co.,
61 Catherine Place,
Westminster,
London, SW1E 6HB.

Solicitors for the Respondent.

IN THE PRIVY COUNCIL | No. 9 of 1976

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2. VIJAY KUMAR s/o RAM NARAYAN (Defendants) Appellants

and

RISHAD HUSSAIN SHAH s/o
TASADUQ HUSSAIN SHAH (Plaintiff) Respondent

(and Cross-Appeal)

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL   No. 9 of 1976

ON APPEAL FROM THE FIJI COURT OF APPEAL

B E T W E E N :

1. RAM NARAYAN s/o SHANKAR
2. VIJAY KUMAR s/o RAM NARAYAN   Appellants (Defendants)

- and -

RISHAD JUSSAIN SHAH s/o TASADUQ HUSSAIN SHAH   Respondent (Plaintiff)

(and Cross-Appeal)

RECORD OF PROCEEDINGS

In the Supreme Court of Fiji

No. 1

Writ of Summons

26th September 1973

No. 1

Writ of Summons

District Registry No. 167 of 1973

IN THE SUPREME COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Between RISHAD HUSSAIN SHAH son of Tasaduq Hussain Shah of Maro, Nadroga, Driver

and
1. RAM NARAYAN son of Shankar of Maro, Nadroga, Cultivator
2. VIJAY KUMAR son of Ram Narain of Maro, Nadroga, Cultivator

10

WE COMMAND you, that within 8 days after the service of this Writ on you inclusive of the day of such service you do cause an appearance to be entered for you in an action at the suit of RISHAD HUSSAIN SHAH son of Tasaduq Hussain Shah of Maro, Nadroga, Driver and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

20 WITNESS THE HONOURABLE SIR JOHN ANGUS NIMMO

Chief Justice of Fiji, at Lautoka this 26th day

In the Supreme Court of Fiji

No. 1

Writ of Summons

26th September 1973 (continued)

of September 1973

(Signed) MANIKAM J.

For

Solicitor for the Plaintiff.

NOTE - This writ may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

DIRECTION FOR ENTERING APPEARANCE

The Defendant may enter an appearance in person or by a solicitor by handing in the appropriate forms, duly completed, at the Supreme Court Registry at Lautoka. 10

NOTE - Where the writ is endorsed with or served with a statement of claim, if the defendant enters an appearance, then, unless a summons for judgment is served on him in the meantime, he must also serve a defence on the solicitor for the plaintiff within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice. 20

INDORSEMENT OF CLAIM (1)

The Plaintiff claims against the Defendants as per Statement of Claim annexed hereto.

And, where the claim is for a debt or liquidated demand the sum of $25 (or such sum as may be allowed on taxation) for costs, and also, if the plaintiff obtains an order for substituted service, the further sum of $12 (or such sum as may be allowed on taxation). If the amount claimed and costs be paid to the plaintiff, (he being resident 30 within the jurisdiction), or his solicitor or agent within 8 days after service hereof (inclusive of the day of service), further proceedings will be stayed.

In the Supreme Court of Fiji

No. 2

Amended Statement of Claim

28th April 1975

No. 2

Amended Statement of Claim

1. By an agreement in writing dated the 31st day of January, 1968, the Defendants sold to the Plaintiff two sugar cane farms known as Farm Nos. 5128 and 11242 (Lomowai Sector) in Maro, Nadroga, together with all improvements thereon for the sum of Ten thousand dollars (£5000.0.0.).

10 2. On the said 31st day of January, 1968, the Plaintiff paid to the Defendants the sum of Two thousand dollars (£1000.0.0.) towards the said purchase price leaving a balance of Eight thousand dollars (£4000.0.0.).

3. It was orally agreed between the Plaintiff and the Defendants that the balance of the purchase price referred to in paragraph 1 hereof, namely the sum of Eight thousand dollars (£4000.0.0.) should be paid by the Plaintiff
20 to the Defendants upon the Defendants doing all acts and things necessary to vest the ownership of the said farms in the Plaintiff and to assign the benefit of sugar cane contract Nos. 5128 and 11242 (Lomowai Sector) to the Plaintiff within a reasonable time.

4. The Plaintiff was at all times ready and willing and is still ready and willing to perform his part of the said Contract, namely to pay the said balance of the purchase price
30 of Eight thousand dollars (£4000.0.0.) less the proceeds of any sugar cane grown by the Plaintiff on the said farms and uplifted by the Defendants but the Defendants have persistently refused and still refuse to perform their part of the said contract, namely, to do all acts and things necessary to vest the ownership of the said farms in the Plaintiff and to assign the benefits of sugar cane contract Nos. 5128 and 11242
40 (Lomowai Sector) to the Plaintiff.

5. It was an implied term of the said contract of sale that the Defendants would give vacant possession of the said farms and improvements to the Plaintiff upon payment of the sum of Two thousand dollars (£1000.0.0.) referred to

In the Supreme Court of Fiji

No. 2

Amended Statement of Claim

28th April 1975 (continued)

in paragraph 2 hereof and do all acts and things necessary to vest the ownership of the said farms in the Plaintiff and to assign the benefit of sugar cane contract Nos. 5128 and 11242 to the Plaintiff.

6. The Defendants have failed to give vacant possession of the said farms to the Plaintiff nor have they taken any steps to vest the ownership of the said farms and improvements in the Plaintiff nor have they assigned the benefit of sugar cane contract Nos. 5128 and 11242 to the Plaintiff. 10

Wherefore the Plaintiff claims :-

(1) An order that the Defendants give vacant possession of Farm Nos. 5128 and 11242 and improvements to the Plaintiff.

(2) Specific performance of the contract of sale by transferring all the Defendants' right title and interest in the said farms and improvements to the Plaintiff and by assigning the benefit of sugar cane contract Nos. 5128 and 11242 to the Plaintiff. 20

(3) An injunction restraining the Defendants by themselves their servants or agents or otherwise from entering upon the said farms.

(4) Damages.

(5) Costs.

DELIVERED the 28th day of April, 1975. 30

PILLAI & CO.

per: Manikam J.

SOLICITORS FOR THE PLAINTIFF

In the Supreme Court of Fiji

No. 3

Amended Statement of Defence

28th April 1975

No. 3

Amended Statement of Defence

The defendants say:-

1. THAT they deny each and every the allegations contained in paragraph 1 of the Statement of Claim.

2. THAT they admit that the Plaintiff paid the sum of $2,000 to them on the 31st of January, 1968 but deny each and every the other allegation contained in paragraph 2 of the Statement of Claim.

3. THAT they deny each and every the allegations contained in paragraph 3 of the Statement of Claim. Furthermore in answer to paragraph 3 of the Plaintiff's amended Statement of Claim the Defendants deny that any agreement was ever reached between the Plaintiff and the Defendants and say that the negotiations between the Plaintiff and the Defendants had not gone beyond the stage of agreeing to enter into an agreement and it was a condition of such agreement to enter into an agreement that the sum of $8,000.00 would be paid into the offices of Messrs. Munro Warren Leys & Kermode by the Plaintiff upon consent of the Colonial Sugar Refining Company Limited as owners to the proposed transfer of the two farms mentioned therein.

4. The Defendants deny each and every the allegations contained in paragraph 4 of the amended Statement of Claim and without prejudice to matters hereinbefore traversed say that the Plaintiff at no time tendered to them the said sum of $8,000.00 together with form of transfer to be executed by them to vest the said farms in the Plaintiff. Furthermore the defendants say that they are the owners of the two farms in question and that they are not obliged to do any of the things mentioned in paragraph 4 of the Statement of Claim.

5. THAT they deny that there ever was a binding agreement between the Plaintiff and them.

6. THAT alternatively and without prejudice to denials hereinbefore contained they say that

In the Supreme Court of Fiji

No. 3

Amended Statement of Defence

28th April 1975 (continued)

on the 30th day of January, 1968 the Plaintiff paid them the sum of $2,000 by way of deposit and in consideration thereof they agreed to apply to the Colonial Sugar Refining Company Limited for its consent as owner to transfer the said farms to the Plaintiff and it was further agreed by and between the Plaintiff and them that the Plaintiff would upon grant of such consent pay the sum of $8,000 into the offices of Messrs. Munro Warren Leys & Kermode Solicitors, Lautoka to be paid to them and being the balance of the price for the said farms and the cane contracts, in respect of the said farms and they further say that they duly applied to the Colonial Sugar Refining Co. Ltd. for its consent to transfer the said farms to the Plaintiff which the said consent was duly granted but the Plaintiff failed to pay the sum of $8,000 into the offices of Messrs. Munro Warren Leys & Kermode.

10

20

7. THAT as a further alternative they say that even if there was an agreement there is no sufficient note or memorandum thereof and the defendants will rely on Section 59 of the Indemnity, Guarantee and Bailment Ordinance (Cap.208).

8. THE defendants say that on the date of issue of the Writ herein the Farms mentioned in the Plaintiff's Statement of Claim were and still are protected Crown Leases and the Plaintiff has not obtained the permission of the Director of Lands to issue these proceedings and therefore this Court has no jurisdiction to make any order in relation to the said farms.

30

DATED this 28th day of April, 1975.

(Signed)

for STUART REDDY & CO.
Solicitors for the Defendants

40

In the Supreme Court of Fiji

No. 4

Proceedings

28th April 1975

No. 4

Proceedings

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION) AT LAUTOKA

Civil Jurisdiction

Action No. 167 of 1973

Before the Honourable Mr. Justice Williams, Judge

Monday the 28th day of April, 1975 at 9.30 a.m.

BETWEEN:	RISHAD HUSSAIN SHAH s/o Tasaduq Hussain Shah		Plaintiff
A N D:	1.	RAM NARAYAN s/o Shankar	
	2.	VIJAY KUMAR s/o Ram Narain	Defendants

10

Mr. Pillai, Counsel for the Plaintiff
Mr. Reddy, Counsel for the Defendants

Stood down to 10.15 for attempt to settle.

(Sgd.) J.T. Williams

Judge

20

10.20 a.m.

As above

No Agreement.

Plaintiff's Evidence

No. 5

Rishad Hussain Shah

Examination

28th April 1975

No. 5

Rishad Hussain Shah

P.W.1 - RISHAD HUSSAIN SHAH, sworn in Hindi

I reside at Sigatoka. Am a taxi proprietor.

Know defendants who are father and son.

I bought 2 plots of land from them with house and other things which were on land for £5,000.00.

30

In the
Supreme Court
of Fiji

Plaintiff's
Evidence

No. 5

Rishad
Hussain Shah

Examination

28th April
1975
(continued)

I paid £1,000 towards purchase price. Got receipt.

Ex.Pl - Receipt for £1,000 dated 31.1.68 Ex.Pl

Ex.Pl mentions improvements. The improvements were:- house (concrete) tractor, bullocks(2) and a plough. The house was 50' x 40'. It would have cost £3,000 to build in 1968.

The tractor in 1968 was worth $200.

The pair bullocks - £100.

Two ploughs - £25 for both. 10

The land at that time was being cultivated in part for sugar. Most of it was fallow.

In 1968 there were about 50 tons cane on it which should have realised about £200.00.

From the S.P.S.M. I got the contracts for cane to defendants for 1969:-

Ex.P2 - Contract 11242 - allocation of 120 tons
Ex.P3 - " 5128 - " 240 tons

Q. When were you to pay the balance of £4,000.

No. 6

Proceedings

28th April
1975

No. 6 20

Proceedings

Mr. Reddy (defendant):

The agreement pleaded is a written agreement. The Statement of Claim does not disclose any reference to an oral agreement or to any date for completion.

Submit the plaintiff is excluded from now setting up an oral agreement the terms of which have never been pleaded. O.18 r. 12.5.

Mr. Pillai (plaintiff): 30

The receipt constitutes an agreement in writing and I submit that it satisfies the law. The Statement of Defence pleads Statute of Frauds

which does not apply in Fiji. There is, however, an Indemnity, Bailment and Guarantee Ordinance Cap. 208.

Refer to Cheshire and Fifoot 2nd Aust.Edn.-279.

By paragraph 6 of the defence the defence have set out terms which do not appear in the receipt. The plaintiff can surely give evidence as to his version of the terms alleged by the defence.

Mr. Reddy:

10 Paragraph 6 is a plea in the alternative only in that the existence of the contract is denied in paragraph 5. The plaintiff is not absolved from setting up and proving the agreement he relies up.

Ruling:

Ruling

Mr. Reddy has raised a valid and sound objection as to the evidence which the plaintiff can lead in connection with the plaintiff's own pleadings. The plaintiff did plead a written agreement, - which apparently is simply a receipt which refers to the 20 existence of some agreement, but which does not contain the terms thereof.

The plaintiff now seeks to present some oral evidence of terms - in fact he seems to be leading towards proof of an oral agreement of some kind.

I am of the view that he cannot do this. He must plead the contract, whether it is oral or in writing and indicate the terms if it was oral. He has not done so and cannot in the circumstances lead evidence of that nature. However, I am loathe 30 to see a party defeated by such inadequacies.

I willgive the plaintiff leave to amend his Statement of Claim so as to set out the agreement he relies upon provided the amendments are indicated to the Court by 12 mid-day and filed before 9.30 a.m. tomorrow, and provided the plaintiff in any event pays all the costs incurred by the defendant to date including the costs of today's appearance - but of course excluding the usual fees for taking full instructions.

In the Supreme Court of Fiji

No. 6

Proceedings

28th April 1975 (continued)

12 Mid-day

Mr. Pillai

I have prepared 2 paragraphs to amend the Statement of Claim. They would be paragraphs 3 and 4, the subsequent paragraph numbers amended accordingly.

Mr. Reddy:

I wish of course to plead to these allegations which I wish take instructions upon. I would file it later in the day with an added defence in law. 10

No. 7

Rishad Hussain Shah (recalled)

Examination (continued)

No. 7

Rishad Hussain Shah (recalled)

Plaintiff recalled:

I paid $2000 in January 1968. Do not remember the date.

The balance was $8000 and was to be paid after the lease was transferred to me. i.e. at the same time as it was transferred.

The 2 farms had sugar cane contracts in name of Ram Narayan and Vijay Kumar respectively. 20

Q. Did you do any work on the land after paying the $8000?

Mr. Reddy:

I object to that. It has not been pleaded. It is approaching part performance and has not been pleaded.

Mr. Pillai:

Paragraph 4 refers to the plaintiff growing sugar cane. It implies that he was to go on the land. Odgers 20th Edn. p.173: 30

Pleadings are concise statements of facts.

Court:

The plaintiffs pleadings, although amended as

In the Supreme Court of Fiji

No. 7

Rishad Hussain Shah (recalled)

Examination

28th April 1975 (continued)

above at the last minute, are still inadequate as the above objection shows.

I feel that at this stage it would be unfair to allow questions which might tend to indicate part performance.

Mr. Pillai:

I will go on to other aspects if the Court is of the view that such questions should not be put.

Court:

10 I rule that the question be disallowed.

Plaintiff continues:

I arranged with Kushi Mohammed to obtain the $8,000 to pay the balance.

The defendants told me that they did not wish to transfer the land to me.

The consent of the S.P.S.M. was required for transfer of the lease. They gave their consent.

It was not agreed that I should pay the $8,000 to solicitors Warren, Munro and Kermode. The
20 present value would be about $15,000 with crops on it.

When the land was not transferred to me I complained to the District Officer in Sigatoka.

I sold my business - involving buses - to one Latchman to raise the $2,000 deposit.

I still do not have possession of the farms. I am asking for possession.

The two sugar cane contracts have not been transferred to me.

30 I am asking for special performance and for damages.

Adjourned to 2.15 p.m.

(Sgd.) J. T. Williams

Judge

In the Supreme Court of Fiji

No. 8

Proceedings

28th April 1975

No. 8

Proceedings

2.15 p.m.

Court as above.

Mr. Reddy:

I tender my amended defence.

Mr. Pillai:

Paragraph 8 of defence is new. I object to its introduction at this stage. The contents have no bearing on the amended Statement of Claim. 10

Ruling:

I feel that when the plaintiff was given leave to amend in the manner adopted the door was opened for an amended defence. Although paragraph 8 is new, nevertheless one cannot refuse one side permission to introduce a new issue after giving the other side a similar privilege.

I permit paragraph 8 to remain. I emphasise that there can be no further amendments.

(Sgd.) J. T. Williams 20

Judge

No. 9

Rishad Hussain Shah

Cross-examination

28th April 1975

No. 9

Rishad Hussain Shah

XXD Mr. Reddy (defence):

I see the receipt Ex.Pl. It was prepared by Abdul Samat, a clerk for Mr. Kuver (solicitor). At the time both defendants were in the office. They signed in Mr. Kuver's office, Sigatoka.

Mr. Kuver was not my solicitor to draw up any agreement. 30

It was the only record. The defendants needed money. I arranged for him to have the $2,000 - but it was not a loan.

In the Supreme Court of Fiji

No. 9

Rishad Hussain Shah

Cross-examination

28th April 1975 (continued)

In fact we discussed the sale in May 1967.

On the date of Ex. P1 all the terms of the sale were agreed upon.

Q. Why not get solicitor to draw up a proper agreement?
A. We trusted each other; and I commenced working.

A formal agreement was not needed - we trusted each other.

Ram Narayan's brother-in-law lived on the land; when he moved off I would move on.

I agreed this was not recorded.

I served a notice on the said brother-in-law to quit. He is Yang Wing. My solicitors served it. I do not have a copy at hand. I only got Mr. Kuver to make out a notice - he was not acting for me.

I was to pay the $8,000 when the C.S.R. consented to the transfer. This arrangement was not put into writing, because we trusted each other.

The defendants applied to C.S.R. for the consent. I went to C.S.R. with them. I know that such consent was granted.

I do not agree that it was a conditional consent.

I got a copy of the letter. It showed that the C.S.R. had no objection.

Q. Then from what you say the time had come for you to pay the $8,000?
A. I was ready. They would not come to the solicitor's office.

Q. Did you tender the $8,000 to defendants?
A. Had he gone to the solicitor's office it would have been done; the moneylender wanted Bill of Sale and Mortgage for his $8,000.

The money was in the solicitor's office but he would not go.

Q. You had not borrowed but only arranged?
A. Yes - but the money was on hand.

In the Supreme Court of Fiji

No. 9

Rishad Hussain Shah

Cross-examination

28th April 1975 (continued)

Q. You have never in writing demanded that the defendants execute a transfer and accept the $8,000?
A. No. I have not.

I did see the District Officer and the latter wrote to the defendants for me.

The District Officer did not hold the $8,000.

I was to be credited with the value of crops I harvested.

Q. When did the defendants refuse to accept your money? 10
A. In 1968.

Q. It was 1968 that you knew they would not give you the land?
A. They were making excuses.

It was 1970 when they said they would not sell the land. Then I complained to District Officer.

I issued writ in September 1973.

Q. You took Ex.P1 to defendants' house?
A. No - and it was not signed there. 20

The solicitor saw Ex.P1. Neither he nor (sic) his clerk witnessed Ex.P1 being signed.

Q. It was agreed that Munro & Co. would draft the documents when the C.S.R. consented?
A. No.

I am shown a letter. It is written by C.S.R. It is in my affidavit of documents.

It is addressed to Munro & Co.

Ex.D1 - Letter of 19.4.68.

Q. Ex. D1 refers to Munro & Co. preparing the necessary documents? 30
A. Yes. But I was to pay the money at Sigatoka or Nadi.

Q. C.S.R.'s custom was for Munro & Co. to arrange for all documents?
A. Yes.

In the Supreme Court of Fiji

No. 9

Rishad Hussain Shah

Cross-examination

28th April 1975 (continued)

Q. You could not have completed without visiting Munro & Co.?
A. Yes.

Q. There was no concluded agreement as to standing crops, date of possession, and such like?
A. It was not agreed.

I was already to pay the $8,000.

Q. You had to pay the $8,000 into offices of Munro & Co. and then the defendants would
10 execute the transfer?
A. No. I would pay at solicitor's office in Nadi or Sigatoka - and we had agreed this.

I did not inquire from Munro & Co. as to whether the documents of transfer had been prepared - because I had not paid the $8,000.

Re-Examination

Re-Ex'd:

It was about beginning of 1968 that I served notice on defendant's brother-in-law to vacate the land and remove his building.

20 (Sgd.) J.T. Williams
Judge

No. 10

Kushi Mohammed

Examination

28th April 1975

No. 10

Kushi Mohammed

P.W.2 - KUSHI MOHAMMED, sworn in Hindi

I live at Maro, Sigatoka. Am moneylender.

I promised to lend plaintiff $8,000 in 1968 if he provided security in regard to the land.

I am a cane farmer. The land in question is good cane land.

30 Cane was £5 ton in 1968. The nett profit would be about £2.10s. per ton.

In 1974 it was $15.50 ton. Net profit would be $7.75 ton.

XXD: Nil.

(Sgd.) J.T. Williams
Judge

Close

In the Supreme Court of Fiji

Defendants' Evidence

No.11

Vijay Kumar

Examination

28th April 1975

No. 11

Vijay Kumar

D.W.1 - VIJAY KUMAR, sworn in Hindi

I am a cane farmer. Defendant 1 is my father. I live in his home. We each own a farm at Maro. I see the lease.

Ex.D2 - Crown Lease 10 years - from 1974 June 12th - 11242.

Ex.D3 - Crown Lease for 5128

In 1968 we owned these farms. The C.S.R. held the freehold and were our landlords. At my home I arranged with the plaintiff that he pay £1,000 and we would get C.S.R.'s consent through Munro & Co. who were C.S.R.'s legal advisers. Then the money would be paid by plaintiff into Munro's office. C.S.R.'s consent was obtained, but plaintiff paid no money into Munro & Co.'s office. 10

The plaintiff never tendered the £4,000 to us.

Defendant 1 my father was present, but I spoke and acted for him. 20

Cross-examination

XXD Mr. Pillai (plaintiff):

My signature appears on Ex.Pl and so does my father's (defendant 1's).

There had been no discussions prior to our signing Ex.Pl.

Q. Then how did plaintiff get the numbers of the farms?
A. I told him this when he brought the receipt.

Q. Where did plaintiff get full names of you, defendant 1, and defendant 1's father? 30
A. Someone must have told him.

Q. Typewriter at your house?
A. No.

Q. Was the stamp on Ex.Pl?
A. Do not know.

The transfer would be made after consent from S.P.S.C.

In the Supreme Court of Fiji

Defendants' Evidence

No.11

Vijay Kumar

Cross-examination

28th April 1975 (continued)

In 1972 Government took over C.S.R.'s freehold land. The approvals for leases were made in 1974, i.e. to the defendants by the Crown.

If plaintiff had paid the $8,000 into Munro & Co.'s office we would have transferred the land, provided it was after we had got the consent.

Plaintiff did not say he had arranged for P.W.2 to lend him $8,000.

Defendant 1 and I were called to District
10 Officer's office about this arrangement. I did not go because the plaintiff had not paid.

We did not write demanding the $8,000.

The agreement was entirely verbal. The plaintiff was told orally that we were not transferring. This was after we had got the C.S.R.'s consent, when plaintiff came to the house in response to our request.

We did not offer to refund the money - the £1,000 he had paid - because there was no
20 arrangement for this to be done.

In 1974 I harvested 170 tons on my farm. Defendant 1's crop was about 170 tons too.

One farm has a concrete house. The arrangement included the house, pair of bullocks and 2 ploughs but not a tractor. The tractor we used was my uncle's. He was on one of the farms. He still there.

RE-EXN: Nil.

(Sgd.) J. T. Williams

30 Judge

Close Defence

(Sgd.) J. T. Williams

Judge

In the
Supreme Court
of Fiji

No.12

Proceedings

28th April
1975

No. 12

Proceedings

Mr. Reddy (defendants):

1. Plaintiff has not proved an agreement of kind for which special performance would be granted.

2. In any event - no sufficient note or memorandum to comply with S.59 Cap.208 - from Statute of Frauds.

3. S.13 Crown Lands Ordinance Cap. 113.

As to 1 Terms should be reduced to writing, or clear oral evidence of the terms supported by part performance. Plaintiff relies upon oral agreement but there has been no part performance. 10

Ex.Pl does not contain the essential terms (i) no mention of date of possession, (ii) when the purchase price was to be paid; (iii) if plaintiff was to get credit for cane this does not appear in Ex.Pl.

Timmins v. Moreland Street 1957 3 A.E.R.265.

Saunders v. Purchase Vol.77 1958 N.Z.L.R.588. 20

If an essential term is missing then the memorandum does not satisfy S.59.

3 Crown Lands Ord. S.13

Court:

But this was not Crown Land at the material time. Is Crown Land Ord. S.13 retrospective?

In Special Performance the claim for damages would be an appreciation in the volume of the land, but there is no evidence of that in this case. No special damages viz loss of earnings have been claimed. 30

Mr. Pillai (Plaintiff):

Plaintiff more reliable than D.W.1 - because his evidence re Ex.Pl was clearly untruthful.

Ex.Pl describe the property, the price, etc. Timmin's case - 265 - cheque which was the only document signed on behalf of the defendant company could not be read with the unsigned receipt to create a memorandum.

Chitty 23rd Edn. Para.168 - Memo - 1945 Ch.D. p.358.

Also submit payment of £1,000 is part performance.

10 One does not have described all the terms in the memorandum - Chitty p.82 para.165 - extrinsic evidence.

Evidence of amount cane harvested.

Court:

5½ years since contract laches.

Mr. Pillai:

The delay is the plaintiff's fault. I feel that the documents should be limited to those accruing from date of writ to date of judgment.

20 Mr. Reddy:

Time payment - relevant. Homes Hyland 1885 N.Z.L.R. p.429 at 432.

(Sgd.) J.T. Williams
Judge

Deferred to a date to be notified.

(Sgd.) J.T. Williams
Judge

No. 13

Judgment

30 IN THE SUPREME COURT OF FIJI (WESTERN DIVISION) AT LAUTOKA

Civil Jurisdiction
Action No.167 of 1973

In the Supreme Court of Fiji

No.13

Judgment

9th June 1975 (continued)

BETWEEN:

RISHAD HUSSAIN SHAH s/o Tasaduq Hussain Shah — Plaintiff

- and -

1. RAM NARAYAN s/o Shankar
2. VIJAY KUMAR s/o Ram Narayan — Defendants

Mr. M.V. Pillai, Counsel for the Plaintiff
Mr. J.R. Reddy, Counsel for the Defendants.

JUDGMENT

The plaintiff sues for specific performance of an agreement for transfer to him of two farms Nos. 5128 and 11242 at Maro, Nadroga. It is not disputed that the agreement was dated 31.1.68 and that the purchasing price was £4000 of which the plaintiff paid £1000 by way of deposit. 10

In January 1968 the land on which the farms stood was owned by the S.P.S.M. Ltd. who had leased the farms to the defendants. The "sale of the two farms" would really be an assignment of the defendants' leases, and the consent of the S.P.S.M. would be required thereto. It is not disputed that such consent was obtained in April, 1968. 20

The amended Statement of Claim alleges that there was an oral term, to the effect that the balance of the purchase price was to be paid when the defendants had done all that was necessary to enable them to vest ownership in the plaintiff. It does not allege any specific date for completion by transfer of the property or payment of the purchase price. It states, presumably in the alternative, that the oral term was in any event implied. 30

The Statement of Defence denies that there was any firm agreement but simply an agreement to agree, upon the condition that $8000 would be paid to Messrs. Munro & Co. (solicitors), when the consent of the S.P.S.M. was obtained to the transfer of the leases.

An alternative plea is that the consent of the S.P.S.M. having been obtained the plaintiff failed to pay the $8000 into the offices of Munro & Co. (solicitors) as had been agreed. 40

The Statement of Defence also pleads that there was no memorandum of the agreement sufficient to satisfy section 59 of the Indemnity Guarantee & Bailment Ordinance Cap. 208.

The defendants also plead that the land having been taken over by the Crown, the permission of the Director of Lands is now required for the transfer that this has not been obtained.

10 There is no dispute that an arrangement had been reached by the parties as to the assignment of the farms to the plaintiff for $8000 and that $2000 had been paid by the plaintiff.

The written document relied upon by the plaintiff is a receipt Ex.Pl for his $2000. It is worded as follows:

> "Received from Richard Hussein Shah f/n Tasaduq Hussain Shah of Maro, Nadroga, the sum of One thousand pounds (£1000) being deposit in respect of two farms at Maro,
> 20 Nadroga, No's. being 5128 and 11242 together with all improvements situate thereon. The balance being £4000.
>
> Dated at Nadroga this 31st day of January, 1968.
>
> Ram Narayan,
> Vijay Kumar. "

It was contended by the defendants that the receipt Ex.Pl was not a sufficient memorandum to satisfy section 59 of The Indemnity Guarantee &
30 Bailment Ordinance, Cap. 208.

The said section 59 reproduces provisions of the Statute of Frauds in requiring a note or memorandum for proving land transactions.

Mr. Reddy, for the defendants claimed that the Ex.Pl should indicate the time when possession was to be given and the time when the purchase price was to be paid.

He referred to Holmes v. Hyland 1885 Vol.III, N. Z. L. R. 429 where it was held that if the time
40 of payment is not mentioned and if the memorandum contemplates non-payment for an uncertain period, it is insufficient under the Statement of Frauds.

In that case the memorandum was an offer to buy land at £4 an acre with half yearly interest payable at 7½%. No mention of the date of payment of the purchase price was indicated. The purchaser failed to pay and when sued contended that the memorandum was defective in omitting the date of payment. The vendor argued that it was not necessary to fix a date of payment because the price could be made payable on demand or within a reasonable time or as soon as the vendor has made a good title. Johnstone J. at p.432 said:- 10

> "..... the terms of this memorandum preclude any such inference, in as much as it contemplates the non-payment of the purchase price for an uncertain period of time."

He went on to say at p.433:-

> "..... and the Court has no right to conjecture what period was probably in the parties' minds. I do not see how, if it was sought to have specific performance of the contract the time for payment of the purchase money could be arrived at." 20

That judgment shows that if the terms of the memorandum can be construed as allowing an indefinite time for completion, the court will not alter the agreement by implying that completion shall be within a specified time. It is not an authority for saying that the time for payment of the purchase price must be contained in a contract for the sale of the land. 30

Regarding the defendant's argument that the memorandum should indicate the date for transfer of possession and payment of the purchase money, attention may be directed to Halsbury's Laws 3rd Edn. Vol. 34, p.295, para 492, which deals with the "Date for completion." The learned author states that completion consists in the purchaser paying the balance of the purchase money and the vendor at the same time executing a conveyance and delivering possession to the purchaser. 40

He states that completion of the contract is conditional upon the vendor making out his title:-

> "Until the vendor makes out his title, the purchaser is not safe in paying the purchase money and taking possession. Hence the date

In the Supreme Court of Fiji

No.13

Judgment

9th June 1975 (continued)

when the vendor makes out his title is the earliest date at which completion should take place, and it is the proper date for completion if no date is fixed by the contract."

The learned author refers especially to occasions where no date is fixed by the contract. There is no suggestion that the contract is defective because it does not fix a date for payment and completion.

10 On p.296 it is pointed out that even where a date for completion is fixed that date is not of the essence and the parties may complete after that date. If the date set out for completion is to be of the essence then this must be stipulated in the contract.

Those observations are supported consistently in decided cases to which the learned author refers.

In Green v. Sevin 1879 13 Ch.D. 589, Green demised property to Sevin for 99 years with an 20 option to purchase the freehold for £5000 to be exercised during the first 7 years of the lease. On 15/3/1879 Sevin gave notice that he was exercising the option, but had difficulty in getting Green to complete. Then in April 1879 Green gave Sevin 19 days in which to complete and Sevin failed to complete in that time. Green sued for a declaration that the option could no longer be exercised and that the contract for purchase had been determined. Sevin counterclaimed for specific performance. 30 Fry J. at p.599 said:-

"It is to be observed that the contract for purchase had limited no time for completion, and that, therefore, according to the rule in this country, each party was entitled to a reasonable time for doing the various acts which he had to do. What right then had a particular party to limit a particular time within which an act was to be done by the other? It appears to me that he had no such 40 right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that if steps were not taken immediately to complete, the person giving the notice should be relieved from his contract."

It is apparent from that judgment that time is

In the Supreme Court of Fiji

No.13

Judgment

9th June 1975 (continued)

not necessarily of the essence in a contract for the sale of land or of an interest in land.

In Stickney v. Keeble 1915 A.C.386, the House of Lords considered an action in which the plaintiff in June 1911 agreed to purchase agricultural land. The date for completion was October 11th. By October 11th, the vendors had not acquired a legal title to the land, because it was part of a huge estate which they were negotiating to buy and dividing by way of speculation into 23 lots. The plaintiff repeatedly pressed for completion and on January 30, 1912, gave notice to defendants requiring them to complete in 2 weeks. They failed to complete. He sued for the return of his deposit and succeeded. In the course of his judgment commencing at p.415, Lord Parker stated that although at law the time fixed for completion was of the essence, equity had always taken the view that time was not of the essence and would grant specific performance in spite of a failure to complete by the stipulated time.

Of course if the parties expressly stipulate that time is of the essence then equity will not interfere with that expressed intention.

In Smith v. Hamilton 1950 2 A.E.R. 928 the date for completion was fixed for April 4th, 1949. On 29.3.49 the purchaser wrote to say she could not pay the balance on the agreed date. The vendor gave notice allowing a further 15 days in which to pay. The purchaser failed to pay in that extended period. The Court and parties accepted that time was not of the essence although a date had been inserted as the date for completion.

In Gray v. Smith (1890) 43 Ch.D. 208 the Court of Appeal approved the following judgment of Kekewitch J., in the Court below stated at 214:-

"But it is said that it is an essential term of such an agreement that the time should be mentioned on the face of it, and therefore that this is not a good memorandum within the Statute of Frauds, because an essential term is omitted, and I have been referred to the principles and authorities, with which the Court is familiar, respecting specific performance of contracts for the sale and purchase of land. The Court has continually held that

time is not of the essence of the contract in the ordinary case of the sale and purchase of land, and for this reason .... the Courts of Equity have overlooked the details of contracts, and have seen, more clearly than originally the Common Law Courts did, the real contract between the parties, namely, that there should be purchase and sale and have regarded the time fixed for completion as a detail which was only introduced for the sake of convenience to indicate when the parties should come together, and not as an essential part of the bargain between them."

It is clearly well established law that in a contract for sale of an interest in land, time is not of the essence, even if a date has been agreed upon for completion, unless the parties expressly stipulate that it shall be of the essence. It is apparent too that it is not necessary to fix any specific date for completion.

It follows that the defendants' contention that the memorandum herein is insufficient because it contains no date for completion is not supportable.

I find that the memorandum Ex.Pl sufficiently contains the terms of the agreement.

If the memorandum fixes no date for completion, how does one arrive at a completion date. The law in that respect appears in Green v. Sevin (supra) where Fry J. at p.599 quoted the judgment of Lord Longdale in Taylor v. Brown 2. Beav. 183 -

> " Where the contract and the circumstances are such that time is not in this Court considered to be of the essence of the contract in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other."

He also quoted from Sir John Romilly's judgment in Pegg v. Wisden 16. Beav. 244 -

> " I concur also in the decisions. Where time is not originally of the essence of the contract, it may, in the case of improper delay, be made so by notice."

Did the parties take any steps to make time

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Supreme Court
of Fiji

No.13

Judgment

9th June 1975
(continued)

of the essence? In particular did the defendant take any such steps? The defendants put in Ex.D1 dated 19.4.68, which is a letter showing that the S.P.S. Mills Ltd., as landlords, had no objection to the proposed transfer to the plaintiffs, of the said leases. The defendant 2 gave evidence that it had been orally agreed that the £4000 balance should be paid into the office of Munro & Co., solicitors, and the plaintiff failed to pay the money at that firm's office. The plaintiff says he was ready and willing to pay, and had arranged a loan from a money-lender, P.W.2, for completing the purchase. P.W.2 gave evidence to the effect that he had promised to lend the money to the plaintiff. I accept the evidence of the plaintiff and P.W.2 which shows that the plaintiff was able to complete.

The plaintiff says that because the defendants did not transfer the land to him he tried to get the District Officer to mediate and bring the parties together. The defendant No.2 agreed that the District Officer had asked the defendants to attend his office but they did not go there because the plaintiff had not paid the £4000 balance.

The plaintiff stated in cross-examination that in 1970 the defendants informed him that they were not going to complete.

Since time was not of the essence it was not open to the defendants to treat the contract as rescinded on the ground that the plaintiff had not paid the £4000 balance by 1970. If the defendants felt that the plaintiff was delaying unreasonably then they could and should have given him notice requiring payment within a reasonable time.

It would seem from the judgment in Green v. Sevin, (supra), and the other cases I have referred to, that where time has not been stipulated as being of the essence, then even where there has been a long delay by one party, it is unlikely that the other party can treat the contract as at an end without giving notice to complete by a certain date. In fact this is what was stated by Perry J. in Monaghan v. Thomas 1974 N.Z.L.R. 377 at p.379 when he quoted with approval the following passage from Williams on Vendor & Purchaser (4th Edition Vol. 2 PP.990, 991):-

10

20

30

40

" The result is that where either party makes delay in performing his part of the agreement, the most prudent course for the other party is to serve a notice upon him making time of the essence of the contract, but taking care to allow him a reasonable time (having regard to the circumstances) from the date of the service of the notice, within which to accomplish the acts he has delayed to perform. If after service of such a notice the party in default fails to perform the required act within the time so limited, the other party will be then entitled to treat the contract as broken."

Applying the law as I see it, to the facts of this case, it appears to me that in order to make time of the essence the defendants should have served some notice upon the plaintiff requiring him to complete. Neither in his evidence-in-chief, nor in cross-examination, did the D.W.1 (defendant 2) state that he had demanded payment of the £4000 balance. There is no evidence that the defendants at any time pressed for completion by demanding payment. There is no evidence that oral or written notice was given to the defendant fixing a reasonable time in which to complete. In fact the evidence is to the contrary. I am satisfied that the plaintiff tried to arrange for the defendants to meet him and to discuss the completion. However, in 1970 they arbitrarily treated the contract as at an end. It is useful to quote the D.W.1's (defendant 2's) evidence in this respect which he gave in cross-examination:-

" The defendant 1 and I were called to the D.O.'s office about this arrangement. I did not go because the plaintiff had not paid."

" We did not write demanding the $8000.00."

" The plaintiff was told orally that we were not transferring."

The plaintiff says that it was in 1970 that the defendants told him they did not intend to complete. He filed his writ in September 1973.

I accordingly find that there was a sufficient memorandum of the agreement; that time was not of the essence; when the plaintiff had not paid within 18 months the defendants did not serve him with

In the Supreme Court of Fiji

No.13

Judgment

9th June 1975 (continued)

any notice giving him a reasonable time within which to pay; and in 1970 they arbitrarily and unjustifiably purported to terminate the contract. To that extent the plaintiff has established his right to specific performance.

The defendants in anticipation of such a decision have pleaded that the Government has taken over the land from the S.P.S.M. Ltd. and that the leases are now Crown land and that the consent of the Director of Lands was not obtained for the issue of these proceedings. 10

The D.W.1 in cross-examination said that it was 1972 when the Government took over the S.P.S.M.'s land and the leases in question were approved in 1974.

In 1970 when the defendants purported to repudiate the contract the consent of the lessors i.e. S.P.S.M. had already been obtained to the proposed transfer of the farms to the plaintiff. The plaintiff had already acquired rights under his 20 contract which the S.P.S.M. had approved. In 1972 when the Government took over S.P.S.M.'s land they could only do so subject to the rights whichlessees, tenants and others held under existing agreements with S.P.S.M. The Crown took subject to the plaintiff's right to be put in possession as a lawful transferee of the tenancies.

In my view the existing rights of the plaintiff cannot be affected by subsequent dealings entered into by the owners of the land. 30

The plaintiff also claims damages but there is very little evidence to demonstrate what damage he has suffered. The loss of profit he may have earned from the farms would accumulate from the date on which he would have been entitled to possession. However, no time having been fixed for completion and time not having been made of the essence one cannot say what the date was. It might reasonably be argued that damages should run from 1970 when the defendants repudated the contract. 40

Mr. Pillai for the plaintiff submitted that damages should be assessed as from the date of the writ to the date of judgment. In that connection the defendants agree that the farms produced about 340 tons of cane in 1974. P.W.2's evidence that it was $15.50 per ton and that the nett profit

In the Supreme Court of Fiji

No.13

Judgment

9th June 1975
(continued)

would be half the gross income was not disputed. On those figures the profit would be $2635 and I allow that sum as damages.

Judgment for the plaintiff for specific performance as claimed and for $2635 as damages. The defendants will pay the plaintiff's costs herein.

(Sgd.) J.T. Williams

(J.T.WILLIAMS)
JUDGE

LAUTOKA,

10 9th June, 1975.

No.14

Order

9th June 1975

No. 14

Order

IN THE SUPREME COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

DISTRICT REGISTRY
No. 167 of 1973

BETWEEN: RISHAD HUSSAIN SHAH son of Tasaduq Hussain Shah of Naro, Nadroga, Driver — Plaintiff

20 AND: 1. RAM NARAYAN son of Shankar of Maro, Nadroga, Cultivator

2. VIJAY KUMAR son of Ram Narain of Maro, Nadroga, Cultivator — Defendants

DATED AND ENTERED THE 9TH DAY OF JUNE, 1975

This action having been tried before the Honourable Mr. Justice Williams at the Supreme Court Western Division at Lautoka and the said Mr. Justice Williams having on the 9th day of June, 1975
30 ordered that judgment as hereinafter provided be entered for the plaintiff

THIS COURT DOTH DECLARE that the agreement dated the 31st day of January, 1968, in the pleadings mentioned ought to be specifically performed and carried into execution AND DOTH ORDER AND ADJUDGE the same accordingly AND THIS COURT DOTH ORDER that the defendants pay to the plaintiff the sum of

In the Supreme Court of Fiji

No.14

Order

9th June 1975 (continued)

$2,635.00 (TWO THOUSAND SIX HUNDRED AND THIRTY FIVE DOLLARS) by way of damages AND IT IS FURTHER ORDERED that the defendants do pay the plaintiff's costs of this action.

BY THE COURT

(Sgd.) Illegible

DEPUTY REGISTRAR
24.6.75

No.15

Order for Security for Costs

2nd September 1975

No. 15

Order for Security for Costs

10

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction

Civil Appeal No.167 of 1973

IN CHAMBERS

Before the Hon. Mr. Justice Mishra

Tuesday the 2nd day of September, 1975 at 2.15 p.m.

Between: RISHAD HUSSAIN SHAH
s/o Tasaduq Hussain Shah — Plaintiff

\- and -

1. RAM NARAYAN s/o Shankar
2. VIJAY KUMAR s/o Ram Narayan

20

Defendants

Mr. Arjun for M/s. Pillai & Co. for the Plaintiff
Mr. Tappoo for the Defendants

Mr. Tappoo:

This is the defendant's application for Security for Costs.

Mr. Arjun:

It is agreed between us that a $200 bond should be sufficient.

30

Court:

Very well. Order accordingly.

(Sgd.) G. Mishra

Judge

No. 16

Notice and Grounds of Appeal

In the Fiji Court of Appeal

No.16

Notice and Grounds of Appeal

29th July 1975

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

Civil Appeal No. 35 of 1975

On Appeal from the Supreme Court of Fiji Lautoka Action No.167 of 1973

BETWEEN: 1. RAM NARAYAN son of Shankar
2. VIJAY KUMAR son of Ram Narayan
APPELLANTS
(Original Defendants)

A N D RISHAD HUSSAIN SHAH son of Tasaduq Hussain Shah RESPONDENT
(Original Plaintiff)

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of fourteen (14) days from the service upon you of this notice, or so soon thereafter as Counsel can be heard, by Counsel for the abovenamed Appellants/Defendants FOR AN ORDER that the Judgment herein of the Honourable Mr.Justice J.T. Williams given on the 9th day of June 1975 whereby it was ordered that there would be specific performance of the Contract as claimed by the Respondent/Plaintiff and that the Appellants/ Defendants do pay to the Respondent/Plaintiff the sum of $2635.00 damages with costs be wholly set aside and an order be made that judgment be entered for the Appellants/Defendants.

AND for a further order that the costs of this Appeal and the hearing in the Court below be paid by the Respondent to the Appellants.

AND for such further or other order as to the Fiji Court of Appeal shall seem just.

AND FURTHER TAKE NOTICE that the grounds of the appeal are as follows:

1. The learned trial Judge erred in holding that the receipt Exhibit P1 was a sufficient memorandum for the purposes of Section 59 of the Indemnity Guarantee and Bailment Ordinance and that it "sufficiently contained the terms of the agreement" and in particular failed to consider the following matters:-

In the Fiji Court of Appeal

No.16

Notice and Grounds of Appeal

29th July 1975 (continued)

(a) The agreement was for the sale of named land and "improvements" which must be taken to mean improvements on the land. In fact several chattels were included.

(b) The Plaintiff was also to take the benefit from an assignment of the Defendant's sugar cane contracts. Under Section 26 of the Sugar Industry Ordinance, an assignment document must show the true consideration. Cane contracts must be treated as choses in action and do not run with the land. 10

(c) The contract is in its terms indivisible; the Sugar Industry Ordinance was not complied with in that there should have been an apportionment of the purchase price between the leasehold interest in the land, the chattels and the cane contracts.

(d) There is no provision for vacant possession of a property which was known by the parties to be tenanted. 20

(e) There was no time for completion stated which is a necessary term in the contract for the sale of a farm with growing crops.

(f) There was no stipulation as to whether standing crops were to be harvested by the vendor or by the purchaser, or if it was, as the Plaintiff alleged, that he was to get this benefit, then this was not stated either.

2. That the learned trial Judge erred in law in granting Specific Performance, an equitable remedy in view of the fact that the Respondent/Plaintiff was guilty of laches and there was no explanation for the delay in bringing the action and also in view of the hardship to the Appellants having regard to all the circumstances of the case. 30

3. The learned trial Judge erred in awarding damages in the sum of $2635.00 when there was no legal basis for awarding such damages. 40

4. That in view of the fact that the Director of Lands granted fresh leases to the Appellants in respect of the two farms in June 1974

(Exhibits D2 and D3) upon taking over the lands from the Colonial Sugar Refinding Company Limited the subject matter of the agreement between the parties was at an end and the learned Judge erred in law in not holding that the Respondent had no claim against the Appellants/Defendants either for Specific Performance or for loss of bargain.

5. That the learned trial Judge's judgment is misdirected and he failed to adjudicate upon the real issues in the Case.

6. That the learned trial Judge did not specify what contract was to be specifically performed and bearing in mind the requirements of the Sugar Industry Ordinance that assignments of cane contracts should have the consideration mentioned specifically, there is just no contract for which Specific Performance could lawfully be granted.

7. That the learned trial Judge erred in law in holding that the consent of the lessor the Colonial Sugar Refinding Company Limited had been granted to the proposed transfer from the Appellants to the Respondent when in fact no such consent was granted and the learned trial Judge erred in not holding that such consent was a condition precedent and not fulfilled and therefore the action should fail.

8. That the learned trial Judge erred in law in holding that the consent of the Director of Lands was not required within the meaning of Section 13 of the Crown Lands Ordinance (Cap.113).

9. That the learned trial Judge erred in law in holding that there was an enforceable contract between the Respondent (Plaintiff) and the Appellants (Defendants).

10. The learned trial Judge not having rejected the Appellants/Defendants evidence that it was a condition of the agreement that the Respondent/Plaintiff pay into the office of Messrs. Munro, Leys, Kermode & Co. the sum of $8,000.00 upon consent of the lessor to the transfer and the Respondent/Plaintiff having failed to make such payment erred in not dismissing the Respondent/Plaintiff's claim.

In the Fiji Court of Appeal

No.16

Notice and Grounds of Appeal

29th July 1975 (continued)

11. The learned trial Judge's order for specific performance is unlawful in that it contravenes the Sugar Industry Ordinance forbidding aggregation of farms in one person.

DATED this 29th day of July 1975.

(Sgd.) Illegible

for STUART, REDDY & CO.
Solicitors for the Appellants

This Notice of Appeal was filed by Messrs. Stuart, Reddy & Co., Solicitors for the Appellants whose address for service is at the Chambers of the said Solicitors at Narara Parade, Lautoka. 10

To the abovenamed Respondent and/or his Solicitors Messrs. Pillai & Co., Nadi.

No.17

Judgment of Marsack, J.A.

26th November 1975

No. 17

Judgment of Marsack J.A.

IN THE FIJI COURT OF APPEAL
Civil Jurisdiction

Civil Appeal No. 35 of 1975

BETWEEN: 20

1. RAM NARAYAN s/o Shankar
2. VIJAY KUMAR s/o Ram Narayan — Appellants

and

RISHAD HUSSAIN SHAH s/o Tasaduq Hussain Shah — Respondent

J.R.Reddy and B.Patel for the Appellants
M.V.Pillai for the Respondent

Date of Hearing: 10th November, 1975
Delivery of Judgment: 26th November, 1975

JUDGMENT OF MARSACK J.A. 30

This is an appeal against a judgment of the Supreme Court sitting at Lautoka and delivered on the 9th June, 1975. The judgment ordered specific performance of a contract for the sale of leasehold

lands from appellants to respondent, and also awarded respondent $2635 by way of damages. The appeal is against both the decree of specific performance and the award of damages.

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

The facts may be shortly stated. The appellants each held a farming property in Maro, Nadroga under lease from the Colonial Sugar Refining Company Limited. These properties were described as farm 5128, of approximately 18 acres, held by Ram Narayan, and farm 11242 of approximately 12 acres held by Vijay Kumar. Each farm was covered by a cane contract with South Pacific Sugar Mills Limited; the farm harvest quota being 240 tons of cane in respect of farm 5128 and 120 tons in respect of farm 11242.

Every cane farm must be covered by a contract with the millers. Under this contract the grower undertakes to supply, and the millers to accept, a stated quantity of sugar cane each season; this stated quantity is referred to as the farm harvest quota. No form of contract was produced at hearing but the terms thereof were not in dispute.

In January, 1968 the respondent entered into negotiations with the appellants - who are father and son - for the purchase of their interest in the lands in dispute.

On the 31st January, 1968 a sum of £1,000 was paid by the appellants to the respondent and a receipt given for this sum in the following terms:-

> "Received from Richard Hussein Shah f/n Tasaduq Hussain Shah of Mar, Nadroga, the sum One thousand pounds (£1000) being deposit in respect of two farms at Maro, Nadroga, NO's being 5128 and 11242 together with all improvements situate thereon. The balance being £4,000.
>
> Dated at Nadroga this 31st day of January, 1968.
>
> Ram Narayan,
> Vijay Kumar."

The parties did not agree as to what items were included in the term 'improvements'. The respondent contended that the 'improvements' comprised a

concrete house on one of the sections, a tractor, two bullocks and a plough. The appellants maintained that the word must be limited to things which necessarily pass with the land, such as the house. Moreover, though they agreed that the two bullocks and the plough were included in the property which was to pass to the appellants, they denied that the tractor was included in the sale.

No formal agreement for sale and purchase was prepared for signature by the parties, who did not instruct solicitors to attend to the appropriate formalities. In his evidence, the respondent stated, on this point: 10

> "A formal agreement was not needed - we trusted each other."

Very few steps seem to have been taken on either side for some considerable time, to complete the sale. The respondent arranged with a moneylender for an advance of the balance payable, $8,000.00, but this sum was not paid or tendered. The necessary consents to the transfer were obtained, but no formal transfer was prepared or executed. The only positive step taken by the respondent in the direction of obtaining completion was to complain to the District Officer in Sigatoka, apparently with a view to having a conference with the other parties. This, however, did not take place. This visit to the District Officer was apparently made some time in 1970. It followed, according to the respondent's evidence, a statement made by the appellants that they would not sell the land. In this connection it must be commented that the appellants showed a complete absence of bona-fides. Appellant Vijay Kumar deposed at the trial: 20 30

> "We did not offer to refund the money - the £1,000 he had paid - because there was no arrangement for this to be done."

On 26th September, 1973, the respondent issued a writ against the appellants claiming specific performance of the contract of sale of the two farms in question. There was considerable delay in having the action heard and it was not until the 28th April, 1975 that the hearing took place. 40

In his judgment the learned trial judge held that the receipt set out above contained the terms

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

of the agreement between the parties sufficiently to satisfy the requirements set out in section 59 of The Indemnity Guarantee & Bailment Ordinance Cap. 208. This section corresponds precisely with section 4 of the Statute of Frauds. He further held that the respondent was entitled to a decree of specific performance of this agreement, and to damages representing the net profit to have been expected for the year 1974, from the sale of sugar cane grown on the lands in question.

The grounds set out in the Notice of Appeal are lengthy and I do not find it necessary to set them out in full in this judgment. Those requiring determination by this Court may be briefly summarised:

(1) that the learned trial judge erred in holding that the receipt already quoted was a sufficient memorandum for the purposes of section 59;

(2) that the learned trial judge erred in granting specific performance in view of the delay of some years in bringing action after the appellants' failure to carry out the agreement.

The question raised by the first ground of appeal is, I find, one of considerable difficulty. There is no doubt, to my mind, that the parties did intend that there should be a sale of the leasehold interest of the appellants in the lands concerned to the respondent, for the total sum of $10,000.00, of which $2,000.00 was paid and accepted as a deposit.

The difficulty arises from interpretation of the statutory phrase in section 59 'unless the agreement .... or some memorandum or note thereof is in writing and signed by the party to be charged.' The determination of this question involves an examination of a great number of judicial decisions on the subject of the sufficiency or insufficiency of the memorandum. In the judgment in Hawkins v. Price (1947) 1 All E.R. 689 at p.691 it is stated:

> 'There is, I think, clear authority that every material term must be so evidenced. The memorandum, however, need not refer to matters which the law implies.'

The first point raised by counsel for the

appellant on this ground concerns the absence of any reference to a date of possession. He emphasises the fact that the date of possession on the sale of a cane farm is an important consideration; possession in April, for example, would include the right to the standing crops, whereas possession in November would mean that the source of the year's revenues would already have been removed. For these reasons, counsel contends that the date of possession is an essential term of this actual agreement, and that its omission from the memorandum necessarily renders that memorandum insufficient for the purposes of the statute. Although this argument was put persuasively, I find myself unable to accept it. As is said in Gray v. Smith (1890) 43 Ch. D. 208 at p.214:

> "The Court has continually held that time is not of the essence of the contract in the ordinary case of the sale and purchase of land."

No distinction is made to this principle in the case of land with growing crops; and the fact that the land in issue in the present case had sugar cane growing on it is not, to my mind, a sufficient reason for deviation from the general principle. Where no date is fixed for completion, it has been authoritatively held on many occasions that the absence of any such provision does not invalidate the contract, but makes it subject to an implied condition that completion is to take place within a reasonable time. As is said by Fry J. in Green v. Sevin (1879) 13 Ch. D. 589 at p. 599:

> 'It is to be observed that the contract for purchase had limited no time for completion, and that, therefore, according to the rule in this country, each party was entitled to a reasonable time for doing the various acts which he had to do.'

On the same point it is stated in Johnson v. Humphrey (1946) 1 All E.R. 460 at p. 463:

> 'It is of course well understood that if a contract fixes no date for completion, the law implies that completion is to take place within a reasonable time.'

The question arising under this heading is simply whether the omission from the memorandum of a date for completion rendered the memorandum insufficient

In the Fiji Court of Appeal
No.17
Judgment of Marsack J.A.
26th November 1975
(continued)

to comply with the statute. For the reasons I have given I would hold that it has not that effect.

The next point for consideration is counsel's argument that the memorandum in question was insufficient in that it failed to specify exactly what property was passing; and that the terms which were omitted from that document could not be read into it as a matter of necessary implication. In support of his argument he cites a passage from 10 Stonham's Vendor & Purchaser at p.86:

> 'Apart from terms implied by law (inclusive of implications arising by construction of interpretation of the writing, or by trade usage otherwise), all the terms of the agreement must appear in the writing, otherwise part only of the contract is evidenced in writing, and the Statute of Frauds has not been complied with.'

(sic)

Mr. Reddy's contention is that the written document 20 did not set out the whole of the bargain; there was no mention of the chattels which formed part of the sale, nor of the assignment of the cane contracts held by the vendors.

As far as chattels were concerned, the only items under this head referred to in the evidence were a tractor, two bullocks and a plough. However, there was a dispute between the parties. The respondent gave evidence that these three items were included in the sale; appellant Vijay Kumar, 30 in the course of his evidence, agreed that the pair of bullocks and two ploughs were included but not the tractor. In any event, as I see it, the law specifies that what must be committed to writing is the sale of land. The sale of chattels could be proved independently. There is nothing in section 59 in my view, stating or even implying that the memorandum required would be insufficient if collateral parts of the bargain between the parties, having no referense to sale and purchase of the 40 land, should have been omitted from what is set down in writing.

The argument directed towards the assignment on the cane contracts presents somewhat more difficulty. It is perfectly clear, as counsel contends, that a cane contract does not pass with the land. It is necessary that there should be an assignment

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

in writing forwarded to the millers for noting; and under section 26 of the Sugar Industry Ordinance, every such assignment shall truly state the consideration. Mr. Reddy's argument on this point may conveniently be divided into two sections. Firstly, that the memorandum was defective in that it makes no mention of the assignment of the cane contracts; and secondly, that the memorandum is defective in that it does not truly state the consideration for the assignment as required by section 26. 10

With regard to the first point there is, in my view, a necessary implication that a contract for the sale of cane lands must involve also an assignment of the cane contract or contracts held in respect of those lands. No person buying a cane farm and no person selling a cane farm would fail to realise that the farm would have little value without a cane contract, covering an undertaking by the millers to buy a stated quantity of sugar cane grown on the farm. Every such person would also 20 realise the necessity of sending an application to the millers for approval of the assignment. In these circumstances, the transaction, in my opinion, would come within the scope of the practice set out in 36 Hals. (Third Ed.) p. 289, para. 406:

> 'In the absence of express agreement, however, the law in many cases makes good the defect (i.e. the omission of a material term) by supplying terms by implication or inference.' 30

As to the second point, it is certainly clear that the consideration for the assignment of the cane contracts is not set out in the memorandum relied on; but in my opinion, it is not necessary to set out that consideration in that particular document. Section 26 of the Sugar Industry Ordinance makes it clear that the correct consideration must be shown in the assignment itself when forwarded to the millers for approval. Whether or not this was done, and if so, what proportion of the 40 total purchase price this consideration was stated to be, that covering the assignment seems to be immaterial in deciding the question whether or not the document on which the purchaser relies is a sufficient memorandum or note of the agreement for the sale of land required under section 59 of the Indemnity Guarantee and Bailment Ordinance.

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

Accordingly, though as I have stated the matter is one of some difficulty, I conclude that the failure to mention the assignment of the cane contracts is not sufficient to invalidate the memorandum.

Mr. Reddy further submits that the document in issue is a receipt and nothing more than a receipt. He cites the decision of the Court of Appeal in Beckett v Nurse (1948) 1 All E.R. p. 81 in which it was held that a document in these words:

> 'Received from B.B. of Thorpe Cottage Thorpe Audlin sum of seventeen pounds being a deposit for a field situate near the Fox Inn. Sold for £50'

on its true construction constituted a receipt and not a contract, although it had a sketch plan of the land at the foot of it. However, in the course of his judgment, Lord Goddard C.J. said:

> 'In view of the conclusions which my Brothers have reached, I will not dissent. No useful purpose will be served by elaborating the doubts which I still feel about the true construction of this document, a matter on which different minds might come to different conclusions. I will only say that, while I think the document is open to the construction that it is an agreement to sell to the deceased for £50 a field shown on the plan, as the county court judge thought it did, the fact that it only bears one signature does afford some ground for saying that it is only intended as a receipt. That it is a receipt does not mean that it might not also be a memorandum of an agreement, and on reconsideration the county court judge will consider what weight he should attach to the document and to the evidence as the condition is a different one from that which is pleaded.'

As I read this judgment, it does not amount to a definite ruling that a document in the form of a receipt may not be a sufficient memorandum of sale within the scope of the statute.

A further contention put forward by counsel for the appellants was that the transaction was unlawful in that the aggregation of cane farms in

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

one person was specifically forbidden under the Sugar Industry Ordinance. This contention is, in my opinion, untenable. There is no such provision in the Ordinance itself. There is reference to the matter in the cane contract. The cane contract was not produced to the Court and I am therefore not entitled to quote from it. It was, however, conceded on the hearing of the appeal, that there is a provision to the effect that the millers shall not be bound by any assignment of the contract if the assignee already holds a contract with the millers in respect of any other land for the sale of cane. There is, therefore, no legal obstacle in the way to aggregation; it is a matter for the discretion of the millers. In any event, the millers, according to evidence produced at the hearing, did approve the assignment of both contracts to the respondent.

In the result, for the reasons I have endeavoured to set out, I am of the opinion that the learned trial judge was justified in his finding that the memorandum quoted earlier in this judgment sufficiently contains the terms of the agreement to comply with the provision of section 59. I have not found this question an easy one to resolve; but I am satisfied that the answer given is in the interests of substantial justice. Accordingly I would hold that the appeal on this ground fails, and would agree with the learned trial Judge's finding that the document of 31 January 1968 constitutes an enforceable contract.

It now becomes necessary to consider whether the learned trial judge was justified in making an order for specific performance in view of what counsel for the appellants refers to as laches on the part of the respondent. The relevant dates to be taken into account are these. The receipt was signed on the 31st January, 1968. On some unspecified date in 1970, according to the respondent's evidence, the applicants informed the respondent that they did not intend to complete the sale. The writ forming the basis of the present proceedings was issued on the 26th September, 1973. In the interval the respondent had taken no steps to establish his rights under the agreement, except in the first place to give, early in 1968, notice to the occupier of the land, Ram Narayan's brother-in-law, to quit; and in the second place to approach the District Officer in Sigatoka in 1970. When the

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

tenant ignored the notice to quit, no further action in that direction was taken by the respondent.

The learned trial judge in the course of his judgment, finds that in 1970 the appellants 'arbitrarily and unjustifiably purported to terminate the contract'. He further held that when the Government took over from the millers in 1972, this could be done only 'subject to the rights which lessees, tenants and others held under existing agreements with the millers'. The point as to whether the very great delay on the part of the respondent affected his rights to a decree of specific performance was not argued in the Court below, and is not directly dealt with by the learned trial judge in his judgment. It is well established that unreasonable delay on the part of the purchaser will prevent him from obtaining a decree of specific performance. The principle is expressed in Stoneham's Vendor and Purchaser at p.778:

> ' A party has an option whether he will bring an action at law and repudiate the contract, or whether he will proceed in a Court of Equity for specific performance of the contract, and he must exercise that option promptly and without delay.'

In the New Zealand case of Dillon v. MacDonald 21 N.Z.L.R. 45, a decree of specific performance was refused because of a delay of 12 months. In another New Zealand case, Casey v. Wharawhara 41 N.Z.L.R. 455, the Court of Appeal held:

> ' In Wilson v. Moir and Dryden v. McCoy the contracts were for the sale of land. In the first-named case an unexplained delay for nine months was held to be a bar to specific performance. In the other case a similar delay for over four months was held to be fatal. In the present case the delay of over eight months was, we think, unreasonable, and ought to be treated as a bar to specific performance.'

This Court is not, of course, bound to follow the decisions of the New Zealand Courts; but in my view the judgments quoted correctly set out the principles to be applied on the subject of the effect of undue delay on a grant of specific

In the Fiji Court of Appeal

No.17

Judgment of Marsack J.A.

26th November 1975 (continued)

performance. In the present case, the respondent took no effective action for over five years after the date the agreement was signed, and for three years after the appellants - according to his own evidence - had notified him that they were not going to complete. Accordingly I am of the opinion that the learned trail judge exercised his discretion wrongly in granting a decree of specific performance. For these reasons I would set aside that decree. 10

The result of this would be that the respondent would be entitled to damages for breach of contract. This Court is not in a position to assess these damages. Mr. Reddy conceded, in reply to a question from this Court, that the deposit paid by respondent should be refunded if the decree of specific performance were set aside. That sum however would in my view form only part of the damages properly payable. I would therefore remit the case to the Supreme Court to assess the damages properly payable 20 to the respondent for breach of contract, and to enter judgment accordingly; with power to the learned trial judge to hear such evidence and such submissions as would be required to enable him to make the appropriate findings.

As far as costs in this Court are concerned, in all the circumstances disclosed I would order that each party pay his own costs.

(Sgd.) C. C. Marsack

JUDGE OF APPEAL 30

SUVA,
26th November, 1975.

No.18

Judgment of Gould V.P.

26th November 1975

No. 18

Judgment of Gould V.P.

The facts in the case under appeal are set out in the judgment of my learned brother Marsack J.A. and there is no need to re-state them.

The question whether the document dated the 31st January, 1968, was a sufficient memorandum to satisfy the requirements of Section 59 of the 40 Indemnity, Guarantee and Bailment Ordinance (Cap.208)

In the Fiji Court of Appeal

No.18

Judgment of Gould V.P.

26th November 1975 (continued)

is not an easy one. I think the law is quite clear that if a contract for the sale of land is silent as to the date for completion and payment of the price, a reasonable time will be allowed and the absence of such terms from the memorandum does not render the contract unenforceable. Mr. Reddy complains in the present case that evidence was given for the appellants that there was an agreement, not so much as to time as to place of payment of the purchase money, and that the learned trial judge had not ruled upon it. The stipulation alleged was that the balance of the price should be paid into the offices of Messrs. Munro, Leys, Kermode & Co., Solicitors, after the consent of the Colonial Sugar Refining Company Limited had been obtained. The materiality of the matter lay in the admitted fact that Messrs. Munro and Company were solicitors for the Colonial Sugar Refinding Company Limited and all documents had to be finalised through them. The respondent denied that there was any such term.

Generally on this question of payment the learned judge accepted the respondent's version that he was ready to pay and tried to get the District Officer to mediate. He said -

> "The defendant 2 gave evidence that it had been orally agreed that the £4000 balance should be paid into the office of Munro & Co., solicitors, and the plaintiff failed to pay the money at that firm's office. The plaintiff says he was ready and willing to pay, and had arranged a loan from a money-lender, P.W.2, for completing the purchase. P.W.2 gave evidence to the effect that he had promised to lend the money to the plaintiff. I accept the evidence of the plaintiff and P.W.2 which shows that the plaintiff was able to complete."

I think it is sufficiently implied that the learned judge rejected the evidence concerning payment in the particular solicitor's office.

Another difficulty is that the respondent pleaded in paragraph 5 of the amended Statement of Claim the following:-

> "It was an implied term of the said contract of sale that the Defendants would give vacant

In the Fiji Court of Appeal
—
No.18
Judgment of Gould V.P.
26th November 1975 (continued)

> possession of the said farms and improvements to the Plaintiff upon payment of the sum of Two thousand dollars (£1000.00.) referred to in paragraph 2 hereof and do all acts and things necessary to vest the ownership of the said farms in the Plaintiff and to assign the benefit of sugar cane contract Nos. 5128 and 11242 to the Plaintiff."

In the judgment under appeal there is the following general reference to the Statement of Claim - 10

> "The amended Statement of Claim alleges that there was an oral term, to the effect that the balance of the purchase price was to be paid when the defendants had done all that was necessary to enable them to vest ownership in the plaintiff. It does not allege any specific date for completion by transfer of the property or payment of the purchase price. It states, presumably in the alternative, that the oral term was in any 20 event implied."

Paragraph 5 of the Statement of Claim, which I have quoted, is no doubt what the learned judge refers to in the last sentence of that passage, but there is no reference to the fact that paragraph 5 also alleges an implied term that the appellants would give vacant possession upon payment of the two thousand dollars. How any such term could be put forward as an "implied" term is difficult to understand. It could not be implied 30 by law and none of the facts in evidence suggest that it was something which was understood. If there was any such term it must have been material, not falling within any "completion within reasonable time" principle, and surely ought to have appeared in the memorandum.

However the respondent gave no evidence in chief about this - he was prevented by counsel's objection from answering a question about working on the land, as part performance had not been pleaded. In cross-examination he said -

> "Ram Narayan's brother-in-law lived on the land; when he moved off I would move on."

He added that he served a notice on the brother-in-law to quit. In re-examination he said that

was in early 1968. It would seem likely that for one reason or another the whole story was not told in the Supreme Court.

There are a number of possible reasons for this matter not having been dealt with by the learned judge in the Supreme Court. He may have thought that the respondent should not be bound by a pleading of something that was not on the face of it a practical possibility. There could have been no such term implied. Or the judge may have considered that if there was any such agreed term it was for the exclusive benefit of the respondent and that by his conduct he had waived it. I would myself consider this to be a permissible view of the matter. Very little time was involved. The memorandum was signed on the 31st January, 1968, and by the 19th April, 1968, the South Pacific Sugar Mills had indicated its consent; at that stage according to both parties the whole transaction was due to be completed. In that brief intervening period there is no evidence of any step by the appellant to enforce a right to immediate possession. The terms of his notice to the occupier have never been proved but if it was a notice or request to leave it was not followed up. As from the date of the consent the respondent would be seeking performance of the contract as a whole, carrying with it the right to possession. There would be no need to rely on a special provision.

This matter does not appear to have been pressed in argument before the learned trial judge and I do not think it is sufficiently meritorious to succeed as a ground of appeal.

The next matter which arises is the statement of the consideration for the transaction in the memorandum. It is quite clear as to the amount - $8000 plus $2000. But it is argued that the amount includes an agreement to assign the cane contract and certain chattels and improvements and the net amount referable to the sale of the actual land is not specified. I do not think this matters. Such of the "improvements" as are chattels are of no great value and in the case of a sale of chattels (as distinct from land) courts are prepared to decide what is a reasonable price - see Hall v. Busst (1960) 104 C.L.R. 206. From that point of view the amount allocated to the land would be ascertainable.

In the Fiji Court of Appeal

No.18

Judgment of Gould V.P.

26th November 1975 (continued)

I would observe in passing that the letter of consent from the South Pacific Sugar Mills Ltd. dated the 19th April, 1968 to Messrs. Munro, Warren Leys and Kermode, referred to "the improvements and chattels as set out in your letter of the 7th March." It seems likely that the letter of the 7th March would have been of assistance in resolving the differences which appeared in the evidence of the parties as to the identity of the chattels, but the letter was not put in evidence by either party. For clarity I should add that it is common knowledge in Fiji that South Pacific Sugar Mills Ltd. is a subsidiary to the Colonial Sugar Refining Co. Ltd.

As to the cane contracts, while, as has been pointed out, they do not run with the land, they are, from a practical point of view, inseparable from the land. I agree fully with Marsack J.A. when he says there is a necessary implication that the agreement covered the cane contracts as well as the land. For the purpose of the memorandum I very much doubt whether it is necessary to separate the consideration for the cane contract from that for the land proper.

As far as Section 26 of the Sugar Industry Ordinance (Cap.180) is concerned it speaks of "assignments" and requires the true consideration for the assignment to be stated. This is a different question from the requirements of a memorandum under Section 59 of the Indemnity, Guarantee and Bailment Ordinance. It does not appear that an executory agreement to assign a cane contract contravenes the provisions of Section 26. The letter of the 19th April, 1968, from South Pacific Sugar Mills Limited, to which I have referred, enclosed, "Form 71 and Check-lists for the respective farms so that you may proceed with the transfer"; there is no evidence as to the contents of these forms but they add some strength to the suggestion that formal documents were invisaged in which the requirement of Section 26 would be complied with. The findings of the learned judge concerning willingness to complete are adverse to the appellants and it must be laid at their door that this aspect of the documentation was not completed. (At least there is no evidence that it was completed). The appellants did not rely on any suggestion that they could not agree upon an apportionment but refused to go on with the matter. A party cannot be permitted to take advantage of

In the Fiji Court of Appeal

No.18

Judgment of Gould V.P.

26th November 1975 (continued)

his own wrong and I do not think that the appellants can be permitted in the circumstances to claim that the consideration as stated in the memorandum lacked certainty.

For these and for the reasons given in the judgment of Marsack J.A. I agree that the argument based on the inadequacy of the memorandum fails. I also agree that the respondent by reason of his own delay was not entitled to a decree of specific performance but should be limited to his remedy in damages to be assessed by the Supreme Court.

All members of the court being in agreement as to the orders proper to be made the appeal is allowed to the extent indicated in the judgment of Marsack J.A. and there will be the orders proposed by him quashing the decree of specific performance and as to remission of the case and costs.

(Sgd.) Sir Trevor Gould
Vice President

No. 19

Judgment of Spring J.A.

No.19

Judgment of Spring J.A.

26th November 1975

I have read the separate judgments of the learned Vice President and my learned brother Marsack J.A. in this appeal and with respect agree with the conclusions and reasonings they have each reached.

(Sgd.) Spring
Judge of Appeal

SUVA

November 1975

In the Fiji Court of Appeal

No.20

Order

26th November 1975

No. 20

Order

IN THE FIJI COURT OF APPEAL

No. 35 of 1975

BETWEEN: 1. RAM NARAYAN son of Shankar
2. VIJAY KUMAR son of Ram Narayan

Defendants/Appellants

A N D: RISHAD HUSSAIN SHAH
son of Tasaduq Hussain Shah

Plaintiff/Respondent 10

WEDNESDAY THE 26TH DAY OF NOVEMBER, 1975

UPON READING the Notice of Motion on behalf of the abovenamed Defendants/Appellants dated the 29th day of July 1975 and the Judgment hereinafter mentioned

AND UPON READING the judge's note herein and UPON HEARING Mr. J.R. Reddy of Counsel for the Defendants/ Appellants and Mr. M.V. Pillai of Counsel for the Plaintiff/Respondent

And mature deliberation thereupon had

IT IS ORDERED that this Appeal be allowed and that the Judgment of the Honourable Mr. Justice Williams dated the 9th day of June 1975 granting the Plaintiff an Order for specific performance as claimed and the sum of $2,635.00 (Two thousand six hundred and thirty five dollars) as damages be set aside 20

AND IT IS FURTHER ORDERED that this case be remitted to the Supreme Court to assess the damages properly payable by the Defendants/Appellants to the Respondent/Plaintiff for breach of contract and to enter Judgment accordingly. 30

AND IT IS ORDERED that the trial Judge shall have power to hear such evidence and submission as would be required to enable him to make appropriate findings

AND IT IS ORDERED each party shall pay his own cost by the Court Registrar.

In the Fiji Court of Appeal

No.20

Order

26th November 1975 (continued)

BY THE COURT

(Sgd.) Illegible

REGISTRAR FOR
FIJI COURT OF APPEAL

No. 21

Order granting Leave to appeal to Her Majesty in Council

No.21

Order granting Leave to appeal to Her Majesty in Council

10th December 1975

10 IN THE FIJI COURT OF APPEAL

No. 35 of 1975

BETWEEN: 1. RAM NARAYAN son of Shankar
2. VIJAY KUMAR son of Ram

Defendants/Appellants

A N D: RISHAD HUSSAIN SHAH
son of Tasaduq Hussain Shah

Plaintiff/Respondent

BEFORE THE HONOURABLE MR. JUSTICE MARSACK, JUDGE OF APPEAL IN CHAMBERS

20 WEDNESDAY THE 10TH DAY OF DECEMBER, 1975

UPON READING the Notices of Motion for Leave to Appeal and to Cross-Appeal herein both dated the 8th of December 1975

AND UPON HEARING MR. H.M. PATEL of Counsel for the Appellants and MR. A.H. RASHEED of Counsel for the Respondent

IT IS THIS DAY ORDERED that the Appellants and the Respondent be granted leave to appeal and cross-appeal respectively to Her Majesty in Council on the following terms:-

In the Fiji Court of Appeal

No.21

Order granting Leave to appeal to Her Majesty in Council

10th December 1975 (continued)

1. Appellants and Respondent each to deposit a sum of $500.-- in Cash or lodge a bond in Court to the satisfaction of the Chief Registrar as security for costs within 21 days.

2. Appeal to be prosecuted with all due diligence.

BY ORDER

(Sgd.) Illegible

REGISTRAR
FIJI COURT OF APPEAL

10

No. 22

No.22

Grounds for Cross Appeal

12th March 1976

Grounds for Cross Appeal

IN THE PRIVY COUNCIL
CIVIL JURISDICTION

On appeal from the Fiji Court of Appeal
No. 35 of 1975

BETWEEN: RISHAD HUSSAIN SHAH son of Tasaduq Hussain Shah) of Maro, Nadroga, Driver APPELLANT
(Original Plaintiff. Original Respondent in the Fiji Court of Appeal).

20

AND: 1. RAM NARAYAN (son of Shankar) of Maro, Nadroga, Cultivator,
2. VIJAY KUMAR (son of Ram Narayan) of Maro, Nadroga, Cultivator.
RESPONDENTS
(Original Defendants, Original Appellants in the Fiji Court of Appeal).

30

1. Having held that Exhibit P1 was a sufficient memorandum or note of agreement for the sale

of land required under section 59 of the Indemnity Guarantee and Bailment Ordinance (Cap.208) the Fiji Court of Appeal erred in law in setting aside the decree of specific performance granted by the Supreme Court of Fiji.

2. The Defendants in Civil Action No.167 of 1973 and in the Supreme Court of Fiji not having pleaded or argued the defence of undue delay the Fiji Court of Appeal ought not to have allowed them to set up and argue this defence as a ground of appeal.

3. The Fiji Court of Appeal erred in law in holding that the Plaintiff in Civil Action No. 167 of 1973 in the Supreme Court of Fiji was guilty of undue delay and ought to have taken into account the unsophisticated conditions prevailing in Fiji.

DATED this 12th day of March, 1976.

PILLAI & CO.

Per: MANIKAM J.

Solicitors for the Appellant.

This Grounds for Cross Appeal was filed by Messrs. Pillai & Co., Solicitors for the Appellant whose address for service is at the chambers of the said Solicitors at Nadi.

To the abovenamed Respondents and/or their Solicitors Messrs. Stuart, Reddy & Co., Lautoka.

Exhibits

P1

Receipt for £1,000

31st January 1968

EXHIBITS

Exhibit P1 - Receipt for £1,000

RECEIVED from RISHAD HUSSAIN SHAH f/n Tasaduq Hussain Shah of Maro, Nadroga, the sum of ONE THOUSAND POUNDS (£1,000:0:0) being deposit in respect of two farms at Maro Nadroga, Nos. being 5128 and 11242 together with all improvements situate thereon. The balance being £4000:0:0.

Dated at Nadroga this 31st day of January, 1968. 10

(Sgd.) RAM NARAYAN
....
Ram Narayan f/n Shankar

(Sgd.) VIJAY KUMAR
....
Vijay Kumar f/n Ram Narain

Exhibit P2

Cane Quota for 1969 Farm 11242

April 1969

Exhibit P2 - Cane Quota for 1969 Farm 11242, April 1969

SOUTH PACIFIC SUGAR MILLS LIMITED
FARM HARVEST QUOTA
1969

LAUTOKA MILL 20

To Vijay Kumar F/n

Farm No. 11242 Lomawai sector

The farm basic allotment of cane for your farm is 120 tons.

In accordance with the Sugar Cane Contract the national and mill harvest quota of cane approved by the Sugar Board for 1969 have been declared publicly by the millers to be 160 percent of basic allotments.

The approved farm harvest quota of cane for your farm for 1969 is 192 tons. 30

For and on behalf of
SOUTH PACIFIC SUGAR MILLS LIMITED

(Sgd.) Illegible
Field Officer

Date: 15 APR. 1969 No. 1855

Exhibit P3 - Cane Quota for 1969, Farm 5128

Exhibits

P3

Cane Quota for 1969 Farm 5128

15th April 1969

SOUTH PACIFIC SUGAR MILLS LIMITED

FARM HARVEST QUOTA

1969

LAUTOKA MILL

To RAM NARAIN F/n

Farm No. 5128 sector

The farm basic allotment of cane for your farm is 240 tons.

10 In accordance with the Sugar Cane Contract the national and mill harvest quotas of cane approved by the Sugar Board for 1969 have been declared publicly by the millers to be 160 percent of basic allotments.

The approved farm harvest quota of cane for your farm for 1969 is 384 tons.

For and on behalf of
SOUTH PACIFIC SUGAR MILLS LIMITED

(Sgd.) Illegible

20 Field Officer

Date: 15 APR. 1969 No. 2285

Exhibits

D1

Letter, South Pacific Sugar Mills Ltd. to Munro, Warren Leys & Kermode

19th April 1968

Exhibit D1 - Letter, South Pacific Sugar Mills Ltd. to Munro, Warren Leys & Kermode

SOUTH PACIFIC SUGAR MILLS LIMITED

LAUTOKA MILL

LAUTOKA, FIJI. 19th April, 1968.

Messrs. Munro, Warren, Leys & Kermode,
Barristers & Solicitors,
LAUTOKA.

Dear Sirs, 10

5128 and 11242 Lomawai - Transfer

We would be prepared to consent to the transfer of these farms.

The improvements and chattels as set out in your letter to us of 7th March, we would have no objection to, provided the parties involved make their own financial arrangements.

At present our records show that there are no encumbrances over these farms.

We enclose forms 71 and Check Lists for the respective farms so that you may proceed with the transfer. 20

Yours faithfully,

(signed by) Actg. Manager.

D2

Crown Lease, Farm 11242

12th June 1974

Exhibit D2 - Crown Lease, Farm 11242

STAMP DUTY		24041	LD.	4/11/1097
Original	0.50	STAMP	Farm No.	11242
Duplicate	0.50		Leasing Letter No.	
	1.00		Sector	Lomawai
			Mill	Lautoka
Collected Vide- R.R......... of 22.5.74			Rent Card No.	

30

Exhibits

D2

Crown Lease,
Farm 11242

12th June 1974
(continued)

Lands and Mineral Resources Department
Government Buildings, SUVA

Date: 12 JUN 1974

Dear Sir,

APPROVAL NOTICE OF LEASE FORM
(Agricultural/~~Grazing~~ Lease)

I refer to your election to accept a Crown Lease in respect of a parcel of Crown land formerly known as Farm 11242 CT 5149 Maro Freehold situated in the Tikina of Sigatoka Province of Nadroga (My letter of the 8th Sept. 1972 refers). The terms and conditions of the lease are as follows:-

Estimated area subject to survey: 12 acres

Period: 10 years ... months ... days from 1.4.73.

Rent (payable half-yearly in advance): $72-00 per annum

Purpose: Agricultural.

Approximate survey fee: $120-00
(Final survey fee is to be assessed on completion of survey and is to be based on $10 per acre for agricultural land).

2. The lease shall be subject to the appropriate conditions as set out in the Crown Lands (Leases and Licences) Regulations, Cap. 113 (a summary of which is attached hereto) and also to the provisions of the Agricultural Landlord and Tenant Ordinance. This lease is a protected lease under the provisions of the Crown Lands Ordinance.

3. The rent is to be paid to The Fiji Sugar Corporation Ltd. (formerly S.P.S.M. Ltd.) at Lautoka Mill/~~xxxxxx~~ (whichever is applicable) except that as from 1st January, 1974, unless otherwise notified the rent is to be paid to the nearest Post Office.

4. Only those areas occupied by agreement with your previous landlord, the C.S.R. Company, will be included in the leased area. (It may be necessary for the Director during survey to make minor boundary alterations in order to satisfy the subdivisional requirements of local bodies and/or the Subdivision of Land Board).

5. In the event of it being shown by survey that the land surveyed for lease forms part of

Exhibits

D2

Crown Lease, Farm 11242

12th June 1974 (continued)

any land the subject of an existing freehold or leasehold title, this notice of approval of lease shall be deemed to be cancelled without prejudice or loss to the Government.

6. The survey fee as assessed may be paid on execution of the lease document or in twenty equal six monthly instalments together with the rent.

Yours faithfully,

(Sgd.) B.

for DIRECTOR OF LANDS

10

TO: Vijay Kumar f/n Ram Narayan

....

....
signed after interpretation
in the Hindustani language.

I/We do hereby accept the lease on the terms and conditions as set out in this Approval Notice

(Sgd.) Vijay Kumar

20

(Witness)

AGRICULTURAL/~~GRAZING~~ LEASE

(1) The rent shall be subject to reassessment to a maximum not exceeding six (6) per centum of the unimproved value of the land in accordance with the provisions of the Agricultural Landlord and Tenant Ordinance.

(2) The lessee shall not transfer, sublet, assign or part with the possession of the whole or any part of the demised land nor shall he enter into a partnership agreement to work the land or any part thereof or a share farming agreement or any other arrangement of a like nature for the working of the demised land or any part thereof, without the written consent of the lessor first had and obtained.

30

(3) Fruit-trees growing on the demised land shall not be cut down without the written consent of the lessor.

Exhibits

D2

Crown Lease, Farm 11242

12th June 1974 (continued)

(4) The whole of any portion of the demised land used for the grazing of stock shall be enlosed with good and substantial fencing so that all stock kept upon the land shall at all times be adequately fenced in to the satisfaction of the lessor.

(5) Only such buildings shall be erected on the demised land as are necessary for -

(a) a dwelling or dwellings for the lessee;

10 (b) accommodation for implements, vehicles, horses and other stock used in connexion with the farm or plantation, or any building directly connected with the work of a farm or plantation.

(6) The lessee shall not obstruct in any way the free passage of any person over any public thoroughfare intersecting or adjoining the demised land and shall if required by the lessor or the Divisional Surveyor so to do forthwith remove any 20 crop or other obstruction placed by him on such public thoroughfare in contravention of this condition. Should any question arise as to whether any path intersecting, or adjoining the demised land is a public thoroughfare it shall be referred to the Director of Lands whose decision shall be final and conclusive.

(7) The lessee shall not remove or dispose of by sale or otherwise any forest produce growing upon the demised land without the written consent of 30 the lessor first had and obtained and subject to such conditions as to the payment of royalty or otherwise prescribed by the Forests Regulations as the lessor may direct.

(8) The lessee shall manure the portions of the demised land planted as aforesaid and shall keep the whole in good condition and shall not allow any part to become impoverished and shall use such artificial or other manure as may be 40 required by the lessor or an officer authorized by the lessor in that behalf in writing.

Delete in Grazing Lease

(9) The lessee shall not fell trees or clear or burn off or cultivate any land within a distance of twenty-four feet from the bank of a river or stream or plant any crops within thirty-three feet of the

Delete in Grazing Lease

Exhibits

D2

Crown Lease,
Farm 11242

12th June 1974
(continued)

centre of any public road or on a slope exceeding twenty-five degrees from the horizontal.

Delete in Agricultural Lease

~~(10) The lessee shall stock the demised land~~ at a minimum rate of one head or cattle or five sheep or goats per 64 acres within the first five years of the lease and at a minimum rate of two head of cattle or ten sheep or goats per 64 acres within ten years of the date of commencement of the lease and the land shall be kept stocked as last aforesaid for the remainder of the term of the lease.

Delete in Agricultural Lease

(11) Should the lessee use any portion of the demised land for agricultural purposes otherwise than for growing crops for the use of stock or persons upon the premises or for the erection of buildings not incident to the purposes of this lease the lessor shall have the right to reassess the rent of the land so used subject to penalty or re-entry should the lessee not accept such reassessment of rent

Delete in Agricultural Lease

(12) The lessee shall not, without the prior consent of the lessor in writing, take use or otherwise injure any forest tree growing upon the demised land except for the purpose of clearing the land for the planting of grass or of erecting fences or of buildings incidental to the use of the demised land ~~for grazing purposes~~.

(13) The lessee shall not clear, burn off or cultivate or permit excessive grazing of the top twenty-five per centum of the hills (as measured vertically) which have a slope exceeding twenty-five degrees from the horizontal.

(14) The lessee shall bear, pay and discharge all existing and future rates, taxes, or assessments, duties, impositions and outgoings whatsoever imposed or charged upon the demised premises or upon the owner or occupier in respect thereof or payable by either in respect thereof, landlords' property tax only excepted.

(15) The lessee shall not subdivide the land without the written consent of the lessor first had and obtained and then only in accordance with a plan of subdivision approved by the lessor in writing.

Exhibits

D2

Crown Lease, Farm11242

12th June 1974 (continued)

(16) The lessee shall keep open and maintain in good condition all drains, ditches and water-courses upon or intersecting the land the subject of the lease, to the satisfaction of the lessor or the Divisional Surveyor.

(17) Subject to Regulation 32, any building erected by the lessee on the demised land, shall be removable by the lessee within three months after the expiration of the lease; provided that -

10

(a) before the removal of any building the lessee shall have paid all rent owing by him and shall have performed or satisfied all his other obligations to the lessor in respect of the demised land;

(b) in the removal of any building the lessee shall not do any avoidable damage to any other buildings or other part of the demised land;

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(c) immediately after the removal of any building the lessee shall make good all damage occasioned to any other building or other part of the demised land;

(d) the lessee shall not remove any building without giving one month's previous notice in writing to the lessor of his intention to remove it;

30

(e) at any time before the expiration of the notice of removal, the lessor, by notice in writing given by him to the lessee, may elect to purchase any building comprised in the notice of removal, and any building thus elected to be purchased shall be left by the lessee and shall become the property of the lessor who shall pay to the lessee the fair value thereof to an incoming lessee of the land; and any difference as to the value shall be settled by arbitration in the manner provided by Regulation 19;

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(f) if the lessee applies for a renewal of the lease the provisions of this clause shall be deemed to be suspended as from the date of the application by the lessee for a renewal of the lease until the date

Exhibits

D2

Crown Lease, Farm 11242

12th June 1974 (continued)

of the application by the lessee for a renewal of the lease until the date (sic) of refusal or approval of such application.

(18) In the event of any breach by the lessee of any covenant or condition in this lease the lessor may enter upon and take possession of the lease or may, at the discretion of the Minister, impose a penal rent in respect of such breach.

(19) The lessee shall apply such measures to check soil erosion as may be required by the lessor in writing and shall maintain such measures to the satisfaction of the lessor. Provided that any such measures qualifying as improvements under Part II of the Schedule to the Agricultural Landlord and Tenant Ordinance, 1966 shall have the recommendation of a nominee of the Director of Agriculture. 10

(20) This contract is subject to the provisions of the Agricultural Landlord and Tenant Ordinance, 1966 and may only be determined whether during its currency or at the end of its term, in accordance with such provisions. All disputes and differences whatsoever arising out of this contract for the decision of which the Ordinance makes provisions shall be decided in accordance with such provisions. 20

-/H77/-

D3

Crown Lease, Farm 5128

13th June 1974

Exhibit D3, Crown Lease, Farm 5128

23971

STAMP DUTY

Original $12-00

Duplicate 0-50

$12-50

Collected Vide -
R.R.
of

STAMP

LD. 4/11/1022 30

Farm No. 5128

Leasing Letter No.

Sector: Lomawai

Mill: Lautoka

Rent Card No.

Lands and Mineral Resources Department
Government Buildings, SUVA.

Date: 13 JUN 1974

Exhibits

D3

Crown Lease, Farm 5128

13th June 1974 (continued)

Dear Sir,

APPROVAL NOTICE OF LEASE FORM
(Agricultural/~~Grazing~~ Lease)

I refer to your election to accept a Crown lease in respect of a parcel of Crown land formerly known as Farm 5128 CT 5149 Maro Freehold situated in the Tikina of Sigatoka Province of Nadroga (My letter of the 8th Sept. 1972 refers). The terms
10 and conditions of the lease are as follows:-

Estimated area subject to survey: 18.0 acres

Period: 22 years 9 months ..... days from 1.4.73.

Rent (payable half-yearly in advance) $108-00 per annum.

Purpose: Agricultural

Approximate survey fee $180-00
(Final survey fee is to be assessed on completion of survey and is to be based on
20 $10 per acre for agricultural land).

2. The lease shall be subject to the appropriate conditions as set out in the Crown Lands (leases and Licences) Regulations, Cap. 113 (a summary of which is attached hereto) and also to the provisions of the Agricultural Landlord and Tenant Ordinance. This lease is a protected lease under the provisions of the Crown Lands Ordinance.

3. The rent is to be paid to The Fiji Sugar Corporation Ltd. (formerly S.P.S.M. Ltd.) at Lomawai
30 ~~Mill~~/Sector (whichever is applicable) except that as from 1st January, 1974, unless otherwise notified the rent is to be paid to the nearest Post Office.

4. Only those areas occupied by agreement with your previous landlord, the C.S.R. Company, will be included in the leased area. (It may be necessary for the Director during survey to make minor boundary alterations in order to satisfy the subdivisional requirements of local bodies and/or the Subdivision of Land Board).

40 5. In the event of it being shown by survey that the land surveyed for lease forms part of any land

Exhibits

D3

Crown Lease,
Farm 5128

13th June 1974
(continued)

the subject of an existing freehold or leasehold title, this notice of approval of lease shall be deemed to be cancelled without prejudice or loss to the Government.

6. The survey fee as assessed may be paid on execution of the lease document or in twenty equal six monthly instalments together with the rent.

Yours faithfully,

(Sgd.) B.

for DIRECTOR OF LANDS. 10

TO: Ram Narayan f/n Sanker

....

....
signed after interpretation
in the Hindustani language.

I/We do hereby accept the lease on the terms and conditions as set out in this Approval Notice.

(Sgd.) Ram Narayan

.... 20
(Witness)

AGRICULTURAL/~~GRAZING~~ LEASE

(1) The rent shall be subject to reassessment to a maximum not exceeding six (6) per centum of the unimproved value of the land in accordance with the provisions of the Agricultural Landlord and Tenant Ordinance.

(2) The lessee shall not transfer, sublet, assign or part with the possession of the whole or any part of the demised land nor shall he enter 30 into a partnership agreement to work the land or any part thereof or a share farming agreement or any other arrangement of a like nature for the working of the demised land or any part thereof, without the written consent of the lessor first had and obtained.

Exhibits

D3

Crown Lease, Farm 5128

13th June 1974 (continued)

(3) Fruit-trees growing on the demised land shall not be cut down without the written consent of the lessor.

(4) The whole of any portion of the demised land used for the grazing of stock shall be enclosed with good and substantial fencing so that all stock kept upon the land shall at all times be adequately fenced in to the satisfaction of the lessor.

10 (5) Only such buildings shall be erected on the demised land as are necessary for -

(a) a dwelling or dwellings for the lessee;

(b) accommodation for implements, vehicles, horses and other stock used in connexion with the farm or plantation, or any building directly connected with the work of a farm or plantation.

(6) The lessee shall not obstruct in any way the free passage of any person over any public 20 thoroughfare intersecting or adjoining the demised land and shall if required by the lessor or the Divisional Surveyor so to do forthwith remove any crop or other obstruction placed by him on such public thoroughfare in contravention of this condition. Should any question arise as to whether any path intersecting, or adjoining the demised land is a public thoroughfae it shall be referred to the Director of Lands whose decision shall be final and conclusive.

30 (7) The lessee shall not remove or dispose of by sale or otherwise any forest produce growing upon the demised land without the written consent of the lessor first had and obtained and subject to such conditions as to the payment of royalty or otherwise prescribed by the Forests Regulations as the lessor may direct.

(8) The lessee shall manure the portions of the demised land planted as aforesaid and shall keep the whole in good condition and shall not allow any part 40 to become impoverished and shall use such artificial or other manure as may be required by the lessor or an officer authorized by the lessor in that behalf in writing.

Delete in Grazing Lease

Exhibits

D3

Crown Lease, Farm 5128

13th June 1974 (continued)

(9) The lessee shall not fell trees or clear or burn off bush or cultivate any land within a distance of twenty-four feet from the bank of a river or stream or plant any crops within thirty-three feet of the centre of any public road or on a slope exceeding twenty-five degrees from the horizontal. Delete in Grazing Lease

(10) The lessee shall stock the demised land at a minimum rate of one head or cattle or five sheep or goats per 64 acres within the first five years of the lease and at a minimum rate of two head of cattle or ten sheep or goats per 64 acres within ten years of the date of commencement of the lease and the land shall be kept stocked as last aforesaid for the remainder of the term of the lease. Delete in Agricultural Lease

10

(11) Should the lessee use any portion of the demised land for agricultural purposes otherwise than for growing crops for the use of stock or persons upon the premises or for the erection of buildings not incident to the purposes of this lease the lessor shall have the right to reassess the rent of the land so used subject to penalty or re-entry should the lessee not accept such reassessment of rent. Delete in Agricultural Lease

20

(12) The lessee shall not, without the prior consent of the lessor in writing, take use or otherwise injure any forest tree growing upon the demised land except for the purpose of clearing the land for the planting of grass or of erecting fences or of buildings incidental to the use of the demised land for grazing purposes. Delete in Agricultural Lease

30

(13) The lessee shall not clear, burn off or cultivate or permit excessive grazing of the top twenty-five per centum of the hills (as measured vertically) which have a slope exceeding twenty-five degrees from the horizontal.

40

(14) The lessee shall bear, pay and discharge all existing and future rates, taxes, or assessments, duties, impositions and outgoings whatsoever imposed or charged upon the demised premises or upon the owner or occupier in respect thereof or payable by either in respect thereof, landlords' property tax only excepted.

Exhibits

D3

Crown Lease,
Farm 5128

13th June 1974
(continued)

(15) The lessee shall not subdivide the land without the written consent of the lessor first had and obtained and then only in accordance with a plan of subdivision approved by the lessor in writing.

(16) The lessee shall keep open and maintain in good condition all drains, ditches and water-courses upon or intersecting the land the subject of the lease, to the satisfaction of the lessor
10 or the Divisional Surveyor.

(17) Subject to Regulation 32, any building erected by the lessee on the demised land, shall be removable by the lessee within three months after the expiration of the lease; provided that -

(a) before the removal of any building the lessee shall have paid all rent owing by him and shall have performed or satisfied all his other obligations to the lessor in respect of the demised land;

20 (b) in the removal of any building the lessee shall not do any avoidable damage to any other buildings or other part of the demised land;

(c) immediately after the removal of any building the lessee shall make good all damage occasioned to any other building or other part of the demised land;

(d) the lessee shall not remove any building without giving one month's previous
30 notice in writing to the lessor of his intention to remove it;

(e) at any time before the expiration of the notice of removal, the lessor, by notice in writing given by him to the lessee, may elect to purchase any building comprised in the notice of removal, and any building thus elected to be purchased shall be left by the lessee and shall become the property of the lessor who
40 shall pay to the lessee the fair value thereof to an incoming lessee of the land; and any difference as to the value shall be settled by arbitration in the manner provided by Regulation 19;

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Exhibits

D3

Crown Lease, Farm 5128

13th June 1974 (continued)

(f) if the lessee applies for a renewal of the lease the provisions of this clause shall be deemed to be suspended as from the date of the application by the lessee for a renewal of the lease until the date of the application by the lessee for a renewal of the lease until the date of refusal or approval of such application.

(18) In the event of any breach by the lessee of any covenant or condition in this lease the lessor may enter upon and take possession of the lease or may, at the discretion of the Minister, impose a penal rent in respect of such breach. 10

(19) The lessee shall apply such measures to check soil erosion as may be required by the lessor in writing and shall maintain such measures to the satisfaction of the lessor. Provided that any such measures qualifying as improvements under Part II of the Schedule to the Agricultural Landlord and Tenant Ordinance, 1966 shall have the recommendation of a nominee of the Director or Agriculture. 20

(2) This contract is subject to the provisions of the Agricultural Landlord and Tenant Ordinance, 1966 and may only be determined whether during its currency or at the end of its term, in accordance with such provisions. All disputes and differences whatsoever arising out of this contract for the decision of which the Ordinance makes provisions shall be decided in accordance with such provisions. 30

IN THE PRIVY COUNCIL | NO. 9 of 1976

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

1. RAM NARAYAN s/o SHANKAR
2. VIJAY KUMAR s/o RAM NARAYAN

(Defendants)Appellants

and

RISHAD HUSSAIN SHAH s/o TASADUQ HUSSAIN SHAH (Plaintiff)Respondent

(and Cross-Appeal)

RECORD OF PROCEEDINGS

Charles Russell & Co.,
Hale Court,
Lincoln's Inn,
London WC2A 3UL.

Solicitors for the Appellants.

Philip Conway Thomas & Co.,
61 Catherine Place,
Westminster,
London, SW1E 6HB.

Solicitors for the Respondent.