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

B E T W E E N :

RAM SHANKAR (S/O PACHU)

Appellant

- and -

PAREKH HOLDINGS LIMITED

Respondent

CASE FOR THE APPELLANT

RECORD

10 1. This is an Appeal from the Judgment and Order of the Fiji Court of Appeal (Gould V.P., Marsack, J.A. and Henry J.A.) which dismissed with costs an Appeal by the Appellant from a Decision and Order of Tuivaga, J. made in the Supreme Court of Fiji on 30th January 1973 whereby he allowed with costs an application made by the Respondent Company under S.169 of the Land Transfer Act 1971, seeking to order the Defendants (the Appellant herein and two others) to give up immediate vacant possession of all that piece of land described in Certificate of Title No. 20 8633 as "Tokotoko" (Part of) Lot 46 on D.P.1218, being an area of 6 acres at Navau, (hereinafter called "the land").

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2. The manner in which such application is made and the powers of the Judge in Chambers upon such application are provided for in sections 169 to 172 of the Land Transfer Act 1971 which is annexed to this Case. Sections 39, 40 and 41, which are also relevant to this Appeal, are also annexed.

30 3. The said Application was supported by the Affidavit of one Sashi Kant Parekh, a director of the Respondent Company, wherein he stated that the said Company was the registered proprietor of the said land, that the Defendants were in unlawful occupation of the

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said land, and that despite repeated verbal requests and a written notice dated 6th October 1972, the Defendants have failed and still refuse to vacate the said land.

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4. In opposing the Application, the third Defendant, one Shanti Devi, stated in an Affidavit dated 21st December 1972 as follows :-

"2. THAT prior to 23rd day of November 1968 I was the registered proprietor of the Freehold land known as "Tokatoka" (part of) being Lot 46 on Deposited Plan No. 1218 situate in the district of Deuba in the Island of Vitilevu, containing six (6) acres and comprised in the Certificate of Title No. 8633 (hereinafter called "the said land").

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3. THAT on the 23rd day of November 1968 I executed a transfer of the said land in consideration of the sum of £850.0.0 now \$1,700.00 to be paid to me after execution in favour of Craids Enterprises Limited, a limited liability Company having its registered office at Suva, Fiji (hereinafter called "the Purchaser").

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4. THAT the said sum of £850.00 was never paid to me by the said purchaser and still remains unpaid as at the date hereof.

5. THAT I have caused a Caveat No. 117514 registered over the said land and that the said Caveat has been extended from time to time by Order of this Honourable Court in civil action No. 283 of 1971 (hereinafter called "the said Caveat"). To the best of my knowledge, information and belief, the said Caveat still subsist on the said land.

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6. THAT I have instituted legal proceedings against the said Purchaser in the Supreme Court of Fiji namely the Civil Action No. 20 of 1971. A copy of the proceedings of the said action is hereto annexed marked "A". The present Solicitors for the Plaintiff Company herein were acting for me in the said civil action No. 20 of 1971. The said Civil Action is still pending before this Honourable Court.

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7. THAT subsequent to the transfer of

the said land, the said purchaser mortgaged the said land subject to the said Caveat to the Bank of New South Wales.

8. THAT the said land so mortgaged to the Bank of New South Wales by the said Purchaser was sold by the Mortgagee to the Plaintiff Company herein, in exercise of powers of sale contained in the said Mortgage No. 112317.

10 9. THAT an order for winding up of the said Purchaser Company has been made by this Honourable Court and the Official Receiver has been appointed the receiver of the said Company.

10. THAT it is my intention and I have been advised by my Solicitors to amend the said Civil Action No. 20 of 1971 to set aside the said Transfer No. 106953 registered on 19th December 1968 in the name of the said Purchaser on the ground that the same is null and void by reason of want of consideration.

20 11. THAT in the alternative, I say that the said purported sale of the said land was subject to then existing agricultural tenancies to the following persons :-

(a) RAM SARUP son of Pachu of Tokotoko, Navua,
Farmer

(b) RAM SHANKAR son of Pachu of Tokotoko, Navua,
Farmer.

30 12. THAT i have been informed by the said Ram Shankar and do verily believe that he has instituted legal proceedings against the Plaintiff Company under the provisions of the Agricultural Landlord and Tenant Ordinance; namely the Agricultural Tribunal Reference No. C6ED 27 of 1972 which said action is still pending before the Agricultural Tribunal. A copy of the said proceedings is hereto annexed marked "B".

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13. THAT in the alternative, I say that the Plaintiff's Notice to quit herein is defective by reasons of :-

40 (a) that at no time the Plaintiff gave any notice or informed me that it has become the registered proprietor of the said land

(b) that at least six (6) months notice is required to be given, in any event, to the

Defendants in this action.

14. THAT by reason of the matters raised herein, I say that this action be dismissed with costs or alternatively be stayed pending the determination of the said Civil Action No. 20 of 1971 and the said Tribunal Action No. Reference C6ED 27 of 1972."

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5. At the hearing of the said summons for ejectment before Tuivage J. on 9th January 1973 Counsel for the Defendants pointed out that there was a pending action (No. 20 of 1971) which was closely related to the instant action, and also an application by the Defendants to a tribunal, reference C6ED of 1972 referred to in the Affidavit of Shanti Devi set out in paragraph 4 above. Counsel went on to submit that as the said summons for ejectment involved an allegation of fraud the matter should go to trial, and referred to section 40 of the Land Transfer Act which is set out in Annexure B. Counsel also submitted that the said land was sold subject to existing agricultural tenancies. The proceedings were adjourned to 30th January 1973.

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6. On 30th January 1973 Tuivaga J held, it is respectfully submitted wrongly, that:

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p.29 1.10

"In view of the provisions of Section 39 of the Land Transfer Act, I cannot see how the defendants could establish a prima facie right to stay on the land in question. The only circumstance in which the title of the plaintiff could be impeached would be on proof of fraud on its part. There is no evidence whatever that the plaintiff acquired its registered title to the land through fraud. Although an allegation of fraud has been made by Counsel for the Defendants it is quite clear that this allegation refers to Craids Enterprises Limited who had purchased the land from the Defendants and is irrelevant to this application.

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The defendants were served with a seven days' notice by the plaintiff to quit the land but they refused to comply with that notice. They have failed to provide any defence to the plaintiff's application.

I therefore grant the application and order that the defendants give up possession of the land in question to the plaintiff."

10 7. It is respectfully submitted that it is plain from Tuivaga J's decision that he took the view that having regard to Section 39 of the Land Transfer Act, the only ground upon which the Plaintiff's title could be impeached would be on proof of fraud on the Plaintiff's part and that consequently the learned Judge failed to take into account the alternative argument, clearly raised in the Affidavit of Shanti Devi, set out in paragraph 4 above, and on the argument before Tuivaga J referred to in paragraph 5 above, namely that the said land was subject to existing agricultural tenancies under the Agricultural Landlord and Tenant Ordinance 1967.

20 8. It is submitted that it is clear from the Court of Appeal Judgment, set out in paragraph 11 below, that the Court disagreed with the view of the learned trial judge about the interpretation of Section 39 of the Land Transfer Act. The Court was unable to accede to the proposition that by virtue of the said section a right to tenancy under the Agricultural Landlord and Tenant Ordinance could not avail as against a new registered proprietor of the land. The Court was of the opinion that this was a highly important question which would have to be settled in an action and not by summary procedure under Section 169.

30 9. It is further submitted that the learned Judge erred in interpreting section 39 of the said Act to mean that the only circumstance in which the title of the Plaintiff could be impeached would be by proof of fraud "on the Plaintiff's part". The said section provides simply that the title of a registered proprietor may be impeached in case of fraud.

10. The Appellant appealed to the Fiji Court of Appeal on 26th February 1972.

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40 11. At the hearing of the Appeal the court reviewed the evidence relating to the Appellant's claim to a right to tenancy under the Agricultural Landlord and Tenant Ordinance 1967. In particular they considered the Affidavit of Shanti Devi (set out in paragraph 4 above) together with the proceedings instituted by the Appellant before the Agricultural Tribunal under the said Agricultural Landlord and Tenant Ordinance. The Court concluded :

"The question is whether evidence of this type

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put forward in the way it was, is sufficient to show cause why the appellant should not be put out of possession. The learned judge in the Supreme Court apparently thought not, for he made no reference to the matter when making his order. The argument before this Court of counsel for the Respondent company was that there was no evidence of any tenancy and that by virtue of Section 39 of the Land Transfer Act 1971, a right to tenancy under the Agricultural Landlord and Tenant Ordinance (Cap 242) could not avail as against a new registered proprietor of the land. To this last proposition we are unable to accede and, if it arose, it is at least a highly important question which would have to be settled in an action and not by summary procedure under Section 169. In our opinion, however, the question does not arise. In order to show cause the appellant surely had to come forward with his own evidence, not hearsay, condescending upon particulars, showing that the land in question was in fact agricultural land subject to the Ordinance in question, giving some details as to area, crops, parties, rent, and matters generally which would indicate at least a possibility that his claim might be supported. It is not of course, and would not have been even if the appellant had provided evidence to the purport above-mentioned, the task of the Supreme Court or this Court to decide whether the Appellant would be entitled to a tenancy under the Agricultural Landlord and Tenant Ordinance; that is a question for the Tribunal established by the particular legislation. It is enough for present purposes to say that he clearly has not shown himself to have any claim as a common law tenant; nor has he, by the manner in which he has chosen to put forward a case which at best can only be described as shadowy and suspect, shown sufficient cause to be permitted to remain in possession while he pursues his application to the Agricultural Tenancy Tribunal."

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12. It is respectfully submitted that the Court of Appeal was wrong in holding that the question whether a right to tenancy under the

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10 Agricultural Landlord and Tenant Ordinance could avail as against a new registered proprietor of the land did not arise. It is submitted that the matter was raised in evidence through the Affidavit of Shanti Devi and clearly argued before Tuivaga J. Tuivaga J. did not take the view that the evidence regarding the question of an agricultural tenancy was insufficient but based his decision solely on his interpretation of Section 39 of the Land Transfer Act, with which the Court of Appeal disagreed.

13. On the 18th December 1974, an Order was made granting the Appellant Special Leave to Appeal in forme pauperis to Her Majesty in Council.

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14. The Appellant respectfully submits that this Appeal should be allowed with costs and an order be made dismissing the Respondent's Summons under S.172 of the Land Transfer Act for the following among other

20 REASONS

1. BECAUSE this Appeal raises a very important point of Law, namely, whether a right to tenancy under the Agricultural Landlord and Tenant Ordinance 1967 can avail as against the provisions of the Land Transfer Act 1971 conferring indefeasibility of title on the registered proprietor of the land, which point ought not to be dealt with by way of summary procedure.
- 30 2. BECAUSE the Trial Judge's reasons for ordering the Appellant to give up possession of the land were wrong being founded on a mistaken interpretation of Section 39 of the Land Transfer Act 1971; and more particularly for the reasons given in paragraphs 7, 8 and 9 above.
3. BECAUSE the Trial Judge failed to consider the evidence before him relating to the Appellant's right to an Agricultural Tenancy.
- 40 4. BECAUSE the Court of Appeal were wrong in holding that the question of the Appellant's right to an Agricultural Tenancy did not arise.
5. BECAUSE the Court of Appeal failed to attach sufficient weight to the evidence which had

clearly been put before it regarding the Appellant's right to an Agricultural Tenancy.

6. BECAUSE having regard to the fact that the case raises important questions of law and also questions of fact, it ought not to be dealt with by way of summary procedure.

EUGENE COTRAN.

(i)

A N N E X U R E

LAND TRANSFER ACT 1971 (NUMBER 19 of 1971)

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

(a) the last registered proprietor of the land."

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

10 "S.171 On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."

20 "S.172 If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;

30 Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

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

40 "S. 39 (1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any Estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as

(ii)

may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except -

- (a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this act; and
- (b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and
- (c) any reservations, exceptions, conditions and powers contained in the original grant."

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"S.40 Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

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"S.41 Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom."

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No. 16 of 1975

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE FIJI COURT OF APPEAL

B E T W E E N:

RAM SHANKAR (S/O PACHU) Appellant

- and -

PAREKH HOLDINGS LTD. Respondent

CASE FOR THE APPELLANT

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