

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 59 of 1979

Between:

LOGESSA s/o Kuppan

Appellant

- and -

PACHAMMA d/o Nadan Naikar Respondent

M.S. Sahu Khan for the Appellant
R.D. Patel for the Respondent

Date of Hearing: 11th June, 1980
Delivery of Judgment:

JUDGMENT OF THE COURT

Gould V.P.

This is an appeal against a judgment of the Supreme Court of Fiji at Lautoka in an action in which the respondent, as plaintiff, claimed possession of 10½ acres of land to which the appellant, by his defence and counterclaim, claimed to be entitled under an agreement of sale and purchase made with the respondent's husband before his death. In the Supreme Court the learned judge held that the agreement for sale and purchase was void and made an order for possession against the appellant.

Sukhramani, the respondent's former husband, was the administrator of the estate of his mother, Anamma, and the sole beneficiary under her will.

She had occupied the same piece of land (we will refer to it as "the said land") under an Approval Notice from the Director of Lands, and after her death in 1972 the Director issued another Approval Notice to Sukhramani (No.75950) on the 18th December, 1974, as administrator of her estate. It was expressed to be for a period of 10 years from the 1st April, 1973. This Approval Notice contained the words "This lease is a protected lease under the provisions of the Crown Lands Ordinance."

The significance of this reference lies in Section 13 of the Crown Lands Ordinance (Cap. 113) which it will be convenient to set out at this stage. It reads :-

"13.(1) Whenever in any lease under this Ordinance there has been inserted the following clause :

'This lease is a protected lease under the provisions of the Crown Lands Ordinance'

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.

(3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.

(4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of the last preceding subsection shall apply to the refusal of any such officer or officers to give any such consent.

(5) For the purposes of this section 'lease' includes a sublease and 'lessee' includes a sublessee."

By an agreement dated the 5th April, 1975, Sukhramani agreed to sell the said land, as comprised in his Approval Notice, to the appellant for the price of \$8,000. This was to be paid "from time to time" from the sugarcane proceeds. Clause 4 provided that possession of the said land would be given and taken by the purchaser or consent to "this dealing". Under clause 7 the purchaser was not entitled to assign etc. or part with possession without the consent in writing of the vendor and the consent of the Director of Lands. Clause 13 provided that the agreement itself was subject to the consent of the Director of Lands. It should be mentioned that, as signed, the agreement contained no reference in clause 7 to the consent of the Director of Lands and the reference in clause 13 was to the consent of

the Native Land Trust Board - an obvious error. As appears in the next paragraph these amendments were made at the request of the Director of Lands.

Despite the provisions of clause 4 the appellant went into possession of the said land about a week after making the agreement, built a house on it (apparently it took only two or three days) and began to farm it.

By a letter dated 23rd April, 1975, Mr. Gordon, solicitor for both parties sent the agreement and an application for consent to the Director of Lands with the consent fee and asked for consent. The Director on the 20th May, 1975, sent the agreement back asking for minor amendments to clauses 7, 9 and 13 and for an application for transfer from Sukhramani as the administrator of the estate of Anamma to himself. Counsel informed us that this last mentioned requirement is a usual procedure. The amendments to clauses 7, 9 and 13, which include the two we have mentioned, all related to the consent of the Director of Lands: only the change from "the Native Land Trust Board" to "the Director of Lands" in clause 13 is material.

It was not until the 3rd May, 1977, that Messrs Gordon and Company replied to the Director's letter. They then wrote enclosing an application for consent by Sukhramani and the sale and purchase agreement duly amended. They asked for the consent.

There is a form of transfer in evidence dated the 3rd July, 1976, from Sukhramani as administrator of Anamma to himself which bears the consent of

the Director of Lands dated the 9th July, 1976. However, Sukhramani died on the 19th August, 1976, and letters of administration of his estate were granted to the respondent on the 28th March, 1977. The further submission of the application for consent by Messrs Gordon and Company on the 3rd May, 1977, was therefore after the death of Sukhramani.

The next step was the issuing of an Approval Notice dated the 11th February, 1978, by the Director of Lands for the said land in favour of the respondent as administratrix of Sukhramani. Its specified "period" is 6 years 7 months 12 days from the 19th August, 1976, (which brings it to termination on the same date as the earlier Approval Notice issued to Sukhramani) and it is endorsed with a statement that the Approval Notice dated the 18th December, 1974, drawn in favour of the estate of Anamma is cancelled. The rental, survey fee and other conditions (including the statement that the lease is a protected lease under the provisions of the Crown Lands Act) are the same. It is obviously in the nature of a replacement approval to the person for the time being entitled.

At the trial a witness in the employ of the Lands Department gave evidence that the Director of Lands would consent to the transfer to the appellant if the respondent were to apply for it. However, the respondent took the position that she was not prepared to perform the agreement made between Sukhramani and the appellant. She brought the present action claiming that for lack of consent by the Director of Lands the said agreement

was null and void; the Statement of Claim makes no mention of Section 13 of the Crown Lands Ordinance nor of the "protected lease" provision but the whole case has been argued on that basis. The appellant counterclaimed for a declaration that the agreement of the 5th April, 1975, was binding on the respondent, for an order that the respondent do such acts as were necessary to obtain the consent of the Director of Lands, and for specific performance.

The judgment of the learned judge in the Supreme Court dealt in the main with two broad submissions made by counsel for the appellant in that court and repeated here. The first is that Section 13 of the Crown Lands Ordinance applies only to "leases", and an Approval Notice (or in any event the approval notice with which this case is concerned) does not create a lease within the section. Hence there is no provision operating to declare a sale of or dealing with the land without consent null and void. The second submission is that even if the first is unacceptable, on the facts of this case there was no breach of Section 13.

The learned judge held against the appellant on both these broad issues and gave judgment for the respondent. As we have said, similar issues were raised in this court and there is nothing to be gained by setting out the formal grounds of appeal.

The Approval Notices with which we are concerned are in the form of a letter from the

Director of Lands, though signed by some person "for" the Director. They commence - "I refer to your election to accept a Crown lease in respect of.....(my letter of the 8th September, 1972 refers)." It is the same letter in each case, though the Notices are some years apart. Then the notice continues - "The terms and conditions of the lease are as follows:-" after which details such as rent and terms are set out, the commencement of the term in each case antedating the Notice. There is a change of tense in the next paragraph - "The lease shall be subject to the appropriate conditions as set out in the Crown Lands (Leases and Licences) Regulations (Cap.113)". Then back to the present tense - "This lease is a protected lease under the provisions of the Crown Lands Act."; these words are those used in Section 13 of the Ordinance. There is a clause dealing with payment of rent and finally clauses dealing with survey which appear, by reference to "your previous landlord" to indicate that the recipients of the Notice were already in possession. There is a signed acceptance at the foot - "I do hereby accept the lease on the terms and conditions as set out in this Approval Notice". The summary of conditions is annexed and it is worthy of note that No. 20 is worded "This contract is subject to (the provisions of the Landlord and Tenant Ordinance)".

Counsel for the appellant relied strongly upon two cases the later of which was a judgment of this court - Ganpati v. Somasundaram (Civil Appeal No. 26 of 1976). The earlier case was a judgment of the Supreme Court in Damodaran Reddy v. Raghwa Nand (Civil Appeal No. 3 of 1972) a judgment

of Stuart J. Both these cases involved consideration of Section 13 of the Crown Lands Ordinance and it is argued that together they support the proposition that an Approval Notice never creates a protected lease within the section. We will look first at Ganpati's case. It involved a claim for specific performance of an agreement for sale and purchase of a tenancy of Crown land of which the vendor held a document in the nature of an Approval Notice from the Director of Lands. This document specifically stated (1) that the recipient was to occupy as tenant at will (2) that the letter did not operate to create a tenancy of the said land. It did not contain any reference to a protected lease.

On these facts this court held that there was no illegality arising by virtue of Section 13 (although a transfer was contrary to the terms of the instrument itself). The case is to be confined to those essential facts, though some confusion has arisen by reason of the fact that after the vendor had refused to go on with the transaction he obtained the issuance of an Approval Notice for the same land in the name of his wife and that Approval Notice did contain the reference to a Protected Lease. It was no doubt with that document in mind that Marsack J.A., in discussing Damodaran's case in his judgment in Ganpati's case, said that the transactions in issue in the two cases were on all fours.

In his judgment in Ganpati's case Spring J.A. said:

"As at the 8th of August, 1973, the only tenure the respondent held in the said land was pursuant to a document issued to him by the Director of Lands and described as a tenancy at will."

"The learned judge, in my view, elevated the tenancy at will into a lease - in fact a 'protected lease' the transfer of which requires the consent of the Director of Lands pursuant to section 13(1) of the Crown Lands Ordinance."

.....

"The tenancy at will was determinable by the Director of Lands at any time; there was no reference to it being a protected lease as indeed it was not."

In his judgment Gould V.P. referred to the aspect of the tenancy at will, the provision that the document would not operate to create a tenancy, and the absence of reference to a protected lease and while this is preceded by a reference to the later Approval Notice there is no doubt that he regarded the issue as confined to the earlier document, which was the only one in existence at the date of the dealing between the parties.

The approval expressed in Ganpati's case (impliedly by Marsack J.A. and expressly by Gould V.P.) of the judgment of Stuart J. in Damodaran's case has probably originated the argument by counsel for the appellant in the present case, but as we have said, the facts of the case are entirely different, and it is open to us to look at Damodaran's case again in the light of present arguments.

In his judgment in that case Stuart J. first considered the nature of the Approval Notice. It was in his opinion a contract for a lease. If the doctrine of Walsh v. Lonsdale (1882) 21 Ch. D. 9 applied to it the tenant would hold under the same

terms in equity as if a lease had been granted. The doctrine would apply if specific performance of the Approval Notice would have been granted, but in his opinion it would not.

As has been pointed out by the learned judge in the Supreme Court in the present case, Stuart J. was not on firm ground in holding that specific performance would not lie against the Director of Lands, having regard to Section 15(1) of the Crown Proceedings Ordinance (Cap.17) giving power to the courts to make declaratory orders in lieu of orders for specific performance in proceedings against the Crown. Stuart J., however, also relied upon Swain v. Ayres (1888) 21 Q.B.D. 289 which indicates that where the holder of the agreement is in breach of a condition of his contract specific performance will not be granted. He was referring to the condition of the contract which forbade a transfer or parting with possession. However, that may have been in Damodaran's case we do not think it is an argument which applies here. As Swain v. Ayres itself indicates there are circumstances in which equity would grant specific performance despite a breach of covenant, and in the present case the evidence shows that the Director never had any objection to a transfer to the appellant.

Accepting then that the Approval Notice created a relationship, after possession, in the nature of an equitable lease, what is the result? At common law "the tenant must be treated in law as holding on the same terms as would be introduced into a lease executed in pursuance of the terms of the agreement for a lease" - see Swain v. Ayres (supra at page 293). But we are dealing with a lease

created pursuant to the Crown Land Ordinance, and with a penal provision created by that enactment. The fact that it may be right to regard the position arising under an Approval Notice as an equitable lease does not necessarily mean that it is a lease within the meaning of Section 13(1). The lease must be one "under this Ordinance".

Counsel for the appellant argued a number of points in support of this proposition after pointing to the provision in Section 3 that "no Crown land shall be sold or leased save under and in accordance with the provisions of this Ordinance". First the lease is not in the form prescribed by Regulation 34 which applies to all leases under the regulations; it is in the form of a "Memorandum of Lease" designed for registration. Secondly the Approval Notice is not executed as a lease is required to be executed by Section 11 of the Ordinance, which requires it to be executed by the person holding the office of Director of Lands. This has not been done in relation to the Approval Notices which are signed by a person "for" the Director of Lands. This provision in Section 11 is to be compared with Section 13(4), which provides that any consent required by Section 13 may be given in writing by any officer authorised by the Director of Lands by notice published in the Gazette. This brought into play the expression expressio unius exclusio alterius. The Director would have a good answer to an action for specific performance in that he did not sign the document. Thirdly the analysis of the provisions of the act and regulations by Stuart J. in Damodaran's case supported his finding that the word "lease" used therein meant a lease in the strict sense - a registered lease.

The first point is an obvious one. The prescribed form for leases is clearly intended for registerable leases and these are the prime concern of the regulations. The transaction initiated by the Approval Notice would be intended to be completed in such a form. The argument is indicative of what the Ordinance means by a "lease" but is not decisive of whether a provision intended for insertion in such a lease can be operative prior to the transaction reaching that stage.

We will deal next with the third submission. Stuart J. in his judgment said :

" It must now be considered whether although section 13 does not apply to letters of approval, the Ordinance generally may comprehend letters of approval in the term 'lease' as used therein and in the Regulations. I am of the opinion that it does not. The Ordinance empowers the Director of Lands in certain circumstances to sell Crown Land, by Section 6, to grant land to religious bodies by Section 9, to grant leases and licences of Crown Land by section 10, and there are also special provisions relating to the foreshore, and the use of roads, tramlines, gates and level crossings and bridges. The section dealing with leases and licences envisages no preliminary agreement before the preparation of either a lease or a licence, other perhaps, than the approvals referred to in Regulations 35 and 36, and envisages that leases shall be registered with the Registrar of Titles and licences in a register kept by the Director of Lands. When one turns to the Regulations, it is seen that detailed provision is made for the covenants and conditions of different classes of leases and licences. Regulation 30 contains the general conditions to be included in a lease, and begins - "

"Regulations 35 and 36 appear to suggest that a lease under the Ordinance normally goes through five stages:

- (1) Provisional approval by the Minister.
- (2) Final notice of approval after payment of the estimated survey fee and the first six months' rent.
- (3) The survey.
- (4) Preparation of the lease in duplicate by the Director of Lands who sends it to the Commissioner of the Division in which the land is situated for two purposes :
 - (a) for the lessee to sign and pay all moneys due for premium, rent, stamp duty and fees; and
 - (b) for the Commissioner to enter in his Crown Leases Rent Register.
- (5) The lease in duplicate is then returned to the Director of Lands who signs it and sends it to the Registrar of Titles for registration. The Registrar of Titles keeps the original and returns the duplicate to the lessee as his document of title.

All of this in my view indicates that the Ordinance and the Regulations apply to registerable leases and the terms 'lease' used therein means a lease in the strict sense, in other words, a registered lease, and likewise the penal sections of the Ordinance, wide as they are, apply only to a registered lease or the land contained in a registered lease."

With this general conclusion we agree but the learned judge himself referred to the approvals as being possibly preliminary agreements. They appear to have been contemplated by the

legislation as something of a comparatively temporary nature - the only real delay would be while a survey was carried out. In practice they appear to have become something in the nature of indicia of title over periods of years. But they do at least contemplate possession being given prior to completion of the formal lease (see regulation 35) and therefore contemplate some conditions of tenancy. They are certainly documents "under this Ordinance" and though they may not be leases as primarily contemplated, they are agreements for such leases, taking effect (in the present case) as equitable leases.

The second of counsel's arguments relates to the mode of signature of the Approval Notices. Now, it is asked, can they be leases under the Ordinance when they are not signed by the person prescribed by the Ordinance. This argument really leads to the same conclusion as that reached by Stuart J. in the passage we have just cited, that when the Ordinance deals with leases it contemplates leases in the strict sense. No fine question of the law of delegation is involved, and it has not been suggested the Approval Notices have to be signed personally by the Director. Section 35(1) merely states that "the applicant shall be notified accordingly". Counsel relies upon these provisions to support the submission that an Approval Notice cannot be a lease under the Ordinance: we agree that for that and the other reasons given above it is not a lease of the nature and form primarily contemplated by the Ordinance.

But that does not end the matter. There are many conditions in the Regulations to which leases are to be made subject, or which may be imposed by the Minister if he thinks fit - see Regulation 21(2). These may be imposed during

the period of the Approval Notice either specifically or by the application in appropriate cases of the doctrine in Walsh v. Lonsdale. The condition concerning protected leases also must be the subject of a decision of someone - presumably the Director. Is there any reason why it should be treated differently? On the face of it a number of reasons are discernible. First, the condition is treated differently by the legislation, being provided for by the Ordinance itself and not, like the other conditions, by the regulations. It is in a part of the Ordinance together with Section 11, which contains directions as to execution, Section 12 dealing with form and registration, all appropriate to the formal registerable document. This provides a context for Section 13 in which the relevant clause is set out as being rather in the nature of a notice or warning to the lessee and to other persons. That is consistent with the actual terms of Section 13 which may affect third parties, for example, persons lending money on mortgage or those concerned to invoke the processes of law against the land. The conditional prohibition of caveats also points to a registered lease. Then Section 40 shows the penal nature of the section by rendering punishable by fine or imprisonment any act done or attempted contrary to the provisions of the Ordinance.

There appear to be two possible approaches to this question of construction. One is straightforward. The legislature intended the clause to be inserted in the only type of lease mentioned in the Ordinance: the type to which all its provisions seem to point; the formal lease for registration. The other arises from consideration of the object

of the Ordinance, the intention to create Crown leases and the necessity to have some preparatory stage before the formal lease can be finalised. This wider construction involves including the Notice of Approval in the term "lease under this Ordinance", not because the Ordinance itself says so but because some Notices of Approval may amount to leases in equity. In order to avoid anomalies arising between individual notices of approval it would be necessary to widen the construction further to include agreements to lease whether or not they amounted to equitable leases.

Having given this matter anxious consideration and not without hesitation we have concluded that the wider construction, to give effect to the object of the Ordinance, is the one that must prevail. It is contrary to reason (though as Stuart J. pointed out there are ways in which the Director can obtain a substantial measure of protection) to think that where it has been decided to grant a protected lease, the Director cannot let the prospective lessee into possession without foregoing, in the interim period, the intended protection.

As Williams J. pointed out in Chandrika Prasad v. Gulzara Singh and others (Civil Action No. 76/1976 - Labasa) there is a similarity between Section 12 of the Native Land Trust Ordinance (Cap.115) and Section 13 of the Crown Lands Ordinance, though only the latter has the complication of the requirement of the form of words making the lease a protected one. We think the answer to the question of construction before us lies in the use of the words "alienate or deal with the land comprised in the ("his", in (Cap.115) lease". Emphasis is placed on the word

"land", not on the document of title which identifies it. We do not think it is placing too great a strain upon the meaning of the word "comprised" to read it as "in process of being comprised" in the light of the legislation and the surrounding circumstances. We would stress that the specified form of words would require to be inserted in the Approval Notice. The notices in the present case comply with this requirement.

For these reasons in our judgment the learned judge was correct when he found that Sukhramani held under a protected tenancy.

As to counsel's second argument that on the facts of the case there had been no breach of Section 13, we are unable to accept it. We do not find it necessary to go through the numerous cases which have been decided on this subject. The appellant went into possession and built a house and commenced cultivation before obtaining the consent of the Director. The fact that he did so in pursuance of the agreement, in spite of the presence of clause 4, which has been mentioned above, is clear on the finding of fact in the Supreme Court.

That was a clear breach of Section 13(1). Had prompt action been taken after the letter from the Director of Lands of the 20th May, 1975, the appellant may not have been without a remedy and probably may not have needed one. But he took no action over the period of fifteen months which elapsed before Sukhramani died and meanwhile the appellant continued his actions in breach of Section 13(1), and any idea of purported compliance with the words "first had and obtained" became more and more a thing of the past. For some nine months after the death of Sukhramani this state

of affairs continued. Whether, over the period of two years, it was the fault of the appellant or his legal adviser we have no information, but when a party to a transaction has been in such protracted breach of the section, without any effort to put the matter right, he cannot complain if the court is unable to afford him an equitable remedy. We therefore uphold the finding of the learned judge in the Supreme Court in this respect also.

It is plain that the wording of the sections of the Ordinance which have been under discussion, has been lacking in clarity on the subject of the precise status of an intended lessee after approval has been given but before the execution of the formal lease. We think this is a matter which should receive the attention of the legislature.

In the result the appeal is dismissed with costs.

(sgd.) T. Gould
VICE PRESIDENT

(sgd.) C.C. Marsack
JUDGE OF APPEAL

(sgd.) B.C. Spring
JUDGE OF APPEAL