

Privy Council Appeal No. 7 of 1966

Kulamma - - - - - *Appellant*

v.

Manadan - - - - - *Respondent*

FROM

THE FIJI COURT OF APPEAL

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY 1968**

Present at the Hearing :

LORD GUEST

LORD WILBERFORCE

LORD PEARSON

[Delivered by LORD WILBERFORCE]

This litigation relates to a Share Farming Agreement made on 23rd May 1957 between the appellant's late husband, Sabhapati s/o Raghawan Gounden and his brother the respondent Manadan s/o Raghawan Gounden. The appellant claimed that the Agreement was illegal and void and sought an order restraining the respondent from collecting or disposing of certain moneys arising from the supply of sugar cane from the farm. In the Supreme Court of Fiji the appellant was successful and a declaration and order as asked was made in her favour. This decision was reversed by the Fiji Court of Appeal and from that reversal the present appeal is brought.

The enactment by virtue of which the Agreement was said to be illegal is the Native Land Trust Ordinance (Cap. 104 Laws of Fiji 1955). This Ordinance established a Board of Trustees called the Native Land Trust Board to control and administer all native land. After providing that native land might be leased by the Board, the Ordinance, by s. 12, continued as follows:

“ 12. (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the 29th day of September, 1948, to mortgage such lease.

(Substituted by 30 of 1945, s. 8 and amended by 29 of 1948, s. 3.)

(2) For the purposes of this section “ lease ” includes a sublease and “ lessee ” includes a sublessee. *(Added by 35 of 1943, s. 2)*”

It is common ground that the land, the subject of the action, is native land. If, therefore, s. 12 is to apply to the Agreement in question it is necessary for the appellant to show:

- (1) that Sabhapati was a "lessee under the Ordinance" and
- (2) that by the Agreement he purported to "alienate or deal with the land . . . whether by sale, transfer, sublease or in any other manner."

It was admitted that the consent of the Board had not been sought or obtained.

Their Lordships will deal first with the second of these conditions. Whether it is satisfied or not depends upon the construction and effect of the Agreement of 1957.

This agreement first recited that Sabhapati (referred to as "the Owner") was the lessee of the land in question from the Colonial Sugar Refining Company Limited, which comprised 10 acres or more and which was known as No. 581 Saweni, and that he had agreed with the respondent (referred to as "the Farmer") to farm the said land on the terms and conditions thereafter set forth. It continued as follows:

"1. THE Owner will employ the farmer to farm and the farmer will farm the said land to the best of his skill and ability.

2. THIS agreement shall enure until all moneys owing by the Owner to Murtuza Hussain Shah are fully paid.

3. THE Farmer will at all times during the currency of this Agreement cultivate and farm in sugar cane in good and husbandlike manner and according to the most approved system of Agriculture practiced in the Saweni district all such parts of the land as are suitable therefor or which may be for the time being included in any contract for the time held by the Owner from the Colonial Sugar Refining Company Limited for the sale and/or purchase of sugar cane and shall in due course of cultivation harvest the same.

4. THE Farmer will at his own cost provide all farm implements and stock for the proper farming of the said land and will pay a one-half share of all other expenses including harvesting incurred in or incidental to the farming of the said land.

4A. UPON payment of all moneys owing or hereafter to become owing by the owner to Murtuza Hussain Shah the owner will apply for and use his best endeavours to obtain the consent of the Colonial Sugar Refining Company Limited to the transfer of one-half interest in the said Farm No. 581 to the Farmer.

5. THE Farmer will at all times obey the lawful directions of the Overseer of the Colonial Sugar Refining Company Limited for the time being having oversight of the district in which the land is situated as regards planting and harvesting of sugar cane and/or management of the said land.

6. ALL sugar cane grown on the said land shall be sold to the Colonial Sugar Refining Company Limited in the name of the Owner and shall be paid by the Colonial Sugar Refining Company Limited into the Bank account of the solicitor of the parties Mr. K. A. Stuart and it is hereby agreed that production of this agreement shall be sufficient authority for such payment.

7. THE Farmer will at all times keep observe and perform all and singular the terms conditions and agreement of any agreement made between the Owner and the Colonial Sugar Refining Company Limited whether relating to the leasing of the said Farm No. 581 or the sale and/or purchase of sugar cane or otherwise howsoever and the Farmer hereby agrees to hold and keep the Owner free and clear of any loss or damage arising from the breach of any such agreement by the Farmer.

8. ALL moneys received from the growing of sugar cane on the said land will be divided after payment thereof of all expenses of and incidental to the growing and harvesting of the said sugar cane between the parties in equal shares and all moneys receivable by the Owner shall be applied in reduction of the Owner's indebtedness to Murtuza Hussain Shah now standing at £550.

9. THE Owner shall from time to time order and procure from the Colonial Sugar Refining Company Limited all such supplies and necessaries for the cultivation of the said land as the Farmer may reasonably require and the cost of all such supplies and necessaries shall be borne by the parties in equal shares."

The appellant submitted that the Agreement was an "alienation" in that it was a disposition of a half of Sabhapati's beneficial interest in the land: upon any view, and even if not strictly an "alienation", the Agreement was, it was contended, a dealing with the land within the meaning of s. 12. The respondent had, it was said, the right to enter upon the land: he had complete control of the farming operations, and was beneficially entitled to one-half of the net value of its produce. Under Clause 4A, he was, after the money owing by Sabhapati to Murtuza Hussain Shah had been paid off, to become entitled to one-half interest in the farm itself. Even if this did not amount to an alienation, consideration of the Ordinance as a whole showed that licences affecting native land were considered as dealings, and at the least the respondent was a licensee.

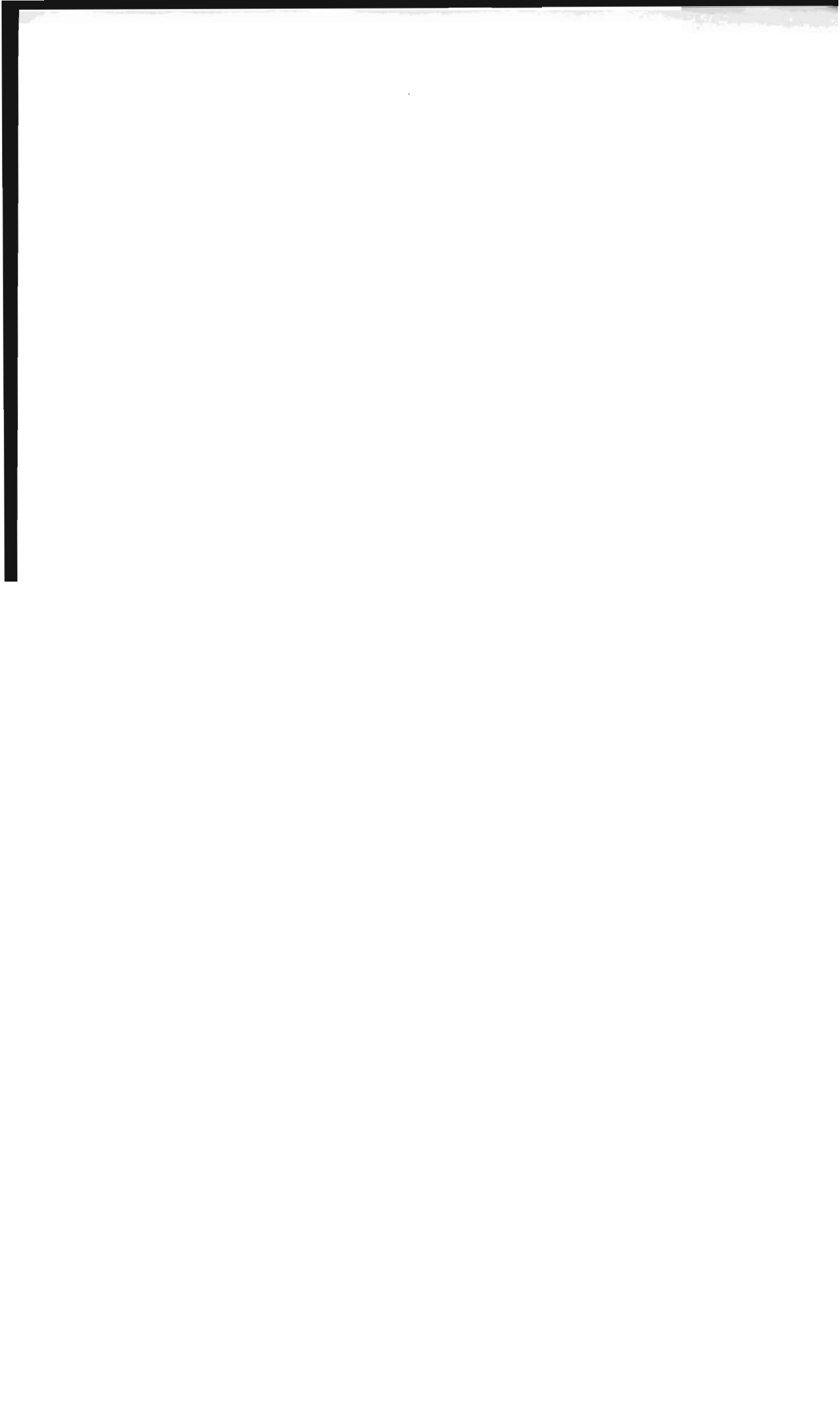
Their Lordships are of opinion that the Agreement cannot be considered as amounting to an alienation. Clause 4A contemplates action in the future, upon the happening of a stated event: it could not (as would be necessary if it were an alienation) have formed the basis of prior application for permission to the Board.

On the other hand, as regards the possible future alienation which might take place after the money owing had been paid and the consent of the Colonial Sugar Company Limited had been obtained, there is nothing in the clause which leads to the conclusion that, prior to such alienation, the consent of the Board would not be sought. The parties should be presumed to contemplate a legal course of proceeding rather than an illegal. Apart from this clause there is nothing in the Agreement to lead to the conclusion that Sabhapati was disposing of his interest, or of half his interest in the land: he remained the lessee, and as between himself and the lessors, remained responsible for the rent and for complying with the terms of the tenancy: the fact that contractually the respondent assumed responsibility for payment of or provision for the rent (the Agreement is not clear precisely how the rent was to be paid) and that he agreed to ensure that the terms of the tenancy Agreement were complied with are fully compatible with a purely contractual agreement under which Sabhapati remained the owner of the tenancy.

The alternative claim that the Agreement amounted to a dealing with the land is, in their Lordships' judgment, equally ill-founded. Their Lordships accept that the Ordinance contemplates, as matters over which the Board is to retain control, transactions which pass a lesser interest in the land than leases, and that the term "licences" is used. Sections 7, 8, and 9 place restrictions on the power of the Board to sell, lease or grant licences in respect of native land—s. 9 using the expression "dealt with by way of lease or licence" and s. 11 requires licences of native land to be in a prescribed form. Section 32 indicates that licences may relate to such matters as rights of cattle grazing or to remove timber, forest produce or minerals. But it does not follow from this that merely because an Agreement can, in certain of its aspects, be described as, or as comprising, a licence, it is to be classified with the type of licence referred to in these sections or (which is the ultimate question) described as a *dealing with* the land. As was said by Gould J.A. in the Fiji Court of Appeal the term licences covers the whole range between one which confers such extensive rights over the land as almost to amount

to a lease and one which merely confers permission to enter without liability to an action for trespass: the question is where, on the scale, the rights conferred by the Agreement are to be found. Their Lordships are of opinion that none of the cases which were cited in argument can be said to be decisive of the present case. Those most relevant were *Chalmers v. Pardoe* [1963] 1 W.L.R. 677, a decision of this Board, *Kuppan v. Unni* 4 Fiji L.R. 188 and *Genda Singh v. Balak Ram*, Civil Appeal No. 20 of 1963. But each of these, inevitably fell to be decided upon the terms of a particular Agreement, which in no case—in so far as the terms of it appears from the report—is identical with the Agreement of 23rd May 1957, and the decision in the present appeal must be based upon an analysis of that Agreement alone. In their Lordships' judgment the key to the nature of the Agreement is provided by Clause 1. It was a contract of employment to farm the land on behalf of the owner. The respondent was the owner's brother: the owner was in poor health; the evident purpose was that the respondent should carry out the farming operations for him—whether as his servant, or as appears more probable, as his agent. The rest of the Agreement confirms this interpretation: the respondent is not given possession of the land, and in fact Sabhapati continued to live on it, the respondent residing elsewhere. It was Sabhapati who, according to Clause 3, was to be in contractual relationship with the Colonial Sugar Refining Company Limited for the sale of sugar cane, and all sugar cane grown had to be sold to that company, under Clause 6, in Sabhapati's name. The division of the net proceeds equally between Sabhapati and the respondent was merely the means, and an appropriate means, of providing for the respondent's remuneration. In its whole effect the Agreement was one of a purely contractual and personal character, which, even in the most general sense, could not be said to amount to a dealing with the land.

This conclusion being reached the appeal must fail, and their Lordships find it unnecessary to enter upon the further question whether Sabhapati was a lessee under the Ordinance. In taking this course their Lordships intend no disrespect to the careful examination of the relevant documents which was made by the learned Chief Justice and by the Court of Appeal. Having reached a clear conclusion upon the terms of the Agreement itself, in agreement with all the members of the Court of Appeal, their Lordships find no necessity to carry the matter further. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the Appeal.



In the Privy Council

KULAMMA

v.

MANADAN

**DELIVERED BY
LORD WILBERFORCE**