

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FIJI COURT OF APPEAL

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
16 JAN 1969  
25 R ... SQUARE  
LONDON, W.C.1.

B E T W E E N :

KULAMTA D/O VEDISA NAICKEN  
as Administratrix of the  
Estate of Sabhapati s/o  
Raghawan (Plaintiff) Appellant

- and -

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MANADAN S/O RAGHAWAN  
GOUNDEN (Defendant) Respondent

CASE FOR THE APPELLANT

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p.78 p.106

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1. This is an Appeal from a Judgment and Order of the Fiji Court of Appeal (Gould J.A., Marsack J.A. and Knox-Mawer J.A.) dated the 16th day of July 1965, allowing the Respondent's Appeal against a Judgment and Order of the Supreme Court of Fiji (Mills-Owens C.J.) dated respectively the 9th day of December 1964 and the 22nd day of January 1965, whereby the said Supreme Court of Fiji

p.56 p.74

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- (a) declared that a Share Farming Agreement dated the 23rd day of May 1957 made between one Sabhapati (the Appellant's late husband) and the Respondent (Defendant) concerning Cane Farm No. 581 situate at Saweni, Lautoka, and an Assignment of Cane Crops given by the Appellant to the Respondent on the 15th day of November 1960 in respect of cane proceeds from the said Cane Farm were illegal transactions and were void at law;
- (b) ordered that the Respondent be restrained from collecting or disposing of the moneys held by the South Pacific Sugar Mills Limited, Lautoka, in respect of sugar cane supplied and/or

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to be supplied from the said Cane Farm.

p.107, 1.4

The said Fiji Court of Appeal, in allowing the Respondent's said Appeal, ordered that the said Judgment of the Supreme Court of Fiji, dated the 9th day of December 1964, be set aside and the Appellant's action be dismissed out of the Supreme Court of Fiji.

p.127

2. The principal matter that falls to be determined in this Appeal is whether the Share Farming Agreement made on the 23rd May 1957 between the Appellant's late husband, Sabhapati, and the Respondent was illegal as having been made in contravention of section 12 of the Native Land Trust Ordinance (Cap. 104, Laws of Fiji, 1955). This section makes it illegal for "any lessee under this Ordinance" to "deal with the land comprised in his lease or any part thereof" without first obtaining the consent of the Board. It was common ground that no such consent to the Share Farming Agreement of the 23rd May 1957 was obtained. The Supreme Court of Fiji held that the Share Farming Agreement was therefore illegal, with the result that the Assignment of cane crops of the 15th day of November 1960, for which admittedly the said Share Farming Agreement was (in part) the consideration, was also void as to such moneys as had not already been paid and credited under it.

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p.32, 11.1-5

p.62, 11.24-

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p.72, 11.40-

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p.44, 1.32-

p.46, 1.19

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There are accordingly two issues to be decided in this appeal, namely

- (a) Was Sabhapati at the material time a "lessee under this Ordinance" (i.e. the Native Land Trust Ordinance)?
- (b) Was the Share Farming Agreement a "dealing with the land" within the meaning of section 12?

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3. The following provisions of the Native Land Trust Ordinance (Cap. 104, Laws of

Fiji 1955) are material to this Appeal:-

"4.(1) The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the native owners.

10 7. Subject to the provisions of the Crown Acquisition of Lands Ordinance, the Forest Ordinance, the Oil Mines Ordinance and the Mining Ordinance, no native land shall be sold, leased or otherwise disposed of and no licence in respect of native land shall be granted save under and in accordance with the provisions of this Ordinance.

20 8.(1) Subject to the provisions of section 9 of this Ordinance it shall be lawful for the Board to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.

(2) Any lease of or licence in respect of land under the provisions of this Ordinance shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board. (Substituted by 30 of 1945, s.6.)

30 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  
40 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

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"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.)"

- p.1 4. The Appellant brought THE PRESENT PROCEEDINGS as the widow and personal representative of Sabhapati who died in November 1958. In her Statement of Claim, dated the 7th November 1963, she alleged that at the time of his death Sabhapati was the holder of Cane Farm No. 581 situate at Saweni, Lautoka, under a Tenancy Agreement from the Colonial Sugar Refining Company Limited (C.S.R. Co.). She alleged that this land was Native Land held by the C.S.R. Co. from the Native Land Trust Board. 10
- p.5,1.35  
p.4,11.25-36
- The Respondent, who is the brother of Sabhapati, deceased, in his Defence, dated the 30th November 1963, admitted that Sabhapati held the said farm at the time of his death under a tenancy from the C.S.R. Co. and it was not in issue that that tenancy became vested in the Appellant. 20
- p.9,1.19
- p.57,1.3
- The Defence did not contain any admission either that the farm was native land or that it was held by the C.S.R. Co. (Sabhapati's landlord) from the Native Land Trust Board. 30
- p.71,1.48-  
p.72,1.27  
p.86,1.33
- The question whether or not the farm was native land was in issue at the trial, but the Supreme Court found that it was native land and it was conceded by the Respondent in the Court of Appeal that this finding could not be challenged.
- p.4,1.37-  
p.5,1.28  
p.9,1.29
5. The Appellant pleaded (and it was admitted in the Defence) that on the 23rd May 1957, Sabhapati and the Respondent entered into an Agreement pursuant to which the 40

Respondent "went into the possession of the said farm and cultivated same and at the time of the deceased's death the Defendant (Respondent) was in possession thereof". This Agreement was a "Share-Farming Agreement" (Exhibit B) and was as follows:-

"AGREEMENT made the 23rd day of May .....  
 1957 BETWEEN SABHAPATI father's name  
 Raghawan of Saweni Lautoka in the Colony of  
 Fiji Cultivator (hereinafter called the  
 Owner) of the one part and MANADAN father's  
 name Raghawan of Saweni aforesaid Cultivator  
 (hereinafter called the Farmer) of the other  
 part WHEREAS the Owner is the lessee of that  
 piece of land comprising 10 acres more or  
 less leased by him from the Colonial Sugar  
 Refining Company Limited and known as Farm  
 No. 581 Saweni AND WHEREAS the Owner has  
 agreed with the Farmer to farm the said land  
 upon the terms and conditions hereinafter  
 set forth NOW THIS AGREEMENT WITNESSETH:

p.127

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

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"farming of the said land.

4.A. 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. 10

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. 20

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. 30

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 40

"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.

10 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.

IN WITNESS whereof the parties have hereunto subscribed their names the day and year hereinbefore written

SIGNED by the said )  
SABHAPATI in the ) X SABHAPATI  
presence of : ) His left thumb mark

20 (sgd) M.S. Dean  
Solicitor's Clerk, Lautoka.

SIGNED by the said )  
MANADAN in the ) X MANADAN  
presence of : ) His left thumb mark

(sgd) H.S. Dean  
Solicitor's Clerk, Lautoka."

30 6. The Statement of Claim went on to recite that on the 15th November 1960 the Appellant executed an Assignment of cane crops over the farm in favour of the Respondent and alleged that this Assignment "was given for past consideration or illegal". The execution of the Assignment was admitted in the Defence. p.6,1.20  
p.6,1.28  
p.10,1.11

7. The history of the dispositions affecting the farm prior to the date of the Share-Farming Agreement of the 23rd May 1957 (Exhibit B) was thus summarised in the Judgment of the Supreme Court:- p.127

40 "It is common ground that the farm is comprised in a Lease made between the Buli Vuda, a Fijian official of the Vuda district, p.66,1.44-  
p.68,1.27

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p.112

"on behalf of the Fijian owners of the one part, and the Commissioner of Lands on behalf of the Crown of the other part. Under this Lease (hereinafter referred to as 'the Lease') the land was demised to the Crown for the term of 99 years from the 1st January, 1900. The Lease is still subsisting in favour of the Crown. It is also clear on the evidence that the land was found by the Native Land Commission, acting under the Native Lands Ordinance (Cap. 103) in the year 1914, to be owned by a Fijian proprietary unit. The Lease is endorsed as registered in the "Register of Crown Leases" and is headed "Crown Lease". (There are in fact two such leases in identical terms but according to the evidence the relevant lease is Exhibit M, the land in question being part of land called Block A.) By a Sub-lease Exhibit O dated the 13th November, 1901, the Commissioner of Lands, on behalf of the Crown, subleased Block A to the C.S.R. Co. for the term of 10 years from the 1st January 1900. It was expressly declared therein that the Sub-lease was a protected lease under the provisions of Ordinance No.1v of 1888, that is to say that restrictions on alienation were to apply. A memorandum, dated September, 1910, is endorsed on the Sub-lease to the effect that it was renewed for a term of 40 years from the 1st January, 1910, by the Commissioner of Lands. In 1940 the Native Land Trust Board was established under Cap. 104 and thereby entrusted with the control of and power to grant leases of native land, as defined. Sometime thereafter, according to the evidence, by informal arrangement the Board took over administration of (inter alia) Block A from the Commissioner of Lands. By a document dated the 29th December, 1951, signed by its Secretary, the Board agreed to grant to the C.S.R. Co. as lease of (inter alia) Block A for the

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p.123

dated the 13th November, 1901, the Commissioner of Lands, on behalf of the Crown, subleased Block A to the C.S.R. Co. for the term of 10 years from the 1st January 1900. It was expressly declared therein that the Sub-lease was a protected lease under the provisions of Ordinance No.1v of 1888, that is to say that restrictions on alienation were to apply. A memorandum, dated September, 1910, is endorsed on the Sub-lease to the effect that it was renewed for a term of 40 years from the 1st January, 1910, by the Commissioner of Lands. In 1940 the Native Land Trust Board was established under Cap. 104 and thereby entrusted with the control of and power to grant leases of native land, as defined. Sometime thereafter, according to the evidence, by informal arrangement the Board took over administration of (inter alia) Block A from the Commissioner of Lands. By a document dated the 29th December, 1951, signed by its Secretary, the Board agreed to grant to the C.S.R. Co. as lease of (inter alia) Block A for the

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p.34,1.33  
p.41,1.14

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"term of 50 years from the 1st January 1950. A further document, in substitution for the foregoing, was issued on the 27th November, 1956, conveying the Board's decision to grant a lease to the Company for 50 years from the 1st January 1957 Exhibit R. The Company periodically submits a list of changes in the occupancy of the land by its tenants to the Board which issues overall approvals thereof, purporting to be consents to such dealings under the Ordinance (Cap. 104). The Board collects the agreed rent from the Company, and accounts for the net rent to the ultimate Fijian owners. For some years therefore, following the informal arrangement between the department responsible for Crown lands and the Board, the Board has acted as if the land were 'native land', notwithstanding the subsistence of the Lease in favour of the Crown. It is part of the arrangement that as soon as the formalities of survey are completed the Crown will surrender the Lease, presumably to the Fijian owners as the Ordinance (Cap. 104) does not contemplate the vesting of native land in the Board. Thereupon the Board will implement its agreement Exhibit R to grant a lease to the C.S.R. Co. by executing a formal lease in the Company's favour under the powers conferred by the Ordinance. The C.S.R. Co. has throughout remained and still remains in occupation, by itself or its tenants; latterly, of course, under the document Exhibit R."

p.33,1.4  
p.34,1.33  
p.41,1.10

The evidence was that, although the Crown had not formally surrendered its lease, an actual surrender had been made, there having been both an agreement to that effect between the Crown, the Native Land Trust Board and the C.S.R. Co., and also a physical handing over of control by the Crown to the Board.

pp.33, 34,  
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8. Exhibit R is expressed to give "provisional approval" for a term of 50 years from the 1st January 1957. It appears from paragraphs 3 and 4 that final approval is to depend only upon

p.87,1.44

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payment of the first 6 months' rent and of the estimated survey fee. Paragraph 5 is as follows:-

p.88,1.6 "5. In the event of it being shown by survey that the land provisionally approved for lease forms part of 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 Board". 10

There is however an indorsement following which contemplates the surrender of the Crown's 99 year lease with effect from the 1st January 1950. The indorsement reads as follows:-

p.88,1.15 "Subject to the surrender of N.L.s. Book IV/1888 Folios 34 and 37 by the Crown w.e.f. 1.1.1950. Subject to usual C.S.R. conditions." 20

p.85,1.1 9. There was no precise evidence showing the nature of the tenancy granted by the C.S.R. Co. to Sabhapati, other than that in the Share-Farming Agreement of the 23rd May 1957 (Exhibit B), to which the Respondent was a part, it was recited that he was "the lessee".

p.127,1.16

No oral evidence was adduced as to when his tenancy commenced, but a list of changes of occupancy kept by the Native Land Trust Board (Exhibit U.1) upon which his name appeared, was produced in evidence, and it was held by Gould J.A. in the Court of Appeal that it was established that he had been on the farm since 1942. 30

p.34,1.8

p.85,1.5

10. It was held by the Supreme Court and by a majority of the Court of Appeal (Gould and Knox-Mawer J.J.A.), it is submitted correctly, that at the material time Sabhapati was a lessee under the Native Land Trust Ordinance. The third member of the Court of Appeal (Marsack J.A.) did not give a definite judgment on this point, expressing a doubt whether the word "lease" 40

p.103,11.1-11

10 in section 12 was wide enough to cover such form of tenancy as Sabhapati may have held. Upon this latter point it was observed by Knox-Mawer J.A. that in his view it had been "the basis of the whole argument in this case that at the time when the share farming agreement, Exhibit B, was executed, Sabhapati's tenancy from the Colonial Sugar Refining Company Limited was a periodic tenancy, although the evidence did not disclose by reference to what particular period rent was being paid by Sabhapati to the Company at the time of his death".

p.105,11.2-  
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11. As to whether the Share-Farming Agreement of the 23rd May 1957 was a "dealing with the land" within the meaning of section 12, the learned trial Judge had no doubt that it was. He pointed out that

20 "Under its terms the Defendant was to enter into immediate occupation of the farm and to cultivate it, sharing in the expenditure and sharing in the proceeds. At the least he was a licensee with an interest. The word 'dealing' is deliberately chosen to embrace such situations. In all but name he was a tenant in common with the deceased, and after his death with the Plaintiff."

p.72,11.30-  
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The Assignment of the 15th November 1960 was tainted with the illegal Share-Farming Agreement as a document collateral to it.

p.72-73

30 The Court of Appeal held ("though with considerable hesitation" in the case of Gould J.A.) that the Share-Farming Agreement was not a "dealing with the land" within the meaning of section 12. The Appellant respectfully submits that the Court of Appeal was wrong in so holding. By the Agreement extensive rights, including a right of possession (though not of exclusive possession), were conferred upon the Respondent and conversely by Clause 7 the obligations of lessee (which necessarily included payment of the rent) were transferred to him. The overall benefits and the burdens of the farm were to be shared equally between Sabhapati and the Respondent. The rights and obligations thus provided for were to continue until all moneys

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p.99,1.36

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owed by Sabhapati to Murtuza Hussain Shah were repaid, at which time the Respondent's interest in the farm was not to determine but on the contrary he was to be entitled to call upon Sabhapati under the Agreement at once to take steps to transfer a half interest in the farm to him. It is submitted that upon a proper construction and in effect, the Agreement was a disposition of a half of Sabhapati's beneficial interest in the farm, but upon any view was a "dealing" with it within the meaning of section 12. 10

12. On the 20th August 1965 the Appellant was given Final Leave to Appeal to the Privy Council.

13. The Appellant respectfully submits that this Appeal should be allowed and the said Judgment and Order of the Fiji Court of Appeal of the 16th day of July 1965 should be set aside and the said Judgment and Order of the Supreme Court of Fiji of respectively the 9th day of December 1964 and the 22nd day of January 1965 should be restored for the following among other 20

## R E A S O N S

1. BECAUSE Sabhapati was rightly held by the Supreme Court of Fiji and by the majority of the Fiji Court of Appeal to have been a lessee under the Native Land Trust Ordinance. 30
2. BECAUSE the Share-Farming Agreement of the 23rd May 1957 was a dealing with the land within the meaning of section 12 of the Native Land Trust Ordinance and null and void as having been made in contravention thereof.
3. BECAUSE the said Judgment of the 40

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Supreme Court of Fiji was right for  
the reasons therein stated.

MONTAGUE SOLOMON

No.7 of 1966

IN THE PRIVY COUNCIL

ON APPEAL FROM THE  
FIJI COURT OF APPEAL

B E T W E E N :

KULAMMA D/O VEDISA NAICKEN  
as Administratrix of the  
Estate of Sabhapati s/o  
Raghawan (Plaintiff)  
Appellant

- and -

MANADAN S/O RAGHAWAN  
GOUNDEN (Defendant)  
Respondent

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