

A

MANADAN

v.

KULAMMA

[COURT OF APPEAL* 1965 (Marsack J.A., Gould J.A., Knox-Mawer J.A.), 20th May, 16th July]

B

Civil Jurisdiction

C Landlord and Tenant—Native Land Trust Board—agreement to lease by Board during currency of lease to Crown—surrender of lease to Crown agreed to but not executed—validity of agreement to lease by Board—Native Land Trust Ordinance (Cap. 104) ss. 12,35—Native Lands Ordinance 1892—Native Lands Ordinance 1905 ss.12,19—Native Lands (Occupation) Ordinance 1933—Real Property Ordinance 1876 ss. 51-7.

Native Land—share-farming agreement—whether a dealing with land—Native Land Trust Ordinance (Cap. 104) s.12.

D The Crown held a lease of native land from the owners thereof for ninety-nine years from the 1st January, 1900. In 1940 the Native Land Control Board was established under the Native Land Trust Ordinance and entrusted with the control of and power to grant leases of native land. The Board thereafter by informal arrangement took over administration of the land in question from the Commissioner of Lands, who agreed to surrender the ninety-nine year lease, though no actual surrender was signed. The Colonial Sugar Refining Co. Ltd. held a sublease of Block A, part of the said land, from the Commissioner of Lands from the 1st January, 1910, to the 31st December, 1950. Prior to the 31st December, 1950, Sabhapati, the respondent's husband, became a sub-tenant of the Colonial Sugar Refining Co. Ltd. of Farm 581, part of Block A. On the 29th December, 1951, the Board agreed to grant to the Colonial Sugar Refining Co. Ltd. a lease of (*inter alia*) Block A for fifty years from the 1st January, 1950.

E On the 23rd May, 1957, Sabhapati and the appellant entered into a "share-farming" agreement in relation to Farm 581 under the terms of which Sabhapati employed the appellant to cultivate the farm, sharing the expenses and the net profits equally between them. There was a provision that at a certain stage Sabhapati was to use his best endeavours to obtain the consent of the Colonial Sugar Refining Co. Ltd. to a transfer of a half interest in the tenancy to the appellant.

G Under section 12 of the Native Land Trust Ordinance it is unlawful for any lessee (including a sublessee) under the Ordinance to deal with the land comprised in his lease without the consent of the Board.

H

* An appeal from this judgment to the Privy Council was dismissed — see Kulamma v. Manadan [1968] 2 W.L.R. 1074.

No consent under the section was applied for in relation to the share-farming agreement.

Held: 1. The phrase "deal with" the land in the context of the Ordinance implies that the land or part of it or an interest in it must be the subject-matter of the dealing. No interest in land passed under the share-farming agreement and the agreement was therefore not a dealing within the meaning of section 12. A

2. (per Gould and Knox-Mawer JJ.A.) The Native Land Trust Board validly created in favour of the Colonial Sugar Refining Co. Ltd. an equitable lease and Sabhapati, as holder of a tenancy derived from that lease, was a sublessee and hence a lessee within the meaning of section 12. B

3. (per Marsack J.A.) In the absence of evidence establishing the terms of Sabhapati's tenancy it is open to doubt whether the word "lease" in section 12 is wide enough to cover such form of tenancy as he may have held. C

Cases referred to: *Genda Singh v. Balak Ram* (1963) 9 F.L.R. 163; *Ramkrishna Mission Fiji (Trustees) v. Ramlingham* (1963) 9 F.L.R. 95; *Chalmers v. Pardoe* [1963] 3 All E.R. 552; [1963] 1 W.L.R. 677; *Harnam Singh and Bakshish Singh v. Bawa Singh* (1958-59) 6 F.L.R. 31; *Director of Public Works v. Ho Po Sang* [1961] A.C. 901; [1961] 2 All E.R. 721; *Camberwell & South London Building Society v. Holloway* (1879) 13 Ch.D. 754; 41 L.T. 752; *Re Negus* [1895] 1 Ch. 73; 71 L.T. 716; *Nell v. Longbottom* [1894] 1 Q.B. 767; 70 L.T. 499. D

Appeal from a judgment of the Supreme Court.

K. A. Stuart for the appellant. E

S. M. Koya for the respondent.

The facts sufficiently appears from the judgment of Gould J.A.

The following judgments were read : [16th July, 1965]— F

GOULD, J.A. : This is an appeal from a judgment of the Supreme Court of Fiji dated the 9th December, 1964, in an action arising out of transactions in relation to a sugar-cane farm at Saweni, Lautoka. In the action the respondent, who was the plaintiff, sought a declaration that a share-farming agreement made on the 23rd May, 1957, between her deceased husband and the appellant, was illegal as having been made without the consent of the Native Land Trust Board required by section 12 of the Native Land Trust Ordinance (Cap. 104 Laws of Fiji, 1955) to which I will refer hereafter as "the Ordinance". There were other issues, but that is the only one which has been argued on this appeal and it is unnecessary to discuss the others. The learned Chief Justice held that the share-farming agreement was illegal, with the result that an assignment of cane proceeds, for which the agreement was (in part) the consideration, was also void as to such moneys as had not already been paid and credited under it. G H

The following passage from the judgment of the learned Chief Justice gives the general facts :—

A "The Plaintiff is the widow and personal representative of Sabhapati who died in November, 1958. At the date of his death Sabhapati was tenant of a sugar-cane farm known as Farm No. 581 Saweni, Lautoka, comprising approximately 10 acres. He held the farm as tenant of the Colonial Sugar Refining Co. Ltd. (the C.S.R. Co.). The tenancy, it is agreed, is now vested in the Plaintiff. The Defendant is the brother of Sabhapati deceased. On the 23rd May, 1957, Sabhapati and the Defendant entered into a "Share-Farming Agreement" (Exhibit B), under the terms of which the Defendant was to cultivate the farm, bearing equally with Sabhapati the expenses of cultivation and sharing equally with him the net proceeds; the crops were to be sold to the C.S.R. Co. and the proceeds paid into an account to be kept by the parties' solicitors; Sabhapati's half-share was to be applied towards discharge of a debt owed by him to one Murtuza and the agreement was to enure until that debt was discharged; thereupon Sabhapati was to use his best endeavours to obtain the consent of the C.S.R. Co. as landlord to a transfer of a one-half interest in the tenancy to the Defendant.

D Sabhapati and the Defendant acted under the Agreement until the former's death in 1958. Following his death the Plaintiff and the Defendant continued to act under the agreement. That state of affairs continued until shortly before the present proceedings were commenced in October, 1963, when disputes arose between them as to the state of the accounts and the Defendant ceased to cultivate the farm. In the meantime, that is to say in November, 1960, the Plaintiff together with her children had gone to live in the Defendant's household at his own farm. In the same month, whilst residing there, she executed, under hand, an Assignment (Exhibit C) purporting to assign to the Defendant all sugar-cane crops then growing, or thereafter to be grown, on Farm No. 581 and all moneys payable or thereafter to become payable in respect of such crops."

F It will be convenient at this point to set out section 12 of the Ordinance in order to indicate the legal issues. It reads :—

G "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:

H 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.

(2) For the purpose of this section "lease" includes a sublease and "lessee" includes a sublessee."

By virtue of that section the share-farming agreement entered into between Sabhapati and the appellant was illegal if it were shown that Sabhapati's tenancy from the Colonial Sugar Refining Company Limited was such as to bring him within the meaning of the phrase "any lessee under this Ordinance", and if the share-farming agreement was an alienation or dealing within the meaning of the section. For the purpose of considering the first of those requirements, I take the following further narration of facts from the judgment of the learned Chief Justice :—

"It is common ground that the farm is comprised in a Lease made between the Buli Vuda, a Fijian official of the Vuda district, on behalf of the Fijian owners of the one part, and the Commissioner of Lands on behalf of the Crown on 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 sublease (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. IV 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. a lease of (*inter alia*) Block A for the 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.

A 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."

B
D The grounds of appeal as set out in the Notice of Motion (excluding Ground 3 which was abandoned at the hearing) are :—

C "1. THAT the learned Judge did not adjudicate upon the appellant's argument based upon section 35 of Cap. 104.

2. THAT if the learned Judge did so adjudicate (which is denied) then he misdirected himself in law in that the real question which arose on this issue was not so much whether the land in question was Native land as whether the respondent could be described as "a lessee under this Ordinance."

D
E 4. THAT the learned Judge misdirected himself in holding that the transaction evidenced by the share-farming agreement between the respondent's deceased husband and the appellant dated the 23rd day of May 1957 was a "dealing" with Native Land within the meaning of section 12 of Cap. 104."

F The argument on the first ground, as presented to this Court, was on a narrow basis. Section 35 of the Ordinance provides that any lease granted before the commencement of the Ordinance under the Native Lands Ordinance 1905, and the Native Lands (Occupation) Ordinance 1933, shall continue in force as if granted under the Ordinance and shall be in all respects subject to the provisions of the Ordinance. Counsel's submission was that as the original lease to the Crown (which I shall call the 99 year lease) was granted before 1905, it could not have been granted under either of the two Ordinances mentioned and was not therefore subject to the provisions of the Ordinance. If this argument was put before the learned Chief Justice it would seem that he must have accepted it, as counsel conceded that if the argument was invalid, he had no case at all. The learned Chief Justice would not then have needed to consider all the other matters which are discussed in his judgment.

G
H As to the merits of the argument, it seems obviously a good one unless by some legislative provision the 99 year lease is deemed to have been made under the Native Lands Ordinance 1905, or the Native Lands (Occupation) Ordinance 1933. Counsel were unable to state under what Ordinance the 99 year lease was issued, but it seems abundantly apparent that it was under section 19 et seq. of the

Native Lands Ordinance 1892, which was repealed by section 19 of the Native Lands Ordinance 1905. Under the 1892 Ordinance leases of native land were restricted to terms of 21 years except in the case of leases to the Crown which could be for any period. The lease, Exhibit M, follows exactly the form in Schedule C to that Ordinance. No provision in any of the legislation has been pointed to by counsel under which a lease under the 1892 Ordinance is deemed to be a lease under the 1905 Ordinance; nor have I been able to find such a provision, though section 12 of the 1905 Ordinance incorporates into Native leases registered under any Ordinance theretofore in force, the conditions contained in sections 51 — 57 of the Real Property Ordinance 1876. They do not affect the position in relation to the argument now under consideration and there is nothing of relevance in the Native Lands (Occupation) Ordinance 1933.

It would seem clear, therefore, that there is no legislation which deems the 99 year lease to be a lease under the Ordinance. That, however, is only one aspect of the question and is only a preliminary to the next matter for consideration, which is one of difficulty. It arises under the second ground of appeal and may be stated thus. Assuming for the moment that the share-farming transaction has rightly been held to be a dealing with the land in question, was Sabhapati at the relevant time "a lessee under" the Ordinance in respect of that land? The question is whether he should rightly be regarded as a sub-tenant deriving title from the 99 year lease (which, as has been seen, is not under the Ordinance) through the Colonial Sugar Refining Company Limited, holding under some type of tenancy at common law, or as a sub-tenant deriving title from that Company holding under a lease from the Native Land Trust Board to which I shall hereafter refer as "the Trust Board". In the last mentioned case Sabhapati would be a lessee under the Ordinance.

There is no precise evidence showing the nature of the tenancy granted by the Colonial Sugar Refining Company Limited to Sabhapati. It was established that he was a tenant and had been on the farm since about 1942. Therefore one fact emerges with clarity — that at the time Sabhapati's tenancy was granted, the Colonial Sugar Refining Company Limited was itself holding under a sublease from the Commissioner of Lands which subsisted until the 31st December, 1950. What restrictions upon alienation there were in the tenancy is not known to the Court, but they are immaterial as a breach of them could only have given the Colonial Sugar Refining Company Limited such rights as it had reserved in relation thereto and could hardly have rendered illegal any act of Sabhapati in the sense of section 21 of the Ordinance.

After the 31st December, 1950, it would seem that the Colonial Sugar Refining Company Limited continued to regard Sabhapati as a tenant and presumably accepted rent. It seems probable in the case of a cane farm that he had some form of periodic tenancy, but if he had a term of years, it must have come to an end on the 31st December, 1950, and there would be an implied grant of a new tenancy of some kind. As from the 1st January 1951, the Colonial Sugar Refining Company Limited has regarded itself as holding a direct lease or agreement to lease from the Trust Board in the circumstances outlined in the passage from the judgment of the learned Chief

Justice which I have quoted. What has to be ascertained is whether this new source of the title of the Colonial Sugar Refining Company Limited has the effect of converting Sabhapati's tenancy from a tenancy which was not, into one that is, under the Ordinance.

A The argument of counsel for the appellant before this Court proceeded thus. The respondent, about to deal with Sabhapati, would search the register of titles and find that the land was subject to the 99 year lease to the Commissioner of Lands. He would observe that a sublease to the Colonial Sugar Refining Company Limited had expired on the 31st December, 1950, but would know that the Colonial
B Sugar Refining Company Limited was still in possession and acting as landlord. The appellant would be entitled to assume that the title of the Colonial Sugar Refining Company Limited to function as landlord flowed in some way from the Commissioner of Lands holding under the 99 year lease. As a third party the respondent could not be affected by private arrangements between Government departments for purposes of convenience or policy.

C While one may have a measure of sympathy with the appellant in the circumstances, it could be pointed out in relation to this argument that, having found the sub-lease to the Colonial Sugar Refining Company Limited had expired, the appellant was put on inquiry as to the Company's title. The question is one which must be resolved by endeavouring to ascertain the position which arose in law. It will
D be necessary to look at Exhibit R, the root of the title of the Colonial Sugar Refining Company Limited after 1950, but before doing so, I will refer to the findings of the learned Chief Justice.

A large part of his judgment was devoted to the consideration of the question whether the land in question was Native Land, or Crown Land, an issue which was much to the fore at the Supreme Court hearing. The learned Chief Justice found that the land was Native
E Land and counsel for the appellant conceded on this appeal that he could not challenge this finding. On the point now in issue the learned Chief Justice first considered authorities relating to estoppel and concluded that the appellant was not estopped from asserting that it was *ultra vires* the Trust Board to grant a lease, and consequently to agree to grant a lease prior to the actual surrender of the 99 year
F lease. He found that no informal arrangement with the Crown could enlarge the powers of the Trust Board, which were statutory: but that the Trust Board did not exceed its statutory powers by agreeing to grant a lease of Native Land to the Colonial Sugar Refining Company Limited; and that the informal arrangement with the Crown enabled the Board to make the lease so agreed to be granted, one in possession and not, as it would otherwise have been compelled to do,
G one in reversion. It was an arrangement which any person having power to deal with land might enter into. The learned Chief Justice then held that the restrictions contained in section 12 of the Ordinance applied at all material times to Farm No. 581. Finally, I quote one sentence which the learned Chief Justice said in the course of his consideration of the matter :—

H "Nor am I to be taken as holding that a person who has merely agreed to take a lease of native land from the Board, where the Board is in a position to grant such a lease in the exercise of its

statutory powers, is not a 'lessee under this Ordinance' for the purposes of section 12 of Cap. 104; such a person, it might well be said, could not accept the benefit without accepting the burden of the agreement, and would, therefore, be bound by the provisions of section 12."

Those findings indicate the learned Chief Justice's opinion that at the material time the Colonial Sugar Refining Company Limited held a valid agreement to lease from the Trust Board and was therefore a lessee under the Ordinance and that Sabhapati, as a sub-tenant under the Colonial Sugar Refining Company Limited, was consequently a sublessee under the Ordinance.

Exhibit R, the source of title of the Colonial Sugar Refining Company Limited is dated the 27th November, 1956, and gives "provisional approval" for a term of 50 years from the 1st January, 1957. The document was therefore in force during the year 1957 when the share-farming transaction took place in May of that year. Although the approval is designated "provisional" it would seem from paragraphs 3 and 4 of the document that final approval depended only upon payment of the first six months' rent and of the estimated survey fee. There appears to be no evidence when it was given, but no point has been made of this by counsel. Paragraph 5 reads :—

"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."

There is the following typed endorsement :—

"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."

Obviously paragraph 5 must be read in the light of that endorsement and could not operate to cancel the approval. It will be seen that, under the endorsement, the 99 year lease is to be surrendered with effect from the 1st January, 1950. I do not think that what is there contemplated is possible in law, whatever result the contractual arrangement between the parties may have in the interim. A surrender is something which extinguishes the lessee's estate and in this case would terminate a registered lease; though it is possible to have a binding agreement to surrender a lease at some future date, an actual surrender *in futuro* is not a possibility, and in my view similar considerations would apply to a surrender with purported retrospective effect: I do not think that the matter is material in the present circumstances.

In my view the Trust Board could validly give a lease of the land in question which was good in equity. It is unusual to have a position in which a statutory body which is empowered to lease has no interest or estate in the land which it leases. It is obvious, however, that, as the name imports, the Trust Board is in the position of a trustee or, at least of a statutory agent and, once it is established that the land to be dealt with is Native Land, the Trust Board's power of

effective leasing would be co-extensive with, or at least no less than, that of the native owners of the freehold. I am referring of course to the power arising from estates in land and not in relation to statutory restrictions as to term or purpose. In this case the land was already subject to the registered 99 year lease, but, having the agreement of the Commissioner of Lands to surrender that lease, I think the owners and consequently the Trust Board could create by agreement a lease in equity, probably creating a full equitable estate, but at the least by estoppel. I see no justification for thinking that an estoppel of that nature would confer upon the Trust Board powers which were beyond those given by the Ordinance and therefore *ultra vires*.

I agree with the learned Chief Justice that the tenancy created by Exhibit R was one under the Ordinance. There is no limitation in section 12 making it applicable to registered or legal leases only, and in my judgment, as the Trust Board derives its powers only from the Ordinance, any form of tenancy which is *intra vires* the Trust Board must be under the Ordinance. I agree also that the tenancy of Sabhapati's cane farm was under the Ordinance. That follows inevitably from the fact of the equitable lease of the Colonial Sugar Refining Company Limited from the Trust Board; its existence must exclude any question of a tenancy to the Colonial Sugar Refining Company Limited arising by holding over as sublessee of the Commissioner of Lands. I cannot find any basis for saying that the position is different because Sabhapati's tenancy was in existence before the expiry of the original sublease of the Colonial Sugar Refining Company Limited. Sabhapati's tenancy could only continue in existence in any form by virtue of the title flowing from its equitable lease from the Trust Board and the altered conditions of Sabhapati's tenancy arose, not from any unilateral act of the Colonial Sugar Refining Company Limited, but from statute, against which there could be no estoppel by the terms of any tenancy between Sabhapati and the Colonial Sugar Refining Company Limited.

Sabhapati being, in my view, a lessee under the Ordinance it follows that the share-farming agreement with the appellant was illegal if it contravened section 12. The learned Chief Justice was satisfied that it did, and said so quite briefly, as follows :—

"As to whether the Share-Farming Agreement was a 'dealing' within the meaning of section 12, I have no doubt it was. 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."

The question is to be resolved by ascertaining whether the transaction fell within the meaning of the words "... or deal with the land ... or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever ...". The important words are "deal with".

It is now expedient to examine the share-farming agreement, Exhibit B. It is dated the 23rd May, 1957, and made between Sabhapati (the Owner) and the appellant (the Farmer); it recites that the owner is lessee of Farm 581 and has agreed with the farmer to farm it. Paragraphs 1, 2 and 3 are 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 a good and husband-like manner and according to the most approved system of Agriculture practised 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 being 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.”

It is then set out that the Farmer will provide the farm implements and stock and pay one-half of the expenses and conform to the directions of the Colonial Sugar Refining Company Limited as to planting and harvesting; and that all cane shall be sold in the name of the Owner to the Colonial Sugar Refining Company Limited and paid to the solicitor for the parties.

Then come paragraphs 7, 8 and 9 as follows :—

- “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 necessities for the cultivation of the said land as the Farmer may reasonably require and the cost of all such supplies and necessities shall be borne by the parties in equal shares.”

I have so far omitted reference to paragraph 4A as there appeared to be no particular reason for its insertion at the point it occupied in the agreement; it reads :—

A "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."

B The use of the word "employ" in the first paragraph implies a relationship of master and servant between Sabhapati and the appellant, but it is difficult to find any further indication of such a relationship in the agreement. The sale of cane to the Colonial Sugar Refining Company Limited was to be in Sabhapati's name which would be expected in any event as the cane contract was in his name; the proceeds of sale were to be equally divided. The agreement is silent as to possession of the land. Obviously it is implied that the appellant would have the right to enter upon the land and farm it but, although that right would be in the circumstances an extensive one, it is not a right as against Sabhapati to possession and certainly not a right of exclusive possession. It was common ground in the course of the argument before this Court that the appellant continued to reside on his own land and Sabhapati (and after his death the respondent) continued to live on the land in question.

Under the agreement the appellant appears to have complete control of the farming operations and was obliged to supply all farm implements and stock, and, it would seem, all the labour. The respondent in evidence, whilst admitting that Sabhapati was very sick at the time and that the production increased substantially under the appellant's management, said that Sabhapati, herself and the children continued to work. If that is so it was not required by the agreement. The position as to the rent payable to the Colonial Sugar Refining Company Limited is obscure. It might well fall technically within the obligations of the appellant under paragraph 7, though I doubt if that was in fact the intention. If, as seems probable, the rent would be deducted from the cane proceeds by the Colonial Sugar Refining Company Limited, would it be regarded as an expense of and incidental to the growing and harvesting under paragraph 8? There seems to be no plain answer to these queries.

G In *Genda Singh v. Balak Ram* (1963) 9 F.L.R. 163, the Supreme Court, on appeal from a Magistrate, considered another share-farming agreement and held that it did not contravene section 12 of the Ordinance; at the same time it was held that the expression "share-farming" is not a term of art and each case must be decided upon its own facts. The agreement in that case was not set out in the judgment but the salient facts can be ascertained from the following passage of the Magistrate's judgment which the Supreme Court approved :—

H "Plaintiff did not live on the land. He had no house there. Defendant did still live on the land. He had his house there. Plaintiff paid no part of the rent. He had no security that he

could continue to work the farm for any particular period. To that extent at least defendant maintained control. Plaintiff worked the land and was repaid by a percentage of the cane proceeds he grew there. He obtained no sort of interest in the land itself and this Court quite fails to see that there was any dealing with the land itself of any sort whatever. It follows there was nothing unlawful about the agreement or the arbitration."

So far as residence is concerned the position is the same here but in the present case there was an ascertainable time limit at the expiration of which the parties hoped to divide the land (whether by way of area or undivided interest seems immaterial) between them. I have indicated that the position regarding the rent in the present case is obscure. I will advert to the question of an interest in land later, but before I do so, it will be well to mention other cases decided in this Court and in the Privy Council.

The document considered in *Ramkrishna Mission Fiji v. Ramlingham*, Civil Appeal No. 20 of 1962, contained first a declaration of trust in relation to the land and then a declaration that all crops were the property of the grantee. It was argued that the second provision was severable and amounted only to a sale of chattels or *fructus industriales*. The Court held that the deceased had only one object, to pass to the grantee the land and the crops and that, being without the consent of the Trust Board, it was illegal. It was not necessary for the Court to consider the position of the crops separately.

The decision of the Privy Council in *Chalmers v. Pardoe* [1963] 3 All E.R. 552 was in relation to facts of a rather different nature. P. who had a lease from the Trust Board made an arrangement with C. that he might build a house and outbuildings on part of P's leasehold. C. erected the buildings but no consent of the Trust Board was applied for. P. and C. then had a disagreement and C. claimed an equitable lien on the land for the cost of the buildings; it was held that he would have been entitled to such a lien but for the fact that the arrangement between P. and C. coupled with the erection of the buildings, and without the consent of the Trust Board was unlawful. The Privy Council considered that the "friendly arrangement" between P. and C. amounted to an agreement for a lease or a sub-lease. The Fiji Court of Appeal had put it as "a licence to occupy coupled with possession" and on this question their Lordships said, at p.557 :—

"Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr. Chalmers and Mr. Pardoe well knew, of erecting a dwelling-house and accessory buildings, it seems to their Lordships that, when this purpose was carried into effect, a "dealing" with the land took place. On this point their Lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained it follows that under the terms of s.12 of the Ordinance, Cap. 104, this dealing with the land was unlawful. It is true that in *Harnam Singh and Backshish Singh v. Bawa Singh* (7), the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene

s.12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but, one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering before hand whether this was desirable."

There is some implication there that (unless a sublease could be inferred) the inchoate arrangement between P. and C. might not have infringed section 12, but that, when the buildings were erected there was a completed dealing. Their Lordships' approach to the "licence to occupy" basis was cautious and I think it is obvious that a mere licence to enter land, which would serve only as a defence in an action of trespass, would not be a *dealing* with land. On the other hand, a licence to occupy coupled with possession, if the latter is exclusive, would frequently amount to a lease. It may be that a question of degree between these extremes is involved. On my reading of the judgment in *Harnam Singh and Bakshish Singh v. Bawa Singh* (1958-9) 6 F.L.R. 31 the dictum from that case to which their Lordships referred in *Chalmers v. Pardoe* (supra) was *obiter*. Their Lordships expressed no dissent from it and applied what was only a small part of what had been said by the learned President. Obviously agreements are numerous and varied, and I do not think that anything in the passage referred to detracts from the necessity of examining and considering each one in the light of its own contents and circumstances.

Returning to the agreement now under consideration, I will look first at paragraph 4A. One possible construction of it is that it is an agreement to sell an interest in the land subject to the consent of the Trust Board being obtained. On the other hand, particularly in the light of the surrounding circumstances of Sabhapati's illness and the fact that Sabhapati and the appellant were brothers, it might be little more than an expression of intention at a later date to approach the Colonial Sugar Refining Company Limited, and if it consented, to take the necessary steps to effect the transfer or re-arrangement. I think this is the better view and certainly until the Colonial Sugar Refining Company Limited had consented it would have been premature and useless to approach the Trust Board. The Board would undoubtedly have refused to consider the question on the ground that the parties were not in a position to "deal" with each other even if the Trust Board's consent were forthcoming. I think this view receives some support from the reference in *Chalmers v. Pardoe* (supra) to the decision in *Harnam Singh and Backshish Singh v. Bawa Singh* (supra). The position is also, I think, analogous to what the Privy Council had in mind in relation to the phrase "grant or disposition of land" when it said in *Director of Public Works v. Ho Po Sang* [1961] 2 All E.R. 721 at 734 :—

"If that agreement were no more than an agreement thereafter to grant a lease, their Lordships would not regard it as being a grant or disposition of land. It is one thing to make a grant or disposition of land. It is quite another thing to enter into an agreement to make thereafter a grant or disposition of land. A

mere agreement thereafter to grant a lease would not, their Lordships conclude, be a grant or disposition within Art.XIII."

That, insofar as paragraph 4A is concerned, I would hold to be the position here, but their Lordships went on to say :—

"This, however, does not conclude this case because there can be no doubt that there are many provisions in the document of June 7, 1955, which might be said to amount to an immediate grant of a present interest in land which was of such a substantial character as to be a grant or disposition of land."

Are there indications in the remainder of the share-farming agreement in the present case that it is a dealing with land? I would indicate first that this is not a case in which it is suggested that the agreement is a sham to cover the *de facto* transfer of wider benefits or rights. Its effect must be ascertained from its tenor having due regard to surrounding circumstances. It appears to me to be a not unnatural arrangement between brothers, one of whom is ill, that the other will farm his land for him, in consideration of one-half of the proceeds of the crops. The appellant did not have possession and was not entitled, under the agreement, to enter on the land except for the purpose of farming it. He was a licensee but I see little to indicate that the agreement went beyond pure contract. When in *Chalmers v. Pardoe* (supra) reference was made to "a licence to occupy coupled with possession", it was possession of a very different calibre — in fact exclusive possession.

The learned Chief Justice considered that the appellant was a licensee "with an interest" and a tenant in common in all but name. As to the latter I think he did not have the legal right to possession which a tenant in common would have had. As I have indicated, the position regarding payment of the rent to the Colonial Sugar Refining Company Limited is obscure and I think that if any presumptions are made they should not be those in favour of invalidating the agreement. As to the former, I would say first that it would not, in my opinion, be right in construing the agreement as a whole to cast over the remainder of it a shadow from paragraph 4A. That the parties hoped later to be permitted to divide the land is not, I think, good reason for thinking they would choose an illegal means of covering the interim period when the method, legal and equally effective, of pure contract, was open. A mere licence to enter and work on the land does not convey an interest in it. The appellant had no easement or profit a prendre and was not, in my view, a tenant. Therefore, if he had an interest in the land it must have arisen in relation to the crops. That question was not argued before this Court and I am doubtful on that account whether I should entertain it. However, I do not find anything in the share-farming agreement which would place the ownership of a half share in the crops, while growing, with the appellant. Certainly, he was entitled to half of the net proceeds but that is only the method under the contract by which he is recompensed for his employment under paragraph 1 of the agreement. I do not think the agreement can in any way be construed as a sale of a proportion of the cane crops to the appellant and therefore it is

unnecessary to embark upon consideration of the question whether sugar-cane is *fructus naturales* (a sale whereof would pass an interest in land) or *fructus industriales*.

- A There is little guidance to be had on the appropriate meaning to be attached to the phrase "deal with" the land in the context of this Ordinance. To my mind the word "with" implies that the land or part of it or an interest in it at least, must be the subject-matter of the dealing. That does not mean that a purportedly innocuous agreement concealing a far-reaching *de facto* arrangement would escape, as the illegal dealing would be the *de facto* transaction. I think it cannot have been the intention of the Ordinance to render illegal the bringing onto a cane farm of an employee or an independent contractor to farm it in consideration of a share of the proceeds.

- C I have reached the conclusion, though with considerable hesitation, that it is on that side of the line that the present case falls. I would therefore hold that the share-farming agreement Exhibit B was not in contravention of section 12 of the Ordinance and would allow the appeal, setting aside the judgment in the Court below and substituting a judgment dismissing the action with costs: the respondent to pay the costs of the appeal.

- D MARSACK J.A. : I have had the advantage of reading the carefully reasoned judgment of Gould J.A. and agree that in the circumstances of this case the agreement between Sabhapati and Manadan is not a dealing in land within the meaning of the Native Land Trust Ordinance, Cap. 104. I fully endorse the reasons given for his reaching that conclusion. Accordingly, I agree that the appeal should be allowed, with the consequences set out in that judgment.

- E With regard to the other section of the judgment, however, I find myself in some doubt as to whether the respondent can properly be regarded as a "lessee" within the meaning of the Native Land Trust Ordinance, section 12. As Gould J.A. points out in the course of his judgment, there is no precise evidence showing the nature of the tenancy granted by the C.S.R. Company Limited to Sabhapati. It may be, as is there stated, that any form of periodic tenancy previously held by Sabhapati must have come to an end on the 31st December, 1950, and that there would be an implied grant of a new tenancy of some kind. There is no finding in the judgment appealed from as to the class of tenancy held by Sabhapati, and, as far as I can ascertain, no evidence upon which such a finding could be based. In the pleadings it is agreed that the lands in question were held by Sabhapati "under tenancy from the C.S.R. Ltd.". There is, however, nothing, in either the pleadings or the evidence, from which the nature of that tenancy can be ascertained. It is possible, and perhaps even probable, that it is a mere tenancy at will. The question then arises: are the terms 'tenant' and 'lessee' synonymous for the purposes of section 12?

- H The term "lessee" is not defined in the Ordinance, Cap. 104. Section 12(2) merely provides that for the purposes of that section lease includes a sublease and lessee includes a sub-lessee. It is perfectly true that in the agreement dated 23rd May, 1957, between Sabhapati and Manadan, the former recites that he is the "lessee" of a piece of

land comprising 10 acres more or less "leased" by him from the C.S.R. Company Limited. But the term in that context may well have been used loosely, and its use there is not in itself sufficient, in my view, to bring the tenancy within the ambit of section 12. In section 12, however, the words "lease" and "lessee" must, in the absence of express definition in the Ordinance itself, be taken to have their strict legal meaning. When any dealing in land by a "lessee" without the consent of the Board is invested with the attributes of illegality, there should be no vagueness as to the form of tenancy intended to be covered by the section. In my opinion it is thus necessary, in deciding whether Sabhapati could at the 23rd May, 1957, properly be described as a "lessee" to use that term in its strict connotation. In *Woodfall's Landlord and Tenant*, 26th Ed., at p.2, "lease" is defined as :—

"The grant of a right to the exclusive possession of land for a determinate term less than that which the grantor has himself in the land."

In *Stroud's Judicial Dictionary*, 3rd Ed., p.1601, it is stated :—

"There must be a certain beginning and a certain ending otherwise it is not a perfect lease."

In these definitions emphasis is laid on the principle that to constitute a lease there must be a definite date of commencement and a definite date of termination. Some of the decided cases appear to lead to the same conclusion: *Camberwell & South London Building Society & Holloway*, 13 Ch.D. 754; in *re Negus* [1895] 1 Ch. 73; *Nell v. Longbottom* [1894] 1 Q.B. 767; and also 23 Hals. (3rd Ed.) 469 para. 1088. I have been unable to find any authority for the strict use of the term "lease" to indicate a tenancy which was not for a definite period.

If then it appears from the authorities quoted to be of the essence of a lease that the grant of the right to exclusive occupation should be made for a determinate period, the vague tenancy which Sabhapati seems to have enjoyed in the present case at the time of execution of the agreement with Manadan, cannot properly be described as a lease within the meaning of section 12 of the Native Land Trust Board Ordinance, Cap. 104.

Section 12 must be taken to contemplate, in using the terms 'lessee' and 'lease', that the tenure of the land is such as to make it possible for the person concerned to alienate or otherwise deal with it, as for example by sale, transfer or sub-lease. I can find no evidence of such a form of tenure here. There is nothing to show that any form of tenancy which Sabhapati held constituted an interest in land capable of being alienated or in any way dealt with by action on the part of the tenant.

There is also perhaps the further question of whether the form of equitable estate held in the land by the C.S.R. Ltd. under what has been called the "Notice of Provisional Approval" from the Native Land Trust Board, is sufficient to enable the Company to grant a tenancy which would amount to a sub-lease under the Ordinance, Cap. 104.

A It is for these reasons that I am impelled to express a doubt whether the word 'lease' in section 12 is wide enough to cover such form of tenancy as Sabhapati may have held. In the absence of evidence definitely establishing the terms of Sabhapati's tenancy, which is here treated as a matter of presumption only, and of legal argument on the subject from counsel appearing on the appeal, I cannot give a definite judgment on the point. Consequently all I wish to say is that my concurrence with my brother Gould as to the fate of the appeal should not necessarily be taken as an agreement with his opinion that Sabhapati was, at material times, a lessee within the scope of section 12 of the Ordinance.

B KNOX-MAWER, J.A.: I have enjoyed the advantage of reading the learned judgments of my brothers Gould and Marsack J.J.A., in this most difficult case.

C Addressing myself shortly to the question 'is the share-farming agreement, Exhibit B, a dealing with the land within section 12 of Cap. 104?', I would answer that, upon the face of it, it is not. No clause in this agreement confers upon the "farmer" (the present appellant) any interest in the land, such as a right to joint possession for instance, as distinct from a mere licence to go on the land to cultivate it in his capacity as a sort of farm manager to his brother.

D A further question arises: does Exhibit B purport to conceal a *de facto* dealing with the land? It was the conclusion of the learned trial Judge that the appellant had become a tenant in common with Sabhapati 'in all but name'. My learned brother Gould J.A. challenged the validity of this conclusion, and my learned brother Marsack J.A. agrees with him. I concur with them upon this issue, but I do so after considerable deliberation because at one stage of the argument I was otherwise inclined. Upon balance, I think it is correct to say that no dealing with the land, concealed or otherwise, in contravention of section 12 has been established in this case. I would therefore allow the appeal on this ground and set aside the judgment in the Court below, substituting therefor a judgment dismissing the action with costs. I would order the respondent to pay the costs of the appeal.

F In case a higher tribunal, upon appeal from this Court, should hold, with the learned trial Judge, that there was a dealing with the land within section 12, I will advert briefly to the other main issue (it being no longer disputed that this is native land).

G This is the question whether Sabhapati was a lessee under the Ordinance within the meaning of section 12. The respondent is the widow and personal representative of Sabhapati who died in November 1958. At the date of his death Sabhapati held the land as tenant of the Colonial Sugar Refining Company Limited. It is common ground that this tenancy is now vested in the respondent. In my view, it has also 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.

H

The source of title of the Colonial Sugar Refining Company (from which this periodic sub-tenancy is derived) is the document Exhibit R. By Exhibit R, the Native Land Trust Board conveyed to the Colonial Sugar Refining Company Limited its decision to grant to the Company a lease for fifty years from the 1st January 1957. It has been a further basis of the argument, both in this Court and in the Court below, that, at the time when the Native Land Trust Board, as statutory agents of the native owners, issued Exhibit R to the Colonial Sugar Refining Company, the Board had the agreement of the Commissioner of Lands that he would surrender the head lease. This basis remains unchallenged. I consider that the Board has validly created in favour of the Colonial Sugar Refining Company an equitable "lease" within the meaning of this word as used in section 12, and the holder of a tenancy deriving from this equitable head-lease is in my view a sub-lessee (and hence a 'lessee under this Ordinance') within the meaning of the section.

I have given careful thought to the observations of my learned brother Marsack J.A. in this regard, but, for myself, I would not, with respect, so restrict the meaning to be given to the words "lease", "lessee", "sub-lease", "sub-lessee" in section 12, as to exclude Sabhapati's tenancy from the operation of the section.

Accordingly, upon this, the other main question that remains in issue in the case, I find myself in substantial agreement with Gould J.A. and with the learned trial Judge.

Appeal allowed.