

## SOMA RAJU

v.

## BHAJAN LAL

[COURT OF APPEAL, 1976 (Gould V.P., Marsack J.A., Spring J.A.),  
9th, 11th, 26th November]

## Civil Jurisdiction

*Practice and procedure—pleadings—these should state material facts relied on and not evidence by which they are to be proved.*

*Appeal—assessment of credibility of witnesses by trial judge—advantage taken of seeing and hearing witness—proper weight given to their testimony—Court of Appeal will not interfere with judge's findings.*

*Landlord and tenant—lease for term of one year or less valid without registration—Land Transfer Act 1971 s. 54(2)—whether purchaser with notice of such tenancy purchases subject to rights enjoyed by tenant—Land Transfer Act 1971 ss. 37, 38, 40, 42, 54, 139, 140—Property Law Act 1971 s. 11—New Zealand Transfer Act 1952.*

*Landlord and Tenant—agricultural land—whether rights of occupation of agricultural land under Agricultural Landlord and Tenant Ordinance (Cap. 242) exist in law independently of Land Transfer Act 1971—whether such rights prevail against indefeasibility of title provisions of Land Transfer Act 1971 ss. 39, 40, 54—Agricultural Landlord and Tenant Ordinance (Cap. 242) ss. 4(1), 5(1), 6, 7, 8, 9(2), 13, 22(1), 56(1)(c), 57, 58, 59—Agricultural Landlord and Tenant (Tribunal Procedure) Regulations 1967 Schedule C, reg. 49(3)—Agricultural Landlord and Tenant (Exemption) Regulations 1967.*

*Interpretation—Ordinance—whether Agricultural Landlord and Tenant Ordinance overridden by Land Transfer Act 1971 s. 3—Property Law Act s. 3—Constitution of Fiji*

In spite of the fact that the appellant was aware that the respondent was occupying agricultural land, he purchased the same land from the landlord and entered into possession himself.

The trial judge decided that the appellant had wrongfully entered the land of which the respondent was lawfully the tenant and awarded damages, at the same time making an order restraining the appellant from entering upon the land during the respondent's tenancy except as landlord.

*Held:* 1. The original verbal agreement between the respondent and the landlord was for a year only, and, therefore, valid without the necessity of registration under the Land Transfer Act 1971. The appellant had been fixed with notice of the tenancy vested in the respondent and purchased the land subject to the respondent's right under the tenancy enjoyed by him.

2. The appellant held the tenancy under the Agricultural Landlord and Tenant Ordinance which prevailed against the plain terms of Land Transfer Act 1971 ss. 39 and 40.

3. There was no validity in the argument that the later Land Transfer Act 1971 s. 3 had the effect of overriding the application of Agricultural Landlord and Tenant Ordinance.

*Per curiam:* 1. Although the statement of claim of the appellant did not refer to the Agricultural Landlord and Tenant Ordinance or the Land Transfer Act 1971, this was not essential as the pleadings should state facts and not law, and the appellant was fully aware, in any event, of the salient issues to be decided at the trial.

2. The respondent had lied in his affidavit prior to the trial, but the judge had considered this aspect and weighed up the evidence carefully. In these circumstances, the Court of Appeal would not interfere unless convinced that the decision was wrong.

Cases referred to:

*Hunt v. Luck* [1902] 1 Ch. 428.

*North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd* [1914] A.C. 461. [1913] 3 K.B. 422.

*Philipps v. Philipps* [1878] 4 Q.B.D. 127.

*Hontestroom S. S. v. Durham Castle S. S.* [1927] A.C. 37.

*Frazer v. Walker* [1967] 1 All E.R. 649.

*Miller v. Minister of Mines* [1963] 1 All E.R. 109; [1963] A.C. 484.

*Barker v. Edger* [1898] A.C. 748.

*Seward v. Vera Cruz* [1884] 10 A.C. 59.

*Breskvar v. Wall* (1971) 126 C.L.R. 376.

Appeal from the judgment of the Supreme Court in favour of the respondent.

*S. M. Koya and M. Tapoo* for the appellant.

*G. P. Shankar and S. R. Shankar* for the respondent.

The following judgments were read.

SPRING, J. A., [26th November 1976]

This is an appeal from the judgment of the Supreme Court of Fiji given at Lautoka on the 1st July 1976 in which the appellant was the unsuccessful defendant.

The facts briefly are as follows. On 18th September 1973 the appellant purchased an area of agricultural land at Nasau, Sigatoka containing 10 acres 30 perches from the executors of the Estate of the late A. D. Patel for \$14,000. A transfer pursuant to the purchase was registered under the Land Transfer Act on 6th November 1973.

The respondent gave evidence that he entered upon the land as a yearly tenant of the late A. D. Patel in 1949 and that the appellant lived on adjoining land for at least the past 24 years. The respondent's tenancy was still subsisting when A. D. Patel died on 1st October 1969 and rent has been paid and accepted up to December 1972; rent was tendered in 1973 but not accepted. On 25th September 1973 the respondent applied to the Agricultural Tribunal for a declaration of tenancy pursuant to the provisions of the Agricultural Landlord and Tenant Ordinance (which for the sake of brevity I shall hereafter refer to as ALTO) and the estate of A. D. Patel was joined as respondent; this application is apparently still pending. At no time was the res-

pondent given notice to vacate the land by his original landlord or his successors. On 30th October 1973 the respondent was given written notice that the appellant had bought the land and was requested to vacate the land. In February 1974 the respondent made a new application to the Agricultural Tribunal for a declaration that he was entitled to a tenancy under ALTO; the appellant was made a party to this application. This later application has been partly heard but no decision has been given. A

It was agreed by counsel in the court below that the decision of the Supreme Court and now this court will determine the matter without further hearing before the tribunal. B

It was found by the trial judge:

- (a) that the appellant when he purchased the lands knew that the respondent was occupying the lands as a tenant of the late A. D. Patel;
- (b) that the respondent had not agreed to vacate the land or surrender or waive his tenancy; C
- (c) that the appellant when he purchased the land gave oral warnings to the respondent to leave the land and not to build a house thereon;
- (d) that on the 8th or 9th November 1973 the appellant entered the land without the respondent's consent and cleared 6 to 8 acres; ploughed up some land and planted crops thereon; demolished a toilet; ploughed up a road or track; and fenced off part of the land cultivated by him. D

The trial judge decided that the appellant wrongfully entered the lands of which the respondent was lawfully the tenant and awarded damages of \$800 and other ancillary orders including an injunction restraining the appellant from entering upon the land during the remainder of respondent's tenancy except as landlord.

The appellant appeals to this court and seeks to have the judgment set aside or a new trial ordered. There are 5 grounds of appeal which are as follows: E

- (1) That the learned trial judge erred in law in not holding that the respondent's statement of claim did not raise the grounds upon which he alleged that he was the lawful tenant of the appellant nor any reference to the Agricultural Landlord and Tenant Ordinance Cap. 242 upon which he relied at the trial or the Land Transfer Act 1971 upon which the learned trial judge relied in his judgment to allow the respondent's claim. F
- (2) That the learned trial judge erred in accepting the evidence of the respondent in view of the fact that during the cross-examination, he confessed on oath that he swore a false statement in his affidavit in support of his application for interim injunction filed with the Supreme Court at Lautoka.
- (3) That the learned trial judge erred in law in holding that by reason of section 54 of the Land Transfer Ordinance the respondent held a valid lease against the appellant without registration and that the rule in *Hunt v. Luck* [1902] 1 Ch. 428 applied. G
- (4) That the learned trial judge erred in law in holding that the respondent was the lawful tenant and held a tenancy Ordinance Cap. 242 and that it prevailed against terms of section 39 and 40 of the Land Transfer Act 1971.
- (5) That the learned trial judge erred in law in not holding that by reason of section 3 of the Land Transfer Act 1971 and in view of the inconsistency between the relevant provisions of the Agricultural Landlord and Tenant H

- A. Ordinance (Cap. 242) and the Land Transfer Act 1971, the Agricultural Land and Tenant Ordinance (Cap. 242) did not apply to the land in question."

Dealing with the first ground of appeal Mr Koya, counsel for the appellant, submitted that the learned trial judge was incorrect in law in allowing the respondent to rely, at the trial, upon the provisions of ALTO and the Land Transfer Act 1971 when neither enactment was referred to in the statement of claim.

- B. The statement of claim issued by the respondent stated that he is the lawful tenant of the appellant in respect of agricultural land and that the appellant wrongfully trespassed thereon and committed various acts of damage which are detained. The rules of the Supreme Court applicable to this matter require that pleadings should state the material facts relied on and not the evidence by which they are to be proved. In *Norh Western Salt Company Ltd. v. Electrolyte Alkali Co. Ltd.* [1913] 3 K.B. 422 at 425 Farwell L.J. said:

C. "The pleader must plead facts not law."

In *Philipps v. Philipps* (1878) 4 Q.B.D. 127 at p. 139 Cotton L.J. says:

- D. "But in my opinion it is absolutely essential that the pleading not to be embarrassing to the defendant should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial."

- E. The statement of defence sets out in greater detail the facts in issue between the parties and specifically refers to both ALTO and the Land Transfer Act. Admittedly, Mr Koya is entitled to complain that the statement of claim is somewhat sketchy, but from a perusal of the statement of defence it cannot be said that the defendant (now the appellant) was taken by surprise as to the issues to be decided by the trial court. Further, had the appellant wished he could have applied to the lower court for an order for further or better particulars before trial; no such application was made.

I conclude, therefore, that the appellant was aware of the salient issues to be decided at the trial and accordingly this ground of appeal must fail.

- F. The second ground of appeal claims that the judge in the court below was wrong in accepting the evidence of the respondent, who had admitted, during the course of the trial in the court below, that he had knowingly sworn an affidavit which contained an untruth; counsel submitted that the respondent's evidence should have been rejected. The circumstances surrounding this matter briefly are as follows. The respondent had at some stage before trial sought an injunction from the lower court and in support thereof he swore and filed an affidavit alleging certain facts which he later admitted were untrue; accordingly Mr Koya argued that the respondent's evidence should not be accepted.

G. The trial judge was aware of this serious lapse on behalf of the respondent and reminded himself thereof, at least twice during the course of his judgment. At p. 3 of the judgment the learned judge says:

- H. "Nevertheless, in view of his admission that he did not tell the truth to his solicitor, I must treat the plaintiff's evidence with considerable reservations."

Again at p. 4 of the judgment he says:

"I do not believe the defendant and I accept the plaintiff's evidence on this aspect of the case as truth even after making allowance for his failings as a witness." A

It is to be noted that the learned judge on some issues of fact disbelieved the respondent and preferred the evidence of the appellant, while on other issues of fact he believed the respondent and disbelieved the appellant. In *S. S. Hontestroom v. S. S. Durham Castle* [1927] A.C. 37 at 47 Lord Sumner said:

"None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be left alone ..... B C

We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong." D

It is apparent from the record that the learned trial judge has weighed the evidence very carefully; has consistently reminded himself of the short comings of the respondent in the telling of an untruth on oath; in evaluating the testimony of witnesses he has had the benefit of observing their demeanour and deportment; and finally has decided what evidence to accept and what evidence to reject. E

In these circumstances I would not be justified in interfering with the findings of the learned trial judge even if I disagreed with him; in fact I find them entirely acceptable. Accordingly the second ground of appeal, in my view, must fail.

The third and fourth grounds of appeal were taken together and I turn now to a consideration thereof. F

Mr Koya submitted that the appellant was the registered proprietor of the land on which the respondent was residing and that the indefeasibility of title provisions of the Land Transfer Act override the rights of the respondent as a yearly tenant under an oral agreement made between the previous registered proprietor A.D. Patel and himself.

Mr Koya submitted that even if the respondent was a yearly tenant, as the learned trial judge found, those sections of the land Transfer Act 1971 which deal with the principle known as the indefeasibility of title destroyed the rights of the respondent under his yearly tenancy. In other words registration of the transfer vested in the appellant, in the absence of fraud, an indefeasible title and the respondent was restricted to a right in personam only, against his lessor. G

Mr Shankar for the respondent supported the judgment of the learned trial judge and argued that by virtue of section 54(2) of the Land Transfer Act any lease H



- A for a term not exceeding one year is valid without registration; that the appellant being fixed with notice of the tenancy agreement took title to the land subject thereto; and that the indefeasibility of title provisions of the Land Transfer Act did not in the circumstances avail the appellant.

- B It is necessary, therefore, to consider the provisions of the Land Transfer Act 1971 so far as they bear upon the facts of this case. Mr Koya relied on sections 37, 38, 39, 40, 42, 139 and 140. In *Fraserv. Walker* [1967] 1 All E.R. 649 the Privy Council considered the New Zealand Land Transfer Act 1952 (which is similar in many respects to the Fiji Act) and in particular the provisions dealing with claims and proceedings against registered proprietors of land. At page 652 their Lordships said:

- C "It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called 'indefeasibility of title'. The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."

Turning now to a consideration of the relevant sections of the Fiji Act, section 39(1) reads as follows:

- E "39. (1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except—" (the three exceptions which follow and subsection 2 of this section are not relevant to this case.)

F This section must, however, be read in conjunction with section 40 of the Act:

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

H

This section deals with notice and the position of third parties who deal with a registered proprietor of land. In *Fraser v. Walker* (supra) at p. 653 their Lordships said: A

"In all systems of registration of land it is usual and necessary to modify and indeed largely to negative the normal rules as to notice, constructive notice or inquiry as to matters possibly affecting the title of the owner of the land."

Mr Koya submitted that fraud had not been pleaded by the respondent and that notwithstanding the finding by the trial judge that the appellant knew that the respondent was a tenant of A.D. Patel and had been for many years, the appellant was entitled to rely on sections 39 and 40 of the Land Transfer Act and that he was not affected by notice of the respondent's unregistered interest in the land. There is a line of authority for the proposition that instruments which are not capable of registration under the Land Transfer Act are not necessarily defeated by the indefeasibility provisions of the Land Transfer Act. The authorities show that where there is an interest which is not capable of registration under the Land Transfer Act then the questions arises whether the interest was independent of the indefeasibility provisions of the Land Transfer Act and would be a burden on the title of the registered proprietor. B C

If the estate or interest is not registrable under the Land Transfer Act then its validity so far as the undefeasible sections of the Land Transfer Act are concerned must be determined in accordance with the general principles of law. Section 42 of the Land Transfer Act 1971 reads: D

"42. (1) No action for possession, or other action for the recovery of any land subject to the provisions of this Act, or any estate or interest therein, shall lie or be sustained against the proprietor in respect of the estate or interest of which he is registered, except in any of the following cases:—"  
(and then follows 5 exceptions which I need not detail). E

This section protects a registered proprietor against any claim or action for possession in respect of recovery of land with certain specified exemptions which again for our purposes are not in issue.

I believe that the purpose of the Land Transfer Act is that in general a title established by the Act is indefeasible but that the court will recognise an interest in land unless the Land Transfer Act precludes such recognition. F

Section 54 of the Land Transfer Act deals with the registration of leases and provides for their incidents:

"54. (1) When any land is intended to be leased or demised for a life or lives or for any term exceeding one year, the proprietor shall execute in duplicate a lease in the prescribed form which shall be registered in accordance with the provisions of this Act, and every such instrument shall, for description of land intended to be dealt with, refer to the instrument of title of the lessor, and shall give such description as may be necessary to identify the land, and shall contain and accurate statement of the land intended to be leased. G

(2) A lease executed in the prescribed form may be registered notwithstanding that the term thereof is for one year or less, but any lease which shall have been granted for a term not exceeding one year shall be valid without registration: H

- A Provided that no right or covenant to purchase the land contained in any lease shall be valid as against any subsequent purchaser of the reversion unless such lease be registered."

It is pertinent to note that section 11 of the Property Law Act 1971 states:

"A Deed is not necessary to the validity of a lease."

- B The proven facts in this case show that the respondent's interest in the land owned by the appellant stems from the tenancy agreement concluded orally in 1949 between himself and the late A.D. Patel and as the learned judge found had continued extant at all material times. The tenancy agreement was not capable of registration because—being oral—it was not in registrable form but section 54(2) states that any lease which shall have been granted for a term not exceeding one year shall be valid without registration—in other words the position appears to be that any lease for a term not exceeding one year is valid without registration and the lessee would have the same legal estate and interest thereunder as if the land to which it related was not under the Land Transfer Act. The question then arises what is the position of a person who with knowledge of such a tenancy agreement proceeds to purchase land that is under the Land Transfer Act. In *Hunt v. Luck* [1902] 1 Ch. 428, 432 Vaughan Williams L.J. after observing that the first rule distilled from the decided cases by the trial judge was, that a tenant's occupation is notice of all that tenant's rights, said:

- E "We have, therefore, to apply the first of the rules stated by the learned judge. Now, what does that mean? It means that, if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession. That, I believe, is a true statement of the law;"

- F Mr Koya argued that if Section 54(2) was to create an exception to the indefeasibility of title provisions then it should have appeared as an exception to section 39 of the Act. Further, he submitted that the right conferred on the respondent under section 54(2) merely conferred on the respondent a right in personam against the lessor.

- G In my view, his argument must fail—firstly because section 54(2) of the Act is quite explicit and secondly because the respondent would have such a right under the general law of contract apart altogether from the express words set forth in section 54(2). I believe that the only meaning that can properly be given to the subsection is that any lease which shall have been granted for a term not exceeding one year shall be valid without the necessity for registration under the Land Transfer Act and that a tenant would have the same legal estate under his lease or tenancy agreement as if the lease had been duly registered. If one analyses the proviso to section 54(2) of the Act some support can be gained for this view. The proviso states:

- H "No right to purchase land contained in any lease for a term of one year or less shall be valid as against any subsequent purchaser of the reversion unless the lease is registered."

The need to negative by this proviso the validity of this particular provision as against a subsequent purchaser provides a clear implication that the remaining pro-



visions of the lease remain valid as against a subsequent purchaser of the reversion without registration.

A

I agree with the learned judge, therefore, that the appellant, being fixed with notice of the existence of the tenancy vested in the respondent, would purchase the land subject to the respondent's rights under the tenancy enjoyed by him. I agree further with the observations of the learned trial judge when he says:

"It is to be observed that since section 54 of the Land Transfer Act allows only leases of one year or less to remain unregistered the new registered proprietor would suffer no real detriment and the only curb on his powers would be that he would have to give notice at the most six months notice—to the occupant or the tenant."

B

It is necessary, however, to consider the further argument of Mr Koya—that if the respondent was a statutory tenant under ALTO then he should have registered his tenancy in accordance with the provisions of ALTO, otherwise the indefeasibility provisions of the Land Transfer Act would preclude the tenancy agreement becoming a burden on the title; and accordingly the appellant is not bound thereby.

C

Counsel for the respondent submitted that under ALTO the respondent was a statutory tenant; that such tenancy could only be determined in manner set out in ALTO; and that notwithstanding that the tenancy was not registered under ALTO it remained unaffected by the principle of indefeasibility of title under the Land Transfer Act. The learned judge in his judgment stated:

D

"It seems to me that a tenancy existed under ALTO . . . . it seems likely that there was thereby a tenancy created after the coming into force of ALTO and by virtue of section 6 a Contract of Tenancy commencing on 1st January 1970 and continuing for a period of 10 years came into being."

E

ALTO was passed into law on 29th December 1967 and the Ordinance deals exclusively with rights and obligations of landlords and tenants of agricultural lands. The preamble to the Act says:

"An Ordinance to provide for the relations between landlords and tenants of agricultural holdings and for matters connected therewith."

It is necessary to examine the Ordinance. A contract of tenancy is defined as:

F

"Any contract express or implied or presumed to exist under the provisions of this Ordinance that creates a tenancy in respect of agricultural land or any transaction that creates a right to cultivate or use any agricultural land;"

It is clear from the judgment appealed from that the respondent had a contract of tenancy in respect of the land purchased by the appellant. "Instrument of Tenancy" is defined as the writing evidencing a contract of tenancy. However as a contract of tenancy can be one implied or presumed to exist by operation of law it follows that such a contract of tenancy can exist without being in writing:

G

Section 4(1) states:

"4. (1) Where a person is in occupation of and is cultivating an agricultural holding and such occupation and cultivation has continued before or after the commencement of this Ordinance for a period of not less than three years and the landlord has taken no steps to evict him, the onus shall be on the landlord to prove that such occupation was without his consent, and if the landlord fails to

H

- A satisfy such onus of proof, a tenancy shall be presumed to exist under the provisions of this Ordinance." (Proviso is of no importance here).

This section raises a strong presumption in favour of occupiers of agricultural land who come within the ambit of this section albeit that such occupiers may hold no title to such land. Section 6 of the Ordinance, which is quite a revolutionary provision, states that every contract of tenancy created after the commencement of the Ordinance shall be deemed to have a term of not less than 10 years. Section 13 as will be seen later in this judgment provides for further extensions of the term.

- B Mr Koya argued that if the respondent had a contract of tenancy presumed under the Ordinance then it was incumbent for him to apply under section 5 for a declaration of tenancy; but a perusal of this section does not support such a submission. Section 5(1) says:

- C "5. (1) A person who maintains that he is a tenant and whose landlord refuses to accept him as such may apply to a tribunal for a declaration that he is a tenant and, if the tribunal makes such a declaration, the tenancy shall be deemed to have commenced when the tenant first occupied the land:

Provided that rent shall only be recoverable by process of law from the date of the application to the tribunal."

- D It would appear that section 5 only comes into operation if the landlord refuses to accept the tenant as such and in the circumstances an application can be made to the tribunal for a declaration of tenancy. In this case the evidence shows that the respondent was at all material times accepted as a tenant by his landlord. Section 8 provides:

- E "8. (1) A contract of tenancy shall be evidenced by an instrument in writing called, in this Ordinance, an instrument of tenancy.

(2) The instrument of tenancy shall be in the prescribed form and shall contain the names and addresses of the parties, the rent provided for and the place at which such rent is payable, the amount of premium or payment for improvements provided by the landlord for the purpose of the tenancy, the term of the tenancy, a sufficient description of the land referred to in such instrument and such other conditions as may be agreed or prescribed."

- F A prescribed form of instrument of tenancy is set out in Schedule 'C' of the Agricultural Landlord and Tenant (Tribunal Procedure) Regulations 1967. Every instrument is to be signed by the parties and registered. Section 8(3) reads:

"8 (3) Every instrument of tenancy shall be signed by the parties thereto and—

- G (a) if registrable under the provisions of the Land (Transfer and Registration) Ordinance, shall be registered in accordance with the provisions of that Ordinance and, notwithstanding the provisions of section 59 of this Ordinance, all other provisions of the said Ordinance shall apply to such instrument and all dealings relating thereto; or
- H (b) if not registrable under the provisions of the Land (Transfer and Registration) Ordinance, shall, together with all dealings relating there, be registered as deeds under the provisions of the Registration Ordinance."

The Landlord, it would appear, has the obligation cast upon him by section 56(c) of the Ordinance to register an instrument of tenancy. Section 56(1)(c) which is part of the offences section of the Ordinance states: A

"Any landlord who—

- (c) fails to register the instrument of tenancy in accordance with the provisions of subsection (3) of section 8 of this Ordinance. shall be guilty of an offence ..... B

Regulation 49(3) of the aforesaid regulations provides for the Registrar of Title to enter, where practicable, a caveat on any title registered under the Land Transfer Act 1971 (which replaced the Land (Transfer and Registration) Ordinance) when an instrument of tenancy is registered in the Deeds Registry. Section 8 (supra) was amended in 1967 to provide for a tenant to have power to request his landlord to register a lease or sublease under the Land Transfer Act and the new subsections provide penalties for a landlord who fails to comply with his tenant's request shall be furnished by the tenant failing to pay the survey shares and other expenses of the lease or sublease. Section 57 gives power to the Minister to make regulations (inter alia) for exempting agricultural land from the operation of ALTO and the Agricultural Landlord and Tenant (Exemption) Regulations 1967 sets forth land which is so exempted. Section 58 sets out three laws to which ALTO is expressly made subject, namely the Crown Acquisition of Lands Ordinance, the Forest Ordinance and Mining Ordinance. Certain sections of the Native Land Trust Ordinance and all regulations made under those sections are expressed as being subject to ALTO. It is acknowledged that in this case no instrument of tenancy was ever signed between the respondent and his landlord (which expression includes A. D. Patel and his personal representatives, executors, administrators and assigns). C D E

Section 22(1) states:

"22. (1) Where—

- (a) in respect of any contract of tenancy, an instrument of tenancy has not been executed by the parties or such instrument does not contain the statutory requirements required by section 8 of this Ordinance to be included therein, either the landlord or the tenant; or F  
(b) in any case coming within the provisions of section 5 of this Ordinance, the tenant,

if he has first requested the other party to the tenancy to have the contract evidenced by an instrument of tenancy or by an instrument in the prescribed form, as the case may be, and no such contract has been executed, may refer such matter to the tribunal of the agricultural district in which the holding is situated." G

Section 22 does not appear to make it mandatory for either the landlord or the tenant to make such an application to the tribunal where a contract is not evidenced in writing. Therefore there is, it would appear, no obligation cast upon a tenant by ALTO to obtain an instrument of tenancy which is of course a contract of tenancy evidenced in writing. Accordingly, if a tenant does not hold an instrument of tenancy he cannot possibly comply with the requirements regarding registration. Therefore, in my view, it cannot be argued that if a tenant does not register an instrument of tenancy in accordance with ALTO his tenancy is impeached by the indefea- H

- A sibility provisions of the Land Transfer Act 1971. In support of this conclusion it is to be noted that a contract of tenancy under ALTO can be terminated only in the manner set forth therein; a tenancy under the ALTO is a creature of statute and it can only be determined in the manner provided.

Section 7 of the Ordinance provides:

- B “7. Except in the manner provided by this Ordinance—  
 (a) No contract of tenancy of any agricultural land subsisting at the commencement of this Ordinance or thereafter shall be terminated by the landlord or by the tenant of such land within the term fixed by such contract or during any of the two extensions granted in accordance with the provisions of this Ordinance; and  
 (b) no contract of tenancy of any agricultural land created after the commencement of this Ordinance shall be terminated as aforesaid within the minimum term specified in the last preceding section.”
- C

Section 9(2) of the Ordinance states:

“9(2) Every such contract of tenancy shall contain the following clause:—

- D “This contract is subject to the provisions of the Agricultural Landlord and Tenant Ordinance, and may only be determined, whether during its currency or at the end of the term, in accordance with such provisions. All disputes and differences whatsoever arising out of this contract, for the decision of which that Ordinance makes provision, shall be decided in accordance with such provisions.”

- E It is apparent that the appellant (as the assignee of A. D. Patel) could only terminate the respondent's tenancy in manner provided in ALTO. I agree with the learned judge when he said:

“In my view the right of the plaintiff to have his tenancy terminated in the manner provided by ALTO is clearly contrary to the defendant's contention that as registered proprietor he had the right to enter upon his land notwithstanding plaintiff's tenancy.”

- F Both counsel referred to *Miller v. Minister of Mines* [1963] 1 All E.R. 109 which was a case where a mining licence granted under the Mining Act 1926 was not registrable under the Land Transfer Act and it was held nevertheless to be a burden on the title of the registered proprietor. Their Lordships at p. 113 said:

- G “It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act, 1952. It is sufficient if this is the proper implication from the terms of the relative statute.”

- H Therefore in my view while ALTO provides its own individual code for the registration of contracts of tenancy it does not make it mandatory that such registration should be effected; the rights to occupation of agricultural land under ALTO exist in law independently of the Land Transfer Act and in my view prevail against the indefeasibility provisions of the Land Transfer Act. Section 13 of ALTO states that subject to the provisions for termination contained in ALTO a tenant shall be entitled to be granted two extensions to his contract of tenancy each extension to be for not less than 10 years so long as he has cultivated the land and committed no breach of his tenancy (unless he is given one year's written notice of termination

upon the grounds set out in the Ordinance). If a contract of tenancy under ALTO is not registrable under the Land Transfer Act and the indefeasibility provisions of that Act are to override the contract of tenancy then the tenancy would be of no value to the tenant except as against the original landlord. Upon a transfer of the land the successor would be entitled by virtue of the indefeasibility provisions of the Land Transfer Act to disregard the contract of tenancy. I do not agree that this can have been the intention of the legislature in enacting ALTO and creating by statute tenancies which can exist for as long as 30 years. In my view I agree with the learned judge when he says:

"I therefore hold that the plaintiff was the lawful tenant of the land and held a tenancy under ALTO which prevailed against the plain terms of section 39 and 40 of the Land Transfer Act."

Accordingly grounds 3 and 4 advanced by the appellant must fail.

I turn now to consider the 5th ground of appeal. Mr Koya argued that when section 3 of the Land Transfer Act 1971 was enacted it had the effect of overriding ALTO; and that the Land Transfer Act being a later Act than ALTO had the effect of annihilating the application of ALTO to lands under the Land Transfer Act; further the intention of the Legislature in passing into law the Land Transfer Act was to strengthen the principle of indefeasibility of title. Section 3 of the Land Transfer Act says:

"3. All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein."

Mr Koya argued that section 3 of the Property Law Act 1971 provides that the Property Law Act is not to be read so as to conflict with either ALTO or the Land Transfer Act 1971. It is to be noted that the Property Law Act became law the same day as the Land Transfer Act and both came into effect on 1st August 1971. If Mr Koya's submission is correct then it would indeed be strange that on the one hand the Legislature should see fit in section 3 of the Property Law Act to recognise ALTO and on the other hand intend that lands under the Land Transfer Act should cease to be subject to ALTO. This would destroy the effect of ALTO—an intention which is diametrically opposed to the Legislature's intention as portrayed in section 3 of the Property Law Act.

Mr Shankar argued that ALTO being special legislation dealing exclusively with agricultural land and passed into law before the Land Transfer Act is not to be derogated from by the general words of section 3 of the Land Transfer Act affecting all land under the Act. He relies upon the maxim *generalalia specialibus non derogant*. In *Barker v. Edger* [1898] A.C. 748 at p. 754 Lord Hobhouse said:

"The general maxim is, '*Generalalia specialibus non derogant*.' When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

In *Seward v. The Vera Cruz* (1884) 10 A.C. 59 at p. 68 Lord Selbourne said:



- A "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

- B Further, ALTO deals with rights in agricultural land. It creates rights and evidences those rights by contracts of tenancies. On the other hand the Land Transfer Act deals with the registration of interest in land and the priorities conferred by registration—it is a system of registration of interests in land. In *Breskvar v. Wall* (1971) 126 C.L.R. 376 at p. 385 Sir Garfield Barwick said:

"The Torrens System of registration is not a system of registration of title but a system of title by registration."

- C Here it seems that the Legislature in passing ALTO into law directed its attention to agricultural land and had it been the intention of the Legislature that the general terms of the Land Transfer Act which deals with all lands were intended to overrule ALTO then the Legislature could easily have said so. There is another good reason for saying that Mr Koya's argument that the Land Transfer Act overrules ALTO cannot be supported—and that is the provisions of section 68 of the Constitution of Fiji.

- D Section 2 of the Constitution provides that the Constitution is the supreme law of Fiji and if any other law is inconsistent with the Constitution that other law shall inconsistent with the Constitution that other law shall, to the extent of inconsistency, be void. Section 68 provides (inter alia) for an Act of Parliament that alters any of the provisions of ALTO shall require to be supported by 75% of the votes of all the members of Parliament of each House of Parliament. Section 68(4) of the Constitution states:

"68. (4) In this section—

- (a) references to the provisions of any law include references to any other law, whether made before or after the commencement of this Constitution, in so far as that law alters those provisions; and
- F (b) references to altering the provisions of any law include references—
- (i) to repealing it with or without re-enactment thereof the making of different provision in lieu thereof;
- (ii) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise;
- (iii) to suspending its operation for any period, or terminating any such suspension; and
- G (iv) to making any other provision that is repugnant to or otherwise inconsistent with it."

- H It would appear therefore that no alteration of ALTO can be effected, whether directly or indirectly, save by a bill which is supported by 75% of the members of both Houses of Parliament. Therefore if Mr Koya is correct that ALTO has ceased to apply to land under the Land Transfer Act by virtue of section 3 thereof then that is a provision which both modifies and is inconsistent with ALTO. Section 68 of the Constitution stipulates that in such circumstances the specified majority would be required on the passing of the Land Transfer Act into law. There is no evidence that

section 68 of the Constitution was complied with and accordingly for the reasons I have given, ground 5 of the appeal must fail.

I would dismiss the appeal with costs to be taxed if not agreed.

MARSACK J. A.

I agree that this appeal must be dismissed. It is established by the evidence that the land in question is "agricultural land" and therefore within the ambit of the Agricultural Landlord and Tenant Ordinance; and that the respondent had been a yearly tenant of part of the land, to the knowledge of the appellant, for some 24 years prior to the purchase of the land by the appellant. The respondent's tenancy was not registered; but there is no need for a yearly tenancy to be registered in order to have validity. On the 25th September 1973, before the registration of the transfer to the appellant, the respondent had made application under ALTO for a declaration of tenancy. On the 30th October 1973, the appellant gave notice to the respondent to quit the land occupied by him but this notice was obviously ineffective. Three or four days later, and two or three days after the registration of the transfer to him, the appellant entered on the land occupied by the respondent and did the damage which is fully described in the judgment of Mr Justice Spring. This action by the appellant had no justification in law; and the judgment of the learned trial judge was, in my opinion, in all respects, sound. The other issues raised at the hearing of the appeal are fully covered in the detailed judgment of Spring J. and I do not find it necessary to comment on them further. Accordingly, as I have said, I agree that the appeal should be dismissed with costs.

GOULD V. P.

I have had the advantage of reading the careful judgment of Spring J. A. in this appeal; I agree with it and have nothing to add.

The members of the court being unanimous in their views the appeal is dismissed with costs to be taxed if not agreed.

*Appeal dismissed.*