IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 77 of 1981

Between:

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| INTAJ ALI s/o Razak Ali Shah | Appellant |
| and | |
| 1. ZOHRA d/o Sukhai<br>2. SURUJ KUMAR s/o Gajadhar | Respondents |

R.D. Patel for the Appellant
M.S. Khan for the Respondents

Date of Hearing: 14th July, 1982
Delivery of Judgment: 30th July 82

JUDGMENT OF THE COURT

Speight, J.A.

This is an appeal against a judgment of Mr. Justice Williams delivered in the Supreme Court at Lautoka on the 27th November 1981, in which he found in favour of the two respondents who were the plaintiffs in the Supreme Court. The judgment required that the present appellant, respondent in that Court, should vacate 78 acres of cane and grazing land originally held by the first respondent as a lessee from the NLTB and later transferred by her to the second respondent. The appellant has been occupying parts of this land, if not the whole of it, and the proceedings in the Supreme Court resulted in an order

that he should vacate. From this judgment he now appeals. It will be convenient to refer to the parties by their original designations namely, the first and second plaintiffs and the defendant. It has been a long drawn-out set of proceedings and before discussing the judgment and the points of appeal it is necessary to outline the matters in issue.

Nature of the Claim:

The plaintiff, Zohra, alleged in her statement of claim that she was the lessee of the land in question and that she had allowed the defendant into occupation of the same on the understanding that if he could arrange finance, she would sell the lease to him. It was alleged that he had not kept his undertakings and that no payments had been made. Thereafter, according to the claim the defendant although in default over any satisfactory financial provision had remained in possession. Because of the default by the defendant the plaintiff had sold the lease to the second plaintiff for $26,000 and the consent of the NLTB had been obtained. It was also alleged that the plaintiff had lent the defendant $1,196 and the remedy sought was for possession of the property, an injunction against the defendant from trespassing further and judgment for $1,196.

The Defence:

It was claimed that the occupancy was consequent upon a written agreement between the first plaintiff and the defendant for the sale of the property to him for $20,000, made up by $4,000 deposit said to have been paid therewith, $8,000 within 2 weeks of the NLTB giving consent and another $8,000 after 5 years. The defence claimed that the deposit of $4,000 had been paid, that the defendant was ready to complete all the other obligations and further alleged by way of a claim for damages that the first

plaintiff had been collecting sugar cane proceeds payable in respect of crops from the property rightfully due to the defendant and sums of approximately $4,000 per annum were alleged to be owing. The first plaintiff gave a reply to the defence acknowledging that there had been a written agreement in the terms alleged but denied that any payments of deposit or otherwise had been made by the defendant and denying that the profit from the property had been taken, because, so it was pleaded the lease had been with consent assigned to the second plaintiff whose work it was that had produced the income.

The issue plainly required a resolution of the question of whether the plaintiff had sold the lease and had received $4,000, even if NLTB consent had not been obtained; or on the other hand whether the defence was totally in default for non-compliance with any term of the arrangement.

The History of the Litigation

This requires careful consideration because of complaints made in this Court that the defendant did not receive proper justice at the hands of the learned trial Judge during the protracted proceedings. We anticipate to say at once that this is an untenable submission and that in our view the defendant received a very great deal of consideration despite his obstructive and evasive behaviour throughout. Let us look at the chronology.

13. 8.79 The pleadings were complete.

30. 4.80 A settlement of the action was signed by all parties to the effect that the property would be transferred to the defendant for a sum of $37,000 on condition that payment was made my the 30 May 1980.

28. 5.80 The defendant applied to the Supreme Court for variation of terms of settlement so as to extend the time to the 30th June.

5. 6.80 An affidavit in reply by the second plaintiff said that the defendant had not attempted to comply with any of the terms of the settlement and as the 30th of May had now past he was in default.

13. 6.80 Williams J. declined to vary the settlement as he said it had not been filed in Court and also was incapable of being filed in Court without the prior consent to the transaction by the NLTB.

27. 6.80 There was an application by the plaintiff for the matter to proceed but it was adjourned at the request of the defendant. The Court record does not show the reason given for requesting the adjournment.

4. 7.80 There was a further adjournment obtained by the defence to enable it to file an affidavit.

16. 7.80 Plaintiff appeared by counsel. There was no appearance on behalf of the defendant. It was said that the counsel for the defence was sick and the matter was again adjourned.

8. 8.80 The matter was called but again adjourned. No reason stated.

23. 4.81 The case appears to have been called as for a hearing. The plaintiff was ready to proceed and was present with counsel and witnesses. Counsel for the defendant was said to be unwell. The matter was taken out of the list but there was adverse comment by the learned Judge that no notification had been given to the plaintiff's counsel

and counsel for the defence was to be called upon to show cause why costs should not be awarded.

1. 5.81 The question of costs for the last adjournment was considered and costs for the same were awarded against defendant's counsel.

7. 7.81 The hearing was apparently ready to commence,this being the date now set for hearing, but application was made on behalf of the defendant that he was unwell and a medical cerficate was tendered to the effect that he would be unable to work for two days. It is not without significance that apparently the anticipated time for hearing was two days. This application was opposed because counsel for the plaintiff claimed that the defendant had been seen up and about that very day. The learned trial Judge was apparently not satisfied and adjourned the matter for the following day to receive evidence as to whether indeed the defendant was incapacitated.

8. 7.81 A further medical certificate was produced much to the same effect as before but in somewhat vague terms. The judge gave the plaintiff leave to call a number of witnesses who alleged that they had seen the defendant at various places the previous day. The Judge declined to allow the matter to be further adjourned and insisted that it proceed to hearing. Mr. Verma counsel for the defendant despite his wish to withdraw was advised that in the circumstances he had an obligation to the Court to

continue to appear and he properly acceded to this suggestion and the hearing commenced. After several witnesses had been heard Mr. Verma collapsed in his chair apparently unwell and the Judge adjourned the matter further. It was brought before the Court again on the 16th October. On that date Mr. Verma again appeared. He advised that he wished to withdraw as the defendant proposed to change solicitors. He was granted leave. The matter was adjourned with instructions that the Registrar fix a date and that written notice of the new date for continuation of the hearing be served upon the defendant.

17.11.81 A date having been fixed for the renewed hearing on 23rd November and upon evidence being produced that the defendant was apparently endeavouring to make himself unavailable an order for substituted service of the notification of the fixture was made, service to be upon his wife.

23.11.81 There was abundant proof of service in accordance with the order made. There was no appearance on behalf of the defendant. The evidence on behalf of the plaintiff was heard and the learned Judge made an order granting possession to the first plaintiff and to the second plaintiff and an injunction prohibiting the defendant from further attempting to occupy the land together with judgment for the sum claimed. An appeal was filed in this Court against the whole of the judgment.

Points of appeal

In his submissions Mr. R.D. Patel adhered

strictly to the points which had been set out in the Notice of Appeal and it is therefore convenient to deal with each point and state the Court's view thereon in sequence. There are a number of paragraphs and sub-paragraphs.

Ground 1

(a) It was submitted that the plaintiff was the executrix of the estate of her late husband Chhote but that she had not so pleaded. The answer to this is simple. In the Statement of Claim she had said that she was the registered lessee of the appropriate native lease. The lease was produced. There she is indeed shown as the executrix of Chhote. As such she is entitled to sue and be sued and what other obligations she may have had as to the subsequent disposition of the estate assets in terms of the will are of no concern to this Court. She was, as pleaded, the registered proprietor.

(b) It was submitted that the defendant's pleading that there had been an agreement containing a clause acknowledging the payment of $4,000 had been admitted by first plaintiff's reply and that therefore no further question could arise. This appears to ignore the evidence given by a number of witnesses for the first plaintiff. There was ample evidence which the trial Judge accepted that whatever had been the original undertaking as to deposit it had not been honoured. Indeed it seems as if the only suggestion of initial payment by the defendant was that he would (future terms) take over the plaintiff's obligation on behalf of her late husband to pay a debt to one Ram Chandar. There was ample evidence that this had never been done so that this point can not avail.

(c) It was submitted that part of the plaintiff's case was that the consent of the NLTB had not been obtained to the first sale and that this had not been pleaded. That matter is immaterial because in the absence

of the payment of any deposit in accordance with the obligation there could be no cause for anyone to apply for consent to an agreement for transfer of lease which had not yet become operable.

(d) This was a repetition of the previous point.

(e) Complaint was made that the Judge had not exercised his jurisdiction to vary the terms of the settlement of the 30th April 1980 whereby defendant had undertaken to pay $37,000 by the 30th May. The answer is equally simple. Irrespective of the fact that the Judge said he could not entertain the matter because NLTB consent had not been obtained, the terms of settlement had already lapsed because by the time the matter came before the Judge the date for payment had gone and the defendant was in default.

Ground 2

These matters all concern the refusal to adjourn the matter because of the supposed illness. It is said and here we condense grounds sub-paragraphs (a) - (d) that the Judge improperly ignored the medical certificate and that by so doing he deprived the defendant of an opportunity to be heard. The answer to this is purely factual. The Judge heard witnesses describing the apparent state of good health of the defendant at the time when he was according to the certificate supposed to be ill. The Judge adjourned the matter for a day because of the unsatisfactory nature of the situation so that the defence could put in better proof. This was not done to his satisfaction. He was charged with assessing the situation as it then appeared to him to be and he concluded that the defendant was evading and that the certificate which had been obtained was of doubtful veracity.

It can also be said that the subsequent wilful evasion by the defendant of the very fair terms on which the adjournments were granted and notices given of continued

hearings vindicates the assessment made by the learned Judge that the defendant was an evasive prevaricator.

Ground 3

Against the history which has just been recited this third submission is somewhat surprising. It is that the Judge from the 8th July onwards demonstrated bias, in the legal meaning of that term, namely that his handling of the defence case thereafter though not indicative of personal and actual bias could well have been thought by an independent onlooker to indicate that he was prejudiced against the defence case. The basis of this was a submission put forward which appeared when made to be quite startling. The Court had inquired of counsel why the matter came before it as an appeal against a matter which had been finally heard ex parte. There is ample provision in the Rules for a defendant who has not been heard to apply for a judgment obtained by the default or ex parte to be set aside. Counsel then made a surprising submission that such attempts had been made but the Court staff had declined to receive the papers. Further inquiry revealed the true situation. What had happened was that after judgment had been obtained no steps were taken on behalf of defendant for quite a long time. Then after another change of solicitors, a motion was filed in the Court for leave to extend time within which to apply to set aside the judgment, for the seven days allowed by the Rule had long since expired. Far from these applications being rejected by the Registry, they were received and the Judge heard them and he considered four affidavits filed in support. When viewed against the evidence which had been given on the 23rd November of the substituted service of notice upon the defendant's wife, it is not surprising that the Judge was little impressed by protests that the defendant did not know of the continued date of hearing. Nevertheless he appears to have given the matter proper consideration and has written a fully reasoned 3 page judgment rejecting the motion for extension of time. Accordingly, we can see little ground for complaining

that the independently minded observer would conclude that because of the events of 8th July and thereafter the Judge would have given the impression that he had closed his mind, to the prejudice of the defendant's case.

Ground 4

A number of particulars alleged neglect or default by other solicitors in the drafting of initial proceedings or in the conduct of litigation thereafter. This Court is not concerned with such matters. They cannot amount to a ground of appeal and indeed counsel for the appellant so conceded and abandoned the point.

Ground 5

This was a claim that the Judge had wrongly accepted the evidence that $1196 had been loaned to the defendant by the first plaintiff and it was submitted that he had confused this with other evidence concerning sums of $1260 which the first plaintiff said she had paid to the defendant's family for work done. We take it that the allegation was that money paid for work done could not thereafter be recovered. This can be quickly disposed of. It is apparent that there are two separate items. No quarrel was made by the plaintiff over the money which she had paid to the defendant's family for the work that had been done. This sum of $1196 was clearly shown to be a loan and the evidence from plaintiffs' witnesses was accepted. We conclude by noting that the learned trial Judge did indeed comment in stringent terms upon the failure of the defendant to appear, upon his evasive attitude towards the Court and, in respect of the only matter where evidence came forward namely, the application for extension of time, the untrustworthy and unacceptable nature of the evidence tendered on his behalf. It is true that judgments of the court are usually delivered in restrained terms but cases emerge from time to time where direct and forceful expression is not only

called for but fully justified. In our view this was such a case. No ground has been demonstrated to suggest that there was any unfairness to the defendant or any breach of the proper rules or procedures of Court. The plaintiffs' case was clearly made out, and remedies granted were fully justified and for these reasons the appeal is dismissed, with costs to be taxed.

VICE PRESIDENT

JUDGE OF APPEAL

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