

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 46 of 1984

Between:

MAHAMUDA BANO  
d/o Ismail Khan

Appellant

and

SOM DUTT  
s/o Ram Karan

Respondent

Mr. P. Knight and Miss V. Sugrim for the Appellant

Mr. A. Singh for the Respondent

Date of Hearing: 20th March, 1985

Delivery of Judgment: 22 3 85

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from a decision of the Supreme Court, Labasa, allowing an appeal by the respondent (defendant) against an order for possession.

When this case first came before the Magistrate, Labasa, on 12th January, 1983, he ordered that a statement of defence be filed within 14 days.

On 2nd February, 1983 when the case was called again for allocating a date of hearing Counsel for the appellant (plaintiff) asked for judgment as the defence, he submitted, had not been filed within time. The defence,

dated 21st January, 1983, however, was before the Court, but, the respondent claimed, was filed one day out of time, and he had, therefore, refused to accept service.

The case was adjourned to 16th March, 1983 and on that day another adjournment was granted to 17th March, 1983.

On 17th March, 1983, the Magistrate heard argument and came to the conclusion on authorities cited that the appellant was entitled to have the case decided in his favour without a hearing. He made the order for possession sought by him.

The respondent appealed to the Supreme Court.

At the hearing of the appeal, Counsel for the respondent (then the appellant) while making his submissions as to the merits of the appeal, informed the judge that the defence had in fact been handed into the Magistrate's Court on 25th, not 27th January, 1983, and was therefore, within time, any default being that of the Court Clerk who processed the document two days later.

In his judgment the learned Judge said :-

" I have caused enquiries to be made in the Registry and have been informed by the Deputy Registrar that the defence in fact was filed on 25th January, 1983. The defendant was well within time in the filing of his defence. The learned Magistrate was misled when he was told that the defence was filed on 27th January 1983.

As the defence was filed in time I see no point in dealing with the grounds of appeal. "

He allowed the appeal, set aside the order of possession and remitted the case to the Magistrate's Court for hearing.

The appellant (defendant) now appeals to this Court on the following grounds :-

- "1. That the Judge was bound by the records of the Magistrate's Court and that he erred in law in going beyond the said record and causing enquiries to be made in the Registry as to the date of filing of the defence.
2. That the ruling of the Judge that the defence was filed within time was against the weight of the evidence as disclosed by the records of the Magistrate's Court. "

At the hearing of the appeal, Counsel for the appellant conceded, that while it would be improper for a judge to institute a private inquiry into the facts appearing on the record, there was nothing unusual or improper for a judge to look at the documents contained in the original court file which would normally be available to him. With the concurrence of counsel that is what this court has done and made the file available to counsel also for scrutiny. At the bottom of the statement of defence is stamped the date "25 January 1983" whereas, at the top appears "Accepted for filing on 27/1/83 at 3 p.m." Close to it is also a stamp bearing the date 27.1.83. Counsel and court were both advised by the court Registrar that, where two dates appear on a document, the date at the bottom indicates the date of lodgment and the one at the top is the date of processing by the appropriate officer. By way of example the appellant's writ filed in the same court, also, has two dates "20 December 1982" at the bottom and "21.12.1982" at the top.

We accept this to be the procedure in practice and the Magistrate, it would seem was misled into making an error when he stated :

"The case was called on 2.2.83 and on this day it was found that the defence had been filed out of time as it had been handed in the office on 27.1.83. "

This, in all likelihood, was due to admissions made by the respondent's own Counsel.

Be it as it may, we consider that the learned Appellate Judge was entitled to look at the statement of defence in the original file and his inference that the defence had been lodged within time was justified.

Apart from the question of whether the defence was filed within time, we also invited Counsel to address us on the merits of the appeal. The respondent's main grounds of appeal, to summarise, was that the learned Magistrate, having become aware of the nature of the respondent's defence, exercised his discretion wrongly in refusing him leave to defend.

The Magistrate was clearly aware of his discretionary power to extend the time for filing the defence and references to its contents in his judgment also indicates his scrutiny of it for ascertainment of merit. He said :-

"The proper course of action for the defence was to have filed the defence within time. If he did not then he should have purged the default and asked for an enquiry and tendered all relevant material including the order in the Tribunal. In the absence of all this I am unable to allow the defendant further time in view of the objection of Plaintiff's Counsel and the cases cited by Mr. Sadiq. "

If the learned Magistrate considered it necessary for the respondent to produce evidence at that stage he was, in our view, in error. The defendant had asserted, in his defence, that there had been a declaration of tenancy in his favour by the Agricultural Tribunal and had given the relevant reference number of the proceedings before that tribunal. If there was such a declaration, it would be as good a defence as any.

The two cases (Rasulan v. Sher Ali Khan 8 F.L.R. 1; and Kot Lingam Pillay v. Inayat Hussein Lautoka Civil Appeal 6 of 1974) cited by the appellant and relied on by the Magistrate were, in our view, clearly distinguishable.

In both those cases defence had been ordered to be filed within a specified period and several adjournments granted thereafter. At the date of hearing there was still no defence. In each case the Magistrate correctly exercised his discretion to grant no further adjournment, nor to extend time within which to file the defence.

In the present case, the defence dated 21st January 1983 i.e. 5 days before the filing date, had been accepted by the court registry. Even if the appellant's contention, viz. that it was filed one day late, were upheld it had still been on the file for about 7 weeks before the matter came up for hearing on 17th March, 1983 and the learned Magistrate was by then fully aware of its contents. The only issue then, in our view, was of merit and the two cases cited by the appellant had no application.

We accept the respondent's submission that coercive powers of the courts are intended to prevent abuse of court procedure and deliberate disobedience to rules. They should not be used to close the door upon a defendant who may have a genuine defence. This, in our view, was

such a case and any inadvertent default on the appellant's part could have been adequately punished by imposition of conditions or award of costs.

The appeal is dismissed and the order of the Supreme Court confirmed. The respondent will have the costs of this appeal to be taxed in default of agreement.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL