IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

CIVIL APPEAL NO. 6 OF 1982

Between:

SURESH CHARAN
(s/o Ram Charan) — Appellant

and

SAMBHU PRASAD
(s/o Chandar Pal) — Respondent

Mrs. A. E. Hoffman for the Appellant.
Mr. N. Dean for the Respondent.

J U D G M E N T

The record in this appeal discloses that the action in which the appellant was the plaintiff was initiated by the appellant's then solicitors, Messrs. Tikaram and Associates moving the Magistrates Court for (inter alia) an order restraining the respondent from selling goods belonging to the appellant which were seized pursuant to a purported distress for rent.

The appellant in that summons also sought an order "that the plaintiff do file a WRIT in REPLEVIN within 14 days of the date of the order."

The Magistrate ordered that a cash bond of $400 be deposited in Court by the plaintiff and that the plaintiff file a "writ of Replevin" within 14 days. The chattels seized by the bailiff were returned to the appellant.

There is no provision in the Distress for Rent Act giving a tenant a remedy to obtain redelivery of his chattels alleged to have been wrongfully seized on his giving security

and undertaking to forthwith commence a replevin action.

There is in the Act, in section 4(2), however, provision that a Magistrate may by summary order direct that goods or chattels exempted under the section if not sold be restored to the owner.

There is nothing in the Magistrates Courts Act similar to Part IV of the County Courts Act 1959 (Imp) which deals with Replevin.

Neither Mr. Tikaram nor the Magistrate appear to have appreciated that the common law remedy of replevin, while retained in England and regulated by Statute, has no place in our law as regards goods seized under a distress for rent.

The legislature has enacted an Act to govern and regulate distress for rent and has not incorporated therein the remedy of replevin (other than a remedy for summary recovery of chattels expressly exempted in the Act from distress).

What the appellant's then solicitors should have done in my view, was to issue a writ and apply ex parte for an interim injunction restraining the respondent from selling the distrained goods.

The Magistrate when ordering a writ of Replevin to be filed also ordered that a defence be filed within 14 days of service of the writ. This was in effect an order for pleadings.

The defendant delivered a defence and counterclaim which he later amended. The Record does not indicate that any defence to the counterclaims was filed. This failure by the appellant was apparently overlooked by all concerned in the action although there was a protracted hearing. Ultimately the Magistrate stated in his judgment that the plaintiff's claims were unsuccessful in all respects. He gave judgment for the defendant (respondent) with costs although he did not state it was on the counterclaims.

He ordered that the plaintiff pay rent to the defendant amounting to $600 and to give vacant possession to the defendant. He did not formally dismiss the appellant's claim.

The appellant applied for stay of execution and leave to appeal out of time. His application for a stay was refused but he was given leave to appeal out of time.

The Record does not include the appellant's application for stay of execution. Attached to his affidavit in support of that application is a certified true copy of Lease No. 119257 which counsel agree is the lease of the property part of which was purportedly let by the respondent to the appellant.

Lease No. 119257 is a Crown Lease containing therein an express declaration "that the lease is a Protected Lease under the provisions of the Crown Lands Ordinance."

Two adjournments of the hearing of this appeal were granted, one of which was to enable the appellant to engage counsel.

Mrs. Hoffman then appeared for the appellant and sought an order that Crown Lease 119257 be treated as part of the Record. She was apparently unaware at the time she swore her affidavit in support of the application that the appellant had been represented by Mr. Tikaram in the Magistrates Court because she stated that the appellant had not been represented in the Magistrates Court. Mrs. Hoffman later sought an order seeking leave for the appellant to adduce further evidence but the application was withdrawn when counsel in chambers agreed that the lease was in fact a protected lease and that the Director of Lands had not consented to the tenancy granted by the respondent to the appellant.

At the hearing of the appeal Mrs. Hoffman confined her main argument to an attack on the Magistrate's judgment as regards the respondent's counterclaim.

The appellant had, before this action was heard, recovered the chattels alleged to have been carried away by the bailiff although his statement of claim in two paragraphs refers to chattels "carried away" or "detained" "under walking possession". Where there is an agreement for 'walking possession' chattels are not removed from the premises. The statement of claim is contradictory and confusing.

Mrs. Hoffman conceded that there was no evidence before the Magistrate to establish the expenses incurred or damages suffered by her client. The chattels allegedly seized were a single bed with mattress, a radio and an iron.

Mr. Dean relied on LATCHMAN v AJUDHYA PRASAD 7. FLR p. 90. He argued that neither party had raised the issue of illegality in the Magistrates Court and the appellant should not now be permitted to raise the issue.

In Latchman's case the illegality was clearly revealed on the evidence before the Court although not pleaded. Nevertheles the Court took notice of the illegality.

The issue was certainly not pleaded in the instant case but as I pointed out earlier there was no defence filed to the respondent's counterclaim. There was however evidence before the Court which should have resulted in the issue being raised and considered by the Magistrate.

Under cross examination the respondent in the Court below admitted he had not obtained the Director of Lands consent "for letting out". Mr. Tikaram should as part of his client's case have produced a certified copy of the lease in defending the counterclaim but did not do so. Mr. I. Khan who acted for the respondent in the Magistrates Court opened his final address by pointing out that there was no evidence whether the land was Crown or Native Land. His client must have been aware of the nature of his lease. Before framing the counterclaim Mr. Khan should have investigated his client's title. Had he done so he would not have raised the counterclaim.

The respondent's admission that the Director of Lands had consented to the extension of his building but not to a letting indicated quite clearly that the land was Crown Land.

Mr. Tikaram appeared belatedly to have appreciated the legal position. In his final address he referred to the lack of consent and he also stated that the defendant should have obtained consent before taking proceedings.

That was a reference to section 13 of the Crown Lands Act dealing with a 'protected lease' i.e. a lease in which there is inserted as in the relevant lease, the following clause:-

> "This lease is a protected lease under the Provisions of the Crown Lands Act."

Section 13 prevents a Court dealing with a protected Crown Lease without the written consent of the Director of Lands.

When Mr. Tikaram raised the issue it was open to the Magistrate to enquire from Counsel whether the lease was a protected one or to point out that there was no evidence before the Court. Mr. Tikaram could then have applied to call further evidence to establish the lease was a protected one.

The Magistrate found as a fact that the land was Crown Land and that the consent of the Director of Lands was not obtained to the letting. He further held that there was no evidence as to whether the lease was 'a protected lease'.

The Magistrate went on to say:

> "Since consent of the Director of Lands is required only in respect of "protected lease" no question of consent arises in this case to debar the defendant from claiming rent and levying distress. Neither party has clarified the position whether it is a "protected lease" or not."

The above remarks are not entirely correct. Virtually every Crown Lease requires consent to any letting but it is only where protected leases are concerned that the act makes any dealing without the Director of Lands prior consent unlawful.

There was sufficient evidence before the Magistrate to put him on enquiry as to whether the lease was a protected one. The Magistrate's past experience as a solicitor and a Magistrate should have caused him to raise the issue himself because that experience should have indicated that it is common knowledge in legal and judicial circles that for very many years virtually every new Crown Lease issued by the Director of Lands has been a protected lease. The very early leases were also protected leases.

It is certainly now known to this Court that the relevant lease is a protected lease and that no consent was obtained by the respondent to the letting to the appellant.

The letting to the appellant without the directors consent was unlawful. There was no legal tenancy and it follows that the respondent could not legally claim rent or levy distress for alleged arrears of rent.

The appellant established no loss or damage and must be deemed to be a party to an illegal transaction. To establish the illegal seizure he would also have to rely on the unlawful tenancy.

The Court will not assist parties who enter into unlawful contracts.

The appeal succeeds to the extent that the judgment on the counterclaim is set aside and the counterclaim is dismissed. The plaintiff's claim is also formally dismissed.

Each party will pay their own costs of this appeal and of the Court below.

R Kermode

(R. G. Kermode)
JUDGE

SUVA,
24th February, 1983.