IN THE FIJI COURT OF APPEAL

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Civil Jurisdiction

CIVIL APPEAL NO. 35 OF 1982

Between:

FRANCIS KRISHNA s/o Govind Samy — Appellant

and

SURUJ KUAR SINGH d/o Gawri Shankar — Respondent

T.B. Ali for the Appellant
T.J.G. Poy Fong for the Respondent

Date of Hearing: 5th November, 1982
Delivery of Judgment: 26th November, 1982

JUDGMENT OF THE COURT

Spring, J.A.

The appellant was at all material times a monthly tenant of a flat on the first floor of premises situated at 49 Huon Street, Toorak, Suva, owned by respondent.

On 5th August, 1981, a 6 months' notice to quit was served on appellant lawfully terminating appellant's tenancy from 1st March, 1982. In the notice to quit respondent advised that she required the premises for her own use and occupation as a dwelling house".

The appellant failed to give up possession and on 2nd March, 1982, an application was made by the respondent to the Supreme Court of Fiji at Suva under the provisions of section 169 of the Land Transfer Act

(Cap. 131) seeking an order for possession. Under sections 169-172 of the Land Transfer Act the procedure is summary and the tenant is required to show cause (section 172) why he refused to give up possession. The premises occupied by appellant being within the City of Suva were subject to the provisions of the Fair Rents Act (Cap. 269) and although the proceedings were commenced under section 169 of the Land Transfer Act they fell to be decided under the provisions of the Fair Rents Act.

An affidavit made by respondent and filed in support of the application deposed to certain facts namely -

(a) that respondent required the flat for her own use and occupation as a dwelling house;

(b) that respondent, her husband, her mother-in-law and her two sons (both teenage) occupied a two bedroom flat adjoining the flat occupied by appellant and that further living accommodation was needed;

(c) that appellant was 5 months in arrears with his rental.

Appellant was served with the application for possession on 30th March, 1982. On 4th May, 1982, the application came before the Supreme Court at Suva; there was no appearance at the hearing of the appellant and the Court made an order of possession in favour of respondent.

On 10th May, 1982, appellant filed a motion in the Supreme Court seeking the setting aside of the order for possession. Two affidavits were filed by appellant on 10th May, 1982, in which he stated he had misplaced the summons served on 30th March, 1982, and as a consequence failed to appear when the order was made on 4th May, 1982; further, it was alleged that some of the facts deposed to in the respondent's affidavit were

incorrect in various particulars; that appellant had a good defence on the merits and that the rent had been paid. Leave was sought to defend the proceedings for recovery of possession. Appellant filed a further affidavit on 26th May, 1982, alleging that the respondent was occupying a 3 bedroom flat and not a 2 bedroom flat as claimed by respondent.

On 27th May, 1982, the parties, both represented by counsel, appeared before the Supreme Court and the following order was made :

> " There is no merit in this application. Defendant had 6 months notice to vacate and was served with summons about 5 weeks before hearing. He did not attend to show cause why an order should not be made against him.
>
> He now says he mislaid his summons, an assertion easy to make and not capable of being checked. It is not in any event a valid ground for setting aside an order properly made.
>
> Application dismissed.
> Costs to plaintiff. "

The appellant appealed against the dismissal of these proceedings and sought leave to defend the proceedi gs commenced by respondent under Civil Action No. 199/82.

At the hearing of this appeal, counsel for appellant requested leave to add three new grounds of appeal; these were admitted, but when examined it was apparent that they were not properly to be regarded as new grounds of appeal, but rather as an attempt to introduce further evidence. We informed counsel that this Court would not permit further evidence to be given in this manner and accordingly these grounds, so called, were not further considered.

Mr. Ali, on behalf of appellant, submitted that appellant having misplaced the summons inadvertently overlooked the Court hearing; that within 6 days of the making

of the order appellant applied to the Court for the order to be set aside; it was claimed that good and sufficient reasons existed for so doing; that it was apparent from the judgment of the Supreme Court given on 27th May, 1982, that the learned Judge had failed to consider the merits of appellant's defence and the matters referred to in his affidavits.

Section 19(1)(e) of the Fair Rents Act reads .

"19(1) No judgment or order for the recovery of possession of any dwelling-house to which this Act applies or for the ejectment of a lessee therefrom shall be made, and no such judgment or order made before the commencement of this Act shall be enforced, unless -

.....

(e) the premises are bona fide required by the lessor for his own occupation as a dwelling-house and the lessor gives at least twenty-eight days' notice in writing to the lessee requiring him to quit and (except as otherwise provided in this section) the court is satisfied that reasonably adequate and suitable alternative accommodation is available at a rent not substantially in excess of the rent of the premises to which the judgment or order relates. "

A proviso to section 19(1)(e) follows which reads :

"Provided that the existence of alternative accommodation shall not be a condition of an order on the grounds specified in paragraph (e) .....

(v) where the period of notice given is at least 6 months. "

It will be seen that at least six months' notice had been given and accordingly the question of availability of suitable alternative accommodation was eliminated by the fifth paragraph of the proviso; the respondent had to show that the premises were bona fide required for her own

occupation as a dwelling house. The Court is enjoined by the further provisions of section 19(1) to make such an order if the Court considers it reasonable so to do.

Accordingly, every applicant seeking an order for possession to which section 19 of the Fair Rents Act applies must (in addition to other matters required to be proved thereunder), satisfy the Court that it is reasonable for such an order to be made.

...

Appellant's counsel urged that a good defence existed on the merits; that appellant had explained adequately his lapse for non appearance before the Court; that the learned judge should have set aside the order for possession which was made on summary procedure, and proceed to hear the parties; consider the merits; decide whether the respondent was entitled to an order for possession; and in such event, determine whether it was reasonable that such an order should be made.

We are mindful that this Court should be slow indeed to interfere where a judge has decided a matter in the exercise of his discretion. However, if the circumstances so demand this Court must be prepared to examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may support, reverse or vary the order of the judge in the lower court.

Thus in Maxwell v. Keun /1928/ 1 K.B. 645 the Court of Appeal reversed the trial judge's order refusing the plaintiff an adjournment. That was a pure matter of discretion on the facts. Atkin L.J. in the above cited case at page 653 said :

> "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat

the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

The considerations which should exercise the mind of an appellate court called upon to review the order of a judge refusing to set aside a default judgment were stated in Evans v. Bartlam /1937/ A.C. 473 where Lord Wright at page 489 said :

"In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. This point was emphasized in Watt v. Barnett 3 Q.B.D. 363.....
He has been guilty of no laches in making the application to set aside the default judgment, though as Atwood v. Chichester, 3 Q.B.D. 722 and other cases show, the Court, while considering delay, have been lenient in excluding applicants on that ground. The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose. The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits. "

With the above statement we respectfully agree.

In the present case we would have expected some mention to have been made in the judgment handed down on 27th May, 1982, of the several matters raised by appellant in the various affidavits indicating that the learned judge had duly considered them.

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In the circumstances of this case, and to avoid the risk of any injustice being occasioned, we agree that we should allow the appeal and order that the case be tried ab initio which will, of necessity, require a hearing before another judge.

Accordingly, the appeal is allowed; the judgments of the Supreme Court dated 4th May, 1982 and 27th May, 1982, are set aside; the order for costs in the Supreme Court is set aside; the case is remitted to the Supreme Court for a new trial ab initio. Costs of the hearing in the Supreme Court will be in the discretion of the judge at the new hearing. In the circumstances we do not allow appellant any costs in this Court.

Judge of Appeal

Judge of Appeal

Judge of Appeal