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IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 3 OF 1988

Between:

SURESH SUSHIL CHANDRA CHARAN
& ANURADHA CHARAN — Appellant

- and -

SUVA CITY COUNCIL — Respondent

Appellants in person
Mr. Gordon for the Respondent

Date of Hearing: 29th August 1988

Delivery of Judgement: 19th September 1988

JUDGEMENT OF THE COURT

The appellants appeared in person and Mr. Charan conducted the appeal on behalf of himself and his wife.

Mr. Charan has presented us with a Record of 292 pages and a large number of authorities. He has also increased, with leave of this Court, the original grounds of appeal from 3 to 14.

In a document he terms a "Chronology" Mr. Charan states there are three main issues in this appeal as follows:

" (a) the malicious prosecution in the breach of covenant of the peaceful enjoyment of the premises.

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(b) 1st distress under the wrong warrant

(c) 2nd distress - removing goods and chattels without first seizing, distraining or impounding them."

The appeal is against the decision of Mr. Justice Sheehan who is no longer in Fiji. He prefaced his Decision by a statement that because of the then political crisis a fully reasoned decision was not possible.

We propose to consider the three issues which the appellants themselves have invited us to consider.

In their statement of claim the appellants did not specifically raise the issue of malicious prosecution. The first of their 16 claims for relief is for "an award for the cost of the defence of the proceedings of Case No.2014/84 (the prosecution by the Respondent).

They succeeded on this claim and the learned judge directed the Registrar to assess those costs.

On their claim for damages to their business the learned judge stated "I find I do not accept the Plaintiffs' claims of loss to his business. He has not proved any before me."

Mr. Charan alleges the prosecution was malicious because:

1) He informed respondent of the position regarding his restaurant licence and that he did not need a retail licence but respondent went ahead with the prosecution.

2) The Respondent would not listen to him about the distress for rent the Respondent put in motion.

3) He was "dragged into Court" causing him loss of business.

There is no cross-appeal against the learned judge's judgement and the award of costs must stand.

Had there been a cross appeal we may have set aside the judgement. We cannot however disturb the judgement. Nor can we hold that a prosecution for not taking out a retail licence can be deemed to be a breach of the covenant for

quiet enjoyment in the lease granted to the appellants by the Respondent.

CLERK & LINDSELL on Torts 13th Edition at paragraph 1885 sets out the essentials of the tort of malicious prosecution.

They state:

> "In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the plaintiff)."

They state in paragraph 1886:

> "The term criminal charge includes "all indictments involving either scandal to reputation or the possible loss of liberty to the person." There are, however, cases in which, though the proceedings follow the forms of the criminal law, they are substantially civil in their nature e.g. conviction on an indictment for the non-repair of a highway; in such cases, and in cases of minor offences carrying a monetary penalty only and to which no moral stigma involving injury to "fair fame" attaches, an action of malicious prosecution will not lie in the absence of proof of special damage."

The learned authors quote as an authority the case of BERRY V BRITISH TRANSPORT COMMISSION (1962) 1 QB 306 CA. The facts of this case are in some respects similar to the facts in the instant case.

The plaintiff pulled the communication cord while travelling on a train. She was prosecuted convicted and fined. She successfully appealed to quarter sessions where the conviction was quashed and she was awarded 15 guineas costs by the Recorder. She then brought an action for malicious prosecution. The only special damages given were the sums she actually expended by way of costs on her defence and her appeal which included the sum awarded her by the Recorder.

The case finally went to the Court of Appeal on a preliminary issue raised by the defendant and she succeeded. It was held

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that her extra costs were sufficient (as special damages) to support her action for malicious prosecution.

In the instant case the learned judge held the appellants had proved no loss to their business. The prosecution did not "involve scandal to reputation or the possible loss of liberty to the person."

As to the reasonableness of the prosecution the appellants had the previous year taken out both a restaurant and a retail licence but did not renew the latter licence the following year. It was for this failure that they were prosecuted.

Mr. Gordon informs us there is difference of opinion in legal circles as to whether a restaurant licence also entitles a person to dispose of goods by retail sale. In our view the appellants have not satisfied us that the prosecution was not brought reasonably and for proper cause or that it was malicious. We view the learned judge's decision as agreeing that the prosecution was wrongful in the sense that it should not have been brought but not as malicious. He awarded costs of that prosecution and entered judgement for the appellants with costs.

The facts giving rise to the second issue can be shortly stated.

The respondent was the landlord of the appellants who were at the time of issue of the first distress in arrears with their rent. The respondent authorised a registered bailiff to levy distress for the arrears of rent. He entered the restaurant premises and commenced levying distress.

The notice of distress was addressed to:

SHIU CHARAN Trading as Check Point Restaurant. On complaining that he was not Shiu Charan the bailiff withdrew and did not complete the distress.

As regards the first distress (there was later a second and a third) the learned judge found as a fact that the first

distress was abandoned and there was no physical removal of goods. He also found as a fact that the appellants suffered no damage.

These findings pose a dilemna for the appellants. Mr. Charan seeks to argue that a second distress for the same rent is barred by law. He quoted authorities to support that argument. However he also quoted GRUNNELL V WELCH (1906) 2KB 555, a Court of Appeal case, which on the facts of the instant case demolished his argument.

It was held in that case:

> "that the proceeding under the first distress warrant was a trespass ab initio and void as a distress, and that the landlord, having had no opportunity of satisfying his claim for rent by means of that proceeding could lawfully distrain under the second warrant for the same rent."

The Court cannot interfere with the findings of fact as regards the purported first distress and the appellants must fail on the second issue. There was a technical trespass. Mr. Charan, however, must have been well aware that the notice was intended for him.

On the third issue the levying of distress cannot be held to be unlawful as being a second distress for the same rent on the authority of Grunnel's case. The appellants were in arrears with their rent entitling the Respondent to authorise a bailiff to levy distress.

We have however to consider whether the distress seizure and sale of the chattels was lawfully exercised and if not whether the Respondent is liable for the bailiff's actions.

In view of the course of action we propose to take we have purposely not fully considered the appellants' argument.

The appellants allege that the distress was irregular because chattels were taken away which had not been seized.

On a comparison of the inventory the bailiff made when he levied distress, with the chattels which the auctioneers listed in his dockets indicating chattels of the appellants which he sold, there are some items which are not listed on the inventory. There are also perishable items sold which under section 4 of the Distress for Rent Act are exempt from distress.

As to those perishable items, whether the appellants should have proceeded under subsection (2) of section 4 of the Act is a matter we do not have to consider. That subsection provides a procedure to be followed if exempt goods are seized. Application is made to a magistrate.

There could also be legal argument regarding section 3(2) if the distress was levied otherwise than in accordance with the Act. That subsection provides a penalty for a bailiff who levies distress contrary to the Act.

The appellants also claim that more chattels than were listed and sold were also taken away illegally.

No rules under section 7 of the act have been made by the Chief Justice for regulating seizure and sale of chattels.

There could, therefore, be legal argument as to whether the council could be held liable for the bailiff seizing goods he had not listed in the Notice of Distress.

The learned Judge considered none of these matters which we have raised. He is no longer in Fiji and the only course open to us is to order a rehearing of the claim for damages arising out of the second seizure.

We allow the appeal on the third issue and set aside that part of the learned judge's judgement relating to the claims of the appellants based on the alleged illegality or irregularity of the second distress.

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As regards costs they have succeeded on only two of the three issues.

We do not disturb the learned judges order as to costs.

Their claims however regarding the second distress are their major claims.

Accordingly we order that the respondent pay to the appellants all disbursements incurred by the appellants in this appeal which they have paid to this Court and further order that each party meet its own legal costs of the appeal before this Court.

T. A. Tuivaga

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President, Fiji Court of Appeal

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Justice Of Appeal

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Justice Of Appeal