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IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 14 OF 1990
(Civil Action No. 1 of 1986)

BETWEEN:

MARIAMMA	APPELLANT
-and-	
LOG NADAN	DEFENDANT

Mr. V. M. Mishra for the Appellant
Mr. G. P. Shankar for the Defendant

Date of Hearing : 9th June, 1992
Date of Delivery of Judgment : 19th June, 1992

J U D G M E N T

It is unfortunate to have to commence this Judgment by stating that it is basically an appeal to this Court from a decision of a High Court Judge which itself was given on an appeal from the decision of a Magistrate who refused to grant an adjournment. To understand what happened it is necessary to refer to a number of events that occurred or did not occur in relation to these proceedings since their commencement in November 1985. There has still been no decision on the merits.

The Statement of Claim, dated 19th November 1985, was apparently filed on or about 8th January 1986 in the Magistrates Court of the Western District and given the number 1 of 1986. In it the Plaintiff, who held a crown lease of certain land,

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which consisted of a farm and a house site, claimed that the Defendant had, in about 1980, evicted the Plaintiff from the house site, and had been occupying it as a trespasser ever since. She sought an order for possession and damages for wrongful occupation.

A notice of intention to defend, dated 16th January 1986, was filed on or about that date. The matter was mentioned in Court twice before a Statement of Defence, dated 9th June 1986, was filed by Messrs Koya & Co. In it the Defendant claimed that he had built the house that stood on the land, with building permission from the relevant authority, had lived there all his life, and that the land belonged not to the Plaintiff but to another, who can conveniently be called Kupsami. He denied the claims of the Plaintiff.

Thereafter the matter was adjourned 9 times until, on 14th January 1988, it was fixed for hearing on 2nd March 1988; there had been various appearances for the Defendant on behalf of Messrs Koya & Co.

On 2nd March 1988 a solicitor has present who seemed to be representing another solicitor who, on the application of the solicitor who appeared, was given leave to withdraw. The Defendant, who was present, claimed that other solicitor was supposed to replace Mr. Koya, and sought an adjournment. The Magistrate ordered the case to proceed; the Defendant then

conducted his own case in person, cross-examined and gave evidence. The Magistrate reserved his decision and fixed 4th March for Judgment. On that day the Court could not sit because of a cyclone. On or about 10th March 1988 Messrs G. P. Shankar & Co filed a notice of change of solicitors. At the same time Mr. Shankar filed or sought to file a notice of motion with two affidavits in support seeking leave for the Defendant to amend his defence, to call evidence and for deferment of the giving of the Magistrate's decision. These documents were not accepted by the Court, and were never before the Magistrate. On 11th March the parties were informed by notice that the matter was adjourned to 18th March for Judgment. On that day Mr. Shankar appeared, and sought an adjournment. He referred to the material that he had sought to file on behalf of the Defendant, and it is clear that he then sought leave to use it. The Magistrate refused to defer giving his Judgment and refused the application. He proceeded to give Judgment and made an order for possession in favour of the Plaintiff. Mr. Shankar succeeded in obtaining a stay of execution for 21 days.

Now stopping there, it is quite clear that on the evidence before him the Magistrate came to the correct decision. In his evidence the Defendant claimed that he had been given the land in question by Kupsami, who he claimed was the owner of it, and he established no equity against the Plaintiff; as she was registered as the owner of the Native Lands Lease of the land, the Magistrate made the necessary order for possession in her favour.

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On 31st March, 1988 the Defendant filed a notice of appeal to the High Court. The grounds were that the Magistrate erred in fact and law in not granting an adjournment, and that before delivering Judgment the Magistrate should have used his discretion to accept the motion and affidavits that Mr. Shankar had sought to file, but which were "received by Court Officer for filing but rejected afterwards" (record p 5). There is no suggestion that the material in them was ever known to the Magistrate.

Stopping again at this point, it is sufficient to state that the sworn evidence in the two affidavits that Mr. Shankar had previously sought to file put a very different complexion on matters; it alleged that the Plaintiff was not or should not be the owner of the land in question at all, that the Plaintiff was aware of this and encouraged the Defendant to build a house there knowing or believing that he was the true owner.

The appeal came on for hearing on 7th July 1988. On 5th July, Mr. Shankar filed a motion which was an application for leave to use in the appeal the evidence which he had sought to file in the Magistrates Court, but which had been rejected. There was a further affidavit filed on the day of the hearing, 7th July. The material in this affidavit, if accepted, would put beyond doubt that the Plaintiff's claim for possession should not be acceeded to.

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It is quite clear from the Judge's notes that this material was at least referred to. There is a note relating to Mr. Shankar's submission. "Application is also made to aduce further evidence", and "There is an affidavit by (one of the deponents)"; and as to the answering submission: "Should affidavits be allowed?" and "Affidavits do not show at what place they were sworn"; and there is a reference to the Magistrates' discretion to refuse to accept the material that was rejected.

The Judge gave Judgment on 19th January 1990. He allowed the appeal, ordered that the order for possession be set aside, and he remitted the matter to the Magistrates Court for re-hearing. In his reasons for Judgment he said:

> *"It is quite obvious that there was no fault on the part of the appellant but his solicitors who did not appear.*
>
> *It is clear from the record that full facts did not come out in the evidence largely due to the fact that the appellant was not represented. The Magistrate acknowledges this in his judgment. There were seious questions of facts and law to be determined."*

(record p 18). He went on to quote the relevant order which gives a Magistrate a discretion to postpone the hearing of any civil cause or matter.

While the learned Judge was in error in stating that the Magistrate had acknowledged in his Judgment that the full facts had not come out in evidence, nor that this was largely due to

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the fact that the Defendant was not represented, His Lordship must have taken into account the material that had been filed by Mr. Shankar just before and on the day of the hearing. Otherwise the evidence was clear that the Plaintiff was entitled to succeed, and there was nothing to suggest that the decision to proceed amounted to a wrongful exercise of discretion in all the circumstances; after all, if the evidence given before the Magistrate was correct, then the assistance of a solicitor there would have availed the Defendant nothing; no doubt this could have been something that the Judge was entitled to take into account. So that the refusal of the Magistrate to grant an adjournment and to defer the pronouncing of his Judgment on the basis that the Defendant had been unrepresented at the hearing does not seem to us to amount to any wrong exercise of the Magistrate's discretion on this aspect.

In substance then it seems to us that the question to be answered is whether the Magistrate erred in the exercise of his discretion in refusing the application of Mr. Shankar made on 18th March 1988 immediately before he was due and had arranged to give Judgment. It will be recalled that Mr. Shankar had attempted to obtain an adjournment and a deferment of the giving of Judgment in effect on the basis that he had evidence which should be considered by the Magistrate on the question of granting such an adjournment and deferment; he had sought to file a motion and affidavits on 10th March 1988 without success.

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Order XXVIII Rule 1 of the Magistrates' Court Rules provides:

> *"1. The court may postpone the hearing of any civil cause or matter, on being satisfied that the postponement is likely to have the effect of better ensuring the hearing and determination of the questions between the parties on the merits, and is not made for the purpose of mere delay. The postponement may be made on such terms as to the court seen just."*

We would have no doubt that postponement of "the hearing" would give a Magistrate powers to do this at any time before judgment, i.e. that the rule is not confined to a postponement before the hearing commences.

An ancilliary question is whether the High Court had power to consider the material filed on behalf of the Defendant in his appeal from the decision of the Magistrate. In general terms it can be said that there could be no doubt about this; Order 55 rule 7 gives the High Court powers to receive affidavit evidence. There is also no doubt about the power to remit for re-hearing (Order 55 rule 5).

A question may at some time arise as to whether a Judge, in the hearing of an appeal against the exercise of a Magistrate's discretion in not granting an adjournment, is entitled to consider evidence that was not before the Magistrate, and on that evidence decide that there were serious questions of fact and law to be determined, so that the Magistrate therefore

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wrongly exercised his discretion in not granting the adjournment. We do not have to consider that. It seems to us that the question to be answered here is whether the Magistrate wrongly exercised his discretion in refusing to consider material said to be relevant to the determination of the case before him on an application for an adjournment.

Each case must depend on its own facts. Here there was an action commenced in January 1986. It had reached readiness for hearing by June 1986. Thereafter there were 9 adjournments leading up to the fixing of a date for hearing in March 1988. On that day the solicitor(s) for the Defendant withdraw. An adjournment was refused and the case proceeded. On the day the case is listed for judgment another solicitor turns up and asks for an adjournment. The case is a clear one in which the Plaintiff on the evidence is entitled to succeed. One can fully understand why the Magistrate refused it out of hand. In many instances he would be perfectly justified on so doing.

But that is not the whole position. The Defendant, as a result of the behaviour of his former solicitor(s) was left without legal representation on the day of the hearing, so far as we know without prior warning, and is required to conduct the case himself. Some 8 days later, before Judgment is delivered, a new solicitor tries to file documents to enable the case to be re-opened; the Court will not let him. The documents consist of sworn evidence, sufficient to change the nature of the case

completely. So the solicitor turns up at the day of judgment and attempts to do so again. His application is refused; the sworn evidence is not considered. The Magistrate, naturally enough, has written his judgment and, on the evidence before him, there is no defence.

We are of the opinion that in the circumstances of this case, and we emphasise that qualification, it was incumbent on the Magistrate at least to look at and give consideration to the material and the matter of an adjournment. The material showed that a solicitor had been engaged shortly after the hearing, there was sworn evidence, it prima facie disclosed a complete defence, and it stated that the Defendant was willing to pay the Plaintiff's costs to date. It may be that the Magistrate might not have thought it sufficient to warrant a decision to stay his hand; more probably, we think, it would have caused him to refrain from giving judgment, more particularly because he already knew that the Defendant had lived on the land all his life, had built the house that then existed on it, and that an agreement made in 1975, purporting to give him a right to occupy the land, refers to a "joint family arrangement" - this agreement was made when his father was the owner or lessee, married to the Plaintiff, but some 5 years before he transferred the land to, or had it put in the name of the Plaintiff. Incidentally, the evidence before the Judge refers to a family arrangement about the land (record p 12). The Plaintiff had not

been living on the land for some 5 years before she commenced her action. There was no evidence of any urgency, in fact, quite the reverse.

We are of opinion that the Magistrate erred in law in the exercise of his discretion in failing to consider the material in support of an application for an adjournment, and that in the circumstances an injustice was suffered by the Defendant.

While we do not agree with the reasons for Judgment given by the Judge, we are of opinion that he reached the correct conclusion. We therefore dismiss the appeal and affirm the order of the High Court. No order as to costs.

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Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Justice Arnold Amet
Judge of Appeal