IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 12 OF 1990
(High Court Civil Action No. 640 of 1986)

BETWEEN:

DEO KARAN SINGH — **APPELLANT**

-and-

SURYA DEO SHARMA
NAR DEO SHARMA — **RESPONDENTS**

Mr. G. P. Shankar for the Appellant
Mr. S. Verma and Mr. H. K. Nagin for the Respondents

Date & Place of Hearing : 3 November 1993 & 11 May 1994, Suva
Date of Delivery of Judgment : 24 November 1994

JUDGMENT OF THE COURT

The respondents in this appeal are the registered owners of a plot of land CT No. 6108 at Togo, Nadi. Twelve acres of that land have been occupied by the appellant since 1964 or 1965. It appears from the affidavits before the Court that a tenancy agreement between the parties expired in 1970 and since then the appellant has occupied the land at will.

In 1969 the rent was set by the Agricultural Tribunal at $46.10 but since 1976 it had been increased to $120. According to the respondent, that was by consent but, on the appellant's affidavit, it was increased arbitrarily by the respondents.

The proceedings that lead to this appeal have meandered through the courts in a leisurely and confused way for many years. The history of this case starts on 6 May 1986 when the respondents served notice on the appellant giving 3 months to quit for failure for some years to pay rent, failure to cultivate the land according to the practice of good husbandry and subletting part of the land without the prior consent of the respondents.

On 8 October 1986 the respondents filed an application for possession under section 169 of the Land Transfer Act on the same grounds as stated in the notice to quit. The application was supported by an affidavit sworn by the second respondent and first came before the court on 21 November 1986. The appellant was given 14 days to file an affidavit in reply and it was adjourned to 13 February 1987 for argument.

On that date, no affidavit had been filed and counsel for the appellant sought an adjournment. Dyke J refused and counsel then sought leave to withdraw. The record does not show whether that was granted but the order refers to "there being no appearance for the appellant" and so it would appear counsel did withdraw. The judge then ordered the appellants to give vacant possession to the respondents.

The order was served on the appellant on 20 February 1987 and, on the same day, an application was filed by the appellant

to stay further proceedings "pending the determination of an application to set aside the order for possession and ejectment".

The application was supported by an affidavit sworn by the appellant on 20 February 1987 in which he explained that he had not supplied an affidavit in reply in time for the hearing on 13 February 1987 because of the failure of his solicitors, denied he was in arrears with the rent and pointed out that he had applied to the Agricultural Tribunal against the forfeiture. He also suggested the original notice of 2 May 1986 did "not comply with the term of the Agricultural Landlord and Tenant Act and is therefore of no effect". Included in the documents exhibited to the affidavit is the application to the Agricultural Tribunal showing it had been filed that same day, 20 February 1987.

The application for a stay was listed before Dyke J on 27 February 1987. The judge ordered an affidavit in reply within 14 days and adjourned to 15 May 1987. Unfortunately the first military coup occurred before then and so the matter had to be adjourned. However, on 12 June 1987 with both counsel present, it was adjourned to 28 August 1987 for argument and the respondents were given a further 14 days to file their affidavits in reply.

On that date it came before Kearsley J. Counsel for the appellant was present but there was no appearance by the respondents. Kearsley J set aside the earlier order but, as no

order appears to have been drawn up and as the application was only for a stay, it is necessary to refer to the record of the Judge's note:-

> *"__Chand__ - Ask for order setting aside order for possession. The affidavits show that it is argued that order would not have been made if argument had been heard. Defendant should not suffer from default of his Counsel.*
>
> *__Court__ - I accept that and therefore order that the order of possession made on 13/2/87 be set aside. The plaintiffs' S.169 submission is to be heard on a date to be assigned by the D/R in consultation with counsels."*

The record then shows five appearances in front of the Deputy Registrar until it was adjourned to 4th March 1988 to fix a hearing date. What happened on that date is not recorded.

The next entry is for 20 May 1988 when counsel appeared before Sadal J. Counsel for the respondents asked for the restoration of the order of 13 February 1987 and advised the Judge that the Agricultural Tribunal application was struck out. Counsel for the appellant replied it had not been struck out on the merits but because of failure of counsel to appear.

It was adjourned to allow the appellant 14 days to file an affidavit in reply. Seven more adjournments brought the proceedings to 10 February 1989 but that time was further extended to 10 March 1989 when the case was, even then, stood

down to 3.00 pm to allow the submissions to be filed.

The respondents filed four pages of submissions setting out the history of the action. The appellant's submissions amounted to less than half a page confined to the single ground that it was agreed all proceedings should be stayed until the result of the application to the Agricultural Tribunal was known and that the appellant had applied to the Tribunal to have the application restored. As a result he requested that "all proceedings in this action be stayed to wait and see the outcome of Tribunal proceedings." It is relevant to mention that the application to restore had already been refused on the 27 February 1989.

More than ten months later on 19 January 1990, Sadal J ruled in the following terms:

> *"The respondent has not filed any affidavit in reply to plaintiff's application dated 17/2/88. He had asked leave to file an affidavit in reply.*
>
> *Further his application to Agricultural Tribunal was struck out.*
>
> *It is only proper in these circumstances to have the order made by this court on 13th February 1987 be restored and I so order."*

The case then ambled gently into this Court. In an undated notice of appeal, apparently drafted in 1992, counsel for the appellant incorrectly reverses the dates of the orders and then continues the confusion in the grounds of appeal:-

"Take notice that grounds of appeal are:-

(1) THAT the Court was wrong in "restoring" the order for possession when it had been on 23rd day of August, 1989 set aside by Mr Justice Kearsley, without hearing and adjudicating on the merits of case (The learned Judge was most probably not appraised of the fact that the order was vacated on 23rd August, 1987).

ALTERNATIVELY

(2) THAT the learned Judge was wrong in ordering that the order for possession made on 19th day of January, 1990 be restored without considering and adjudicating the merits of the appellant's application to set aside order for possession made in default.

(3) THAT the appellant has suffered substantial miscarriage of Justice by failure on the part of the court to make or give decision and reasons thereof on the appellant's applications."

The appeal came before this Court on 3 November 1993 when the Court sought submissions on four matters and stated the appeal would be determined according to its decision on them:-

"1. Whether or not Dyke J should have proceeded to make an order on 13th February 1987 without a trial on the merits, including a submission that the original notice dated 2nd May 1986 did not comply with the provisions of s.38(1)(b) of the Agricultural Landlord and Tenant Act Cap.270.

2. *Whether or not Dyke J on 13th February 1987 should have proceeded to make an order when the solicitor for the appellant sought leave to withdraw, without the Court having given adequate notification to the appellant.*

3. *Whether, in all the circumstances, Kearsley J, on 28th August 1987, was entitled to set aside the order made by Dyke J on 13th February 1987 when that order had been passed and entered on 20th February 1987.*

4. *Whether, if Kearsley J had jurisdiction to make the order which he purported to make on 28th August 1987, the order made by Sadal J on 19th January 1990 should be read as meaning that the said order of Kearsley J be set aside, so that the said order of Dyke J was consequently restored, particularly when the said order by Kearsley J had not been passed and entered."*

Submissions were filed and the appeal listed for hearing on 11th May 1994 but counsel applied for an adjournment and alternatively that the matter be decided on written submissions. That being acceded to, in keeping with the manner in which the case has been conducted throughout, counsel sought time to file further submissions.

At risk of unnecessarily prolonging an already lengthy judgment, it may be wise to summarise the events that have just been described.

The respondents filed a notice to quit in May 1986 and an application for an order of possession under section 169 in

October 1986. The order was granted by Dyke J on 13 February 1987. No affidavit had been filed by the appellant; counsel was clearly not instructed to oppose the application and withdrew.

Application for a stay pending application to strike out was filed promptly on 20 February 1987 and the same day an application filed with the Agricultural Tribunal. The application for a stay was heard by Kearsley J on 28th August 1987 and there was no appearance by the respondents. Kearsley J treated the application for a stay as the substantive application and set aside the order of Dyke J.

Following failure of the appellant to appear, the Agricultural Tribunal refused the application on 2 February 1988 and the respondents applied on 17th February 1988 to have the order of Dyke J reinstated. The appellant applied to have the matter reinstated before the Agricultural Tribunal and that was refused on 27 February 1989. The application to reinstate the order of Dyke J was heard finally by Sadal J on 10 March 1989 and he granted the application on 19 February 1990.

The submissions filed with this Court since May this year have, to a large extent, ignored the four matters on which submissions were sought by this Court but, as the various submissions have been made, the case has more and more clearly turned on the validity of the original order of Dyke J on 13th February 1987 and the power of Kearsley J to set it aside.

When the case came before the Court on 21 November 1986, the return date of the summons, the proceedings were to allow the appellant to show cause. That day the appellant was not ready and was granted 14 days to file an affidavit. Such an affidavit could have shown cause and had the Judge been satisfied the deponent had a right to possession, the summons would have been dismissed with costs.

By 13 February 1987 when the matter came before Dyke J, the fourteen days had effectively extended to three months and still no affidavit was filed. It must be borne in mind that the onus is on the person summoned to show cause. When Dyke J heard the case, counsel for the appellant had no affidavit nor did he attempt to show cause. Objection to the original notice could have been raised then or, indeed, in November 1986, as could any other relevant matter but the learned Judge was given nothing on behalf of the appellant. The appellant having failed to discharge the burden of showing cause, the Judge made the order.

It has been suggested that he should not have allowed counsel to withdraw. The record suggests he did allow it and then made the order on the basis that there was no appearance. Whilst that was an unfortunate choice of words, we do not consider it affects the issue of the propriety of the order. Had there been no appearance he could, under section 171, have made the order he did. Section 172 covers the position where there is an appearance as there clearly was on the 13th February.

Generous time had been given to prepare any submission to show cause and the lawyer presented nothing. In such circumstances, the Judge was entitled to make the same order. The fact his actual order refers to the failure of the appellant to appear makes no difference. The matters the Judge must be satisfied about are the same whether there is a failure to appear or not. In a case such as this where counsel appeared but was unable to offer any reason why the order should not be made, the Judge was entitled, on being satisfied of the matters in section 171, to order possession.

The next question is whether Kearsley J was entitled to set aside the order of Dyke J. The power to set aside is found in Order 35 rule 2:-

> *"2-(1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.*
>
> *(2) An application under this rule must be made within 7 days after the trial."*

The terms of that rule are clear, the Court has a discretion to set aside an order made where one party does not appear. In this case, it is apparent from the record and the affidavits and despite the wording of the formal order that the appellant did appear by counsel before Dyke J.

The hearing date had been fixed to allow the appellant time to file affidavits and to address the Court. He did appear and he had the opportunity to present his case. The fact he chose to say nothing and, having failed to obtain an adjournment, withdrew does not affect the issue.

Order 35 rule 2 is to provide a remedy where a party can show he had good reason for failing to appear. It is based on the principle that every party has a right to his day in Court and should not be denied it through some mischance or accident. The classic statement of the principle is found in **Evans v Bartlam** [1937] AC 480 (per Atkin LJ):-

> *"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*

What occurred on 13 February 1987 was a hearing and the order of Dyke J was a judgment on the merits. Counsel for both parties were present and the fact one counsel chose to say nothing does not alter that fact. As a result this was not an appropriate case for application under Order 35 rule 2 and Kearsley J had no power to set the order aside. We should add that, as the application was solely for a stay pending application to set aside, Kearsley J should not have treated the hearing as the substantive application. Counsel for the

respondent was not present and had no opportunity to reply. Faced only with an application for a stay, he may not have appeared because he had no objection whereas he would have appeared had he known the Judge was to consider an application to set aside.

We therefore hold that the possession order made by Dyke J on 13 February 1987 was properly made and is enforceable at the instance of the respondents. This being so it is not necessary for us to decide whether Sadal J was justified in restoring the possession order since the question has now become academic.

The appeal is dismissed with costs to the respondents.

Decision:

Appeal dismissed.

Possession Order made by Dyke J on 13 February 1987 upheld.

Appellant to pay costs of this appeal.

M. Tikaram

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Sir Moti Tikaram
President Fiji Court of Appeal

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal

I. R. Thompson

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Mr. Justice Ian R. Thompson
Judge of Appeal