

IN THE COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0002 OF 1998S  
(High Court Civil Appeal No. HBC0067 of 1997L)

BETWEEN:

DEO KUMARI F/N BUDHU

*Appellant*

AND:

BHAGWAN DASS F/N SUKHAI

*Respondent*

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge  
The Hon. Sir Mari Kapi, Justice of Appeal  
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Friday, 19 February 1999, Suva

Counsel:

Mr. G.P. Shankar for the Appellant  
Mr. V. Mishra for the Respondent

Date of Judgment: Friday, 26 February 1999

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**JUDGMENT OF THE COURT**

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This appeal is against orders made in the High Court that the appellant give the respondent vacant possession of certain land and that she be restrained from doing building work on the land and from allowing anyone to move into a house on the land.

On 5 March 1997 the respondent caused a writ of summons, with the statement of claim indorsed, to be issued seeking the orders eventually made and also an order setting aside "the terms of a settlement" made in 1976 and an order restraining the appellant from "being a nuisance to" the respondent. On the same day an application made *ex parte* for restraining orders was granted substantially in the terms of the orders now under appeal. On 6 March 1997 the appellant was served with the writ, the *ex parte* notice of motion, the affidavit which the respondent had sworn in support of it and the orders made on the motion. The appellant did not

acknowledge service or take any steps to defend the action or in respect of the orders made *ex parte*.

On 4 November 1997 the respondent applied by summons for final orders in terms of those now under appeal and for damages. Although not expressly stated to be an application for judgment, the summons was entitled as issued in the action and as having been made pursuant to O.13 and O.19 r.7 of the High Court Rules "and the inherent jurisdiction of [the] Court". O.13 r. 6(1) enables a plaintiff to proceed in an action such as this where the defendant has failed to give notice of intention to defend. O.19 r.7 provides for application for judgment to be made in such actions where no defence has been served. On the hearing of such an application the Court is required "to give such judgment *as the plaintiff appears entitled to on his statement of claim.*" (Emphasis added).

The application was heard on 21 November 1997; the appellant was present unrepresented. She admitted having been served with the summons and having had "the material" explained to her. Why she had been served is not clear but it is apparent that at the hearing the respondent and the learned judge dealt with the application as though it were one made, not pursuant to O.19 r.7 by a summons in an action commenced by a writ of summons, but pursuant to section 169 of the Land Transfer Act (Cap.131), with the summons treated as though it was an originating summons. Any disadvantage resulting from the adoption of that course would have been suffered by the respondent and not the appellant, as it gave her a chance to be heard to which she was not entitled. However, all that the learned judge could properly do in such circumstances was either to give her leave to give late notice of intention to defend and to serve a late defence or, if he did not do that, to proceed to give judgment for the respondent in

accordance with the facts stated in his statement of claim.

In the event he caused the interpreter to explain "the material" to the appellant. She then said that in a case in the former Supreme Court that Court had "given us 2 acres of land" and that "we are staying on that land". A copy of the written agreement by which the parties to that action had settled it was before the Court, having been exhibited to an affidavit sworn by the respondent. Although the learned judge was not entitled to rely on affidavit evidence for the purpose of giving judgment for the plaintiff, he was entitled to look at it when the appellant referred to what might possibly be a defence. He did so and informed the appellant that under the terms of settlement a licence to occupy the land was given to her husband personally and had expired on his death. He said that that was the respondent's case. The appellant then simply agreed that her husband had died. As stated above, he was erroneously dealing with the matter before him as though it was an application made pursuant to section 169 of the Land Transfer Act. But essentially he found that the agreement would not afford the appellant a defence.

After a brief adjournment the learned judge made the orders now under appeal and stayed their operation for four months; he subsequently suspended it further pending the determination of any appeal.

On 15 January 1998 the appellant lodged her appeal. The grounds stated were:

- "1. That the learned hearing Judge was wrong in making order for possession against the Appellant when the Appellant's late husband Latchman Dass had entered unto a valid compromise and/or settlement in Civil Action No.317 of 1972 (High Court, Lautoka) which entitles the Appellant the quiet peaceful and*

*uninterrupted use and occupation of the said 2 acres land and the Respondent did not acquire and/or offer to the Appellant another piece of 2 acres land in terms of the compromise and settlement.*

2. *That the learned hearing Judge was wrong in not appreciating and/or considering that having regard to the terms of compromise and/or settlement in Civil Action No.317 of 1972 there was insufficient and/or inadequate materials before the Court to justify the making of the order for possession against the Appellant."*

Subsequently on 2 December 1998 Mr. Shankar gave notice adding six additional grounds. They are:

- “1. *THAT the learned hearing Judge was wrong in introducing and/or adding limitation to the interest and rights created by the settlement in Civil Action No.317 of 1973(sic), and without the benefit of any evidence or other material, and without prior notice to the Plaintiff of any claim that the interest created by the settlement was limited to the lifetime of Latchman Dass, was wrong in interpreting and/or construing the terms of settlement as the learned Judge did. There has been substantial miscarriage of Justice.*
2. *THAT the learned hearing Judge was wrong in curtailing the interest created by terms of settlement or construing it in the manner the learned Judge did without any material and/or evidence to support it, and in the absence of express provision, and without compliance of procedural fairness and/or proprietary (sic) to the Appellant.*
3. *THAT the learned Judge was wrong in not holding that upon full and proper consideration of the contents of the terms of settlement as a whole, and having regard to all the acts facts or circumstances the interest created by terms of settlement was not a life interest in favour of Latchman Dass but interest in the property capable of devolving to and resting in the legal personal representation of Latchman Dass and right in favour of his legal representative until happening of the events therein mentioned.*
4. *THAT the construction and/or interpretation pleaded by the learned Judge on the contents of terms of settlement are wrong unreasonable, and do not take into account the plan (sic) intention and/or purpose of the settlement.*

- 5. *THE learned Judge was wrong in treating and dealing with the Plaintiff's case as an application under Section 169 of the Land Transfer Act when the application was not so expressed and could not have been having regard to the fact that there was no proof. The Plaintiff/Respondent's registered title or of any lawful notice to quit or service of it, and in fact the action was commenced as an ordinary civil action by writ. There has therefore been substantial miscarriage of justice and/or serious misconception of the type and nature of the case, and relevant principles.*
  
- 6. *THAT the learned trial Judge was wrong in dealing with the matter summarily under misapprehension and/or mistaken belief. That it was an application under section 169 of Land Transfer Act when the Plaintiff/Respondent's application by summons (page 43 of record) was for judgment in respect of reliefs sought under Statement of Claim and it required proof having regard to the nature of claim. There has therefore been substantial miscarriage of Justice and disregard of the rules and procedure."*

We do not need to discuss those grounds of appeal individually. At the hearing of the appeal the nub of Mr Shankar's submissions was that the learned judge should have allowed the appellant to defend the action. He pointed out that she was unrepresented. He submitted that His Lordship should have found that she had shown him that she had a good defence, namely the agreement made in settlement of the action in the Supreme Court.

We are satisfied that that agreement did not afford her a defence. It provided for the respondent, as tenant of a larger area of land held on a native lease, to give possession of two acres of that land to the appellant's husband. If, as Mr Shankar urged, the parties intended to create an interest capable of forming part of her late husband's estate, that was a dealing with the land requiring the consent of the Native Land Trust Board (Native Land Trust Act (Cap.134), section 12). The respondent had sworn in his affidavit that, as far as he was aware, that consent was not given. His affidavit had not been answered; nor did the appellant assert that consent was

given. Mr Shankar submitted that the respondent was estopped by his conduct from denying that the appellant was entitled to occupy the land, notwithstanding the lack of the Native Land Trust Board's consent. In our view there was no evidence of such conduct. But, even if there had been, the High Court could not have made orders which would have had the effect of sanctioning the illegal occupation of the land. As we pointed out at the hearing, if the respondent breached the agreement in any way, that may have given the appellant a cause of action against him but it could not afford a defence to his claim for possession of the land.

We are satisfied, therefore, that nothing said by the appellant in the High Court and no evidence in the proceedings there would have warranted the learned judge giving the appellant leave to give late notice of her intention to defend the action or to serve a late defence.

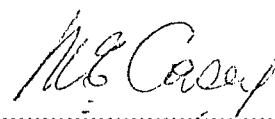
The situation at the conclusion of the hearing of the application made under 0.19 r.7 was that the respondent's assertion in paragraph 1 of his statement of claim that he was "the holder of the native lease" of the land had not been traversed. Similarly his assertion that the appellant was in unlawful occupation of part of the land had not been traversed. In the absence of any lawful right of the appellant to occupy any part of the respondent's land, the respondent was entitled to have judgment given for vacant possession of it and to have the appellant restrained from occupying it or otherwise interfering with his rights in respect of it.

Although His Lordship erroneously treated the summons as an originating summons issued under section 169 of the Land Transfer Act, the result of the hearing of the application for judgment in the action commenced by the writ of summons, if it had been

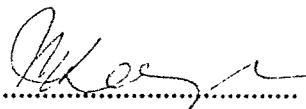
conducted correctly, would necessarily have been the same as it was. Accordingly the appeal must be dismissed. We fix the costs which the appellant is to pay to respondent as \$350 including disbursements.

**Decision:** Appeal dismissed.

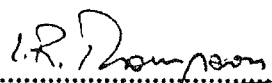
Appellant to pay the respondent \$350 his costs of this appeal, including disbursements.



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Sir Maurice Casey  
Presiding Judge



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Sir Mari Kapi  
Justice of Appeal



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Mr. Justice I.R. Thompson  
Justice of Appeal

**Solicitors:**

Messrs.G.P. Shankar & Company, Ba for the Appellant  
Messrs. Mishra, Prakash & Associates, Ba for the Respondent