

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

**CIVIL APPEAL NO. ABU0004 OF 1999S**  
High Court Civil Action No. HBC0089 of 1994/L)

**BETWEEN:**

**KAMLESH KAUR**

*Appellant*

**AND:**

**AUSTRALIA AND NEW ZEALAND**  
**BANKING GROUP**

*Respondent*

**Coram:**

**The Hon. Sir Moti Tikaram, President**  
**The Hon. Rt. Sir Maurice Casey, Justice of Appeal**  
**The Hon. Sir David Tompkins, Justice of Appeal**

**Hearing:**

**Tuesday, 23 November 1999, Suva**

**Counsel:**

**Mr. V.M. Mishra for the Appellant**  
**Mr. A.K. Narayan for the Respondent**

**Date of Judgment:**

**Friday, 26 November 1999**

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**JUDGMENT OF THE COURT**

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The question raised in this appeal is whether a Landlord's actions in relation to the exercise of his right to distrain for arrears of rent take priority over the earlier seizure and removal of goods on the tenanted premises by the grantee of a bill of sale on default. The Landlord was Gurdial Singh, now deceased, and his executrix is his daughter, the present appellant. He had commenced proceedings in the High Court at Lautoka on 8 April 1994 against the tenant and the respondent Bank claiming \$5,280 (the amount of rent outstanding), alleging that it had seized the tenant's goods under its bill of sale in breach of the Landlord's priority in respect of the distress he claimed to have levied for that rent on 9 September 1991. He obtained a default judgment against the tenant but the Bank filed a statement of defence on 17 May 1994, and on 10 July 1996 applied for the action to be dismissed for want of prosecution. Counsel agreed that this should be treated as an application under 0.33 r.3 to determine whether the

Landlord in the circumstances had priority over the seizure by the Bank, and this came before Lyons J. who ruled on 16 October 1998 in the Bank's favour. Leave to appeal out of time was granted by Thompson J.

In this Court priority was the only question argued by Mr Mishra for the appellant. He rightly conceded that if in fact there was no distress levied before the goods were seized and removed by the Bank, then he was in difficulty. He endeavoured to persuade us that correspondence and other documents which included a recorded protest by the tenant over the seizure, taken together constituted sufficient evidence of prior distraint to give the appellant priority. Mr Mishra must be commended for his ingenuity, but he could not overcome the reality acknowledged in the letter written on behalf of the Landlord to the Bank on 9 September 1991. That letter plainly stated that distress was levied on that date after the goods had been removed by the Bank, as the following extract confirms:-

*"You have seized the goods and chattels of the Shiu's Bargain Centre situate at the Ganga Singh Buildings on last Friday and removed the goods and chattels forthwith.*

*On behalf of the Landlords we have this day distressed for arrears of rent, a copy whereof is enclosed herewith and regard this has having been served on you."*

The letter went on to assert that in the circumstances removal was a fraud on the Landlords. Mr Mishra made it clear that he was not alleging dishonesty or bad faith by the Bank. The term "fraud" was used to describe its action in ignoring the Landlord's prior claim to preference. It would have been better to have described the Bank's conduct as being in breach of that alleged priority.

A mere right to levy distress on goods for rent enjoys no such priority; the Landlord must be able to point to conduct on his part indicating that in some way he has sufficiently distrained before their removal - see *Wood v. Nunn* [1828] 5 Bing 10; 130 ER 962 where the Landlord was on the premises and physically laid claim to the property in an endeavour to prevent its removal; and *Cramer & Co. v. Mott* [1869-70] 5 L R 357 where the Landlord's agent in the house laid claim to a piano for arrears of rent when it was being removed by the person who had hired it out to the tenant, following default under the hire agreement.


Mr Mishra pointed to documents authorising the Landlord's agent to seize the goods, and a Notice of Distress to the tenant, both dated 9 September, along with an acknowledgment by the latter of the rent owing, with a paragraph stating that he received no notice from the Bank before seizure (he was not entitled to any); and that they seized the goods in spite of his protest and objection. Even if there could be spelt out of this an assertion that the seizure was in breach of the Landlord's right to distrain, it falls a long way short of the active intervention expected of him in terms of the two cases cited above, in order to qualify as distress levied before removal of the goods by the Bank.


We therefore hold that on the particular facts of this case the Landlord's actions to distrain for arrears of rent did not take priority over the earlier seizure of goods by the Bank under a bill of sale.

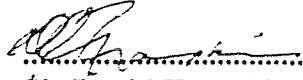
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**Conclusion**

The appeal is dismissed with \$750 to the respondent to cover costs and disbursements.

  
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**Sir Moti Tikaram**  
**President**

  
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**Sir Maurice Casey**  
**Justice of Appeal**

  
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**Sir David Tompkins**  
**Justice of Appeal**



**Solicitors:**

Messrs. Mishra Prakash and Associates, Ba for the Appellant  
Messrs. A.K. Narayan and Company, Ba for the Respondent