

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

CIVIL APPEAL NO. ABU0014 OF 2000  
 (High Court Civil Action No. HBC. 225 OF 1999)

BETWEEN:

KRISHNA MURTHI

*Applicant/Appellant*

AND:

ATUL KUMAR AMBALAL PATEL

*Respondent*

In Chambers: The Hon. Mr. Justice Ian Thompson, Justice of Appeal

Hearing: Monday, 1 May 2000, Suva

Counsel: Mr. D. Naidu for the Appellant  
 Ms. Vasantika Patel for the Respondent

Date of Decision: Friday, 5 May, 2000

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DECISION

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The appellant is seeking a stay of execution of orders of Gates J. in the High Court requiring him to give to the respondent vacant possession of land specified in the orders and to pay the respondent costs fixed as \$905. A temporary stay was granted *ex parte* by Tikaram P. on 14 March 2000 and, at an *inter partes* hearing, extended by Reddy P. on 28 March 2000 to the hearing of the application on 1 May 2000.

The order for possession of the land was made in an action for ejectment commenced in February 1999 under section 169 of the Land Transfer Act (Cap.131). The appellant, and his father before him, had been tenants of the land for many years; lately their tenancy had derived from the provisions of the Agricultural Landlord and Tenant Act (Cap.270). On 24 August 1998 the respondent had caused the appellant to be served with written notice under section 37(1)(c)(ii) of that Act terminating the tenancy and giving the appellant three months' notice to quit on the ground that rent was in arrear amounting to \$1,576. He then had

a period of three months within which to pay the rent in arrear; if he had done so within that period, the notice to quit would have been deemed to have been cancelled. However, he did not do so and he did not apply to the Agricultural Landlord and Tenant Tribunal for relief against forfeiture, as he was entitled to do within the period of three months from the date on which the respondent's notice was served on him. He simply continued to maintain possession of the land.

The effect of all that was that the notice terminated the contract of tenancy and entitled the respondent to recover possession of the land. When, therefore, the respondent caused the summons to issue under section 169 of the Land Transfer Act, the appellant had ceased to have any right to possession of the land and the respondent was entitled to recover possession of it. On 16 August 1999 the appellant paid the respondent \$1,710 in respect of arrears of rent; that apparently was the amount which the respondent alleged was due. The appellant requested an account to be provided by the respondent, as he was not satisfied that was the amount due. The respondent declined his request.

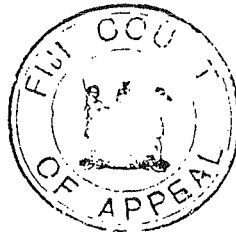
The arrears of rent, whatever their correct amount, were a debt owed to the respondent by the appellant. The payment of the money in August 1999 relieved the appellant of his liability to be sued for it by the respondent; but, not having been made within three months of the service of the notice under section 37(1) of the Agricultural Landlord and Tenant Act, it did not affect the operation of that section; that is to say it did not cause cancellation of the notice to quit. The contract of tenancy remained terminated and the respondent remained entitled to recover possession.

A number of considerations have to be taken into account by a judge exercising

his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favour.

In the present instance the appellant and his family will suffer detriment, as they reside on the land and have no other residence. Also the farming of the land is the appellant's only source of income; if the lease was not effectively terminated, it has over three years' to run. However, if the stay is granted, the respondent will be kept out of enjoyment of possession of the land until the appeal is heard. As the statement of events and the applicable law which I have set out above discloses, the appellant's prospect of success when the appeal is heard is extremely poor.

I have decided that in all the circumstances of the present case the interests of justice will be best served by refusing to grant a stay of execution. Accordingly the application is dismissed and the appellant is ordered to pay to the respondent the costs connected with it, which I fix as \$300.



*Ian Thompson*  
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Mr Justice Ian Thompson  
Justice of Appeal

Solicitors:

Messrs. Pillai, Naidu and Associates, Nadi for the Appellant  
Vasantika Patel, Nadi for the Respondent