

IN THE HIGH COURT OF FIJI
IN LAUTOKA
IN THE EXERCISE OF ITS CIVIL APPELLATE JURISDICTION

HBA-16 of 2018

Magistrate's Court of Nadi 30 of 2012

BETWEEN: UMA DUTT SHARMA

APPELLANT-(ORIGINAL PLAINTIFF)

AND ISIRELI BIUMAITOTOYA

RESPONDENT- (ORIGINAL DEFENDANT)

Counsel: - Mr. Victor Sharma for the Appellant (Original Plaintiff)
 Mr. Anil J. Singh for the Respondent (Original Defendant)

Notice Returnable date: - 28 September 2018.

Judgment: - 16 October 2018.

J U D G M E N T

A. INTRODUCTION:

1. This is a timely Appeal arising out of the Judgment delivered by the Magistrate's Court of Nadi on 14th August 2018 in the actions **No. 29 of 2012** and **30 of 2012**, whereby the Appellant's (plaintiff) claim and the counter claim of the Respondent (Defendant) were dismissed, after arriving at the, purported, finding that the Court does not have jurisdiction to deal with this matter in terms of the proviso to section 16(2) of the Magistrate's Court Act.
2. Being aggrieved by the above judgment, the Appellant has moved this Court to exercise its Appellate jurisdiction. The Appellant had filed two separate claims before the Magistrate's Court of Nadi against the Respondent, being

the action Nos. 29 of 2012 and 30 of 2012, and both these actions being consolidated, the impugned judgment came out to be in common to both these actions.

3. These Appeals bearing Nos. **HBA-15 /18 & HBA-16/18** were mentioned before me for the first time on 28 September 2018, and it was found that the parties and the facts are almost same since the parties and facts in both the cases are almost the same. However, I observed that the amounts claimed by the Appellant and that of the counter claim by the Respondent in both the cases are different.

B. BACKGROUND:

4. Admittedly, the Respondent had become the monthly tenant of the Appellant on a verbal agreement, initially for 5 years from an unspecified date, which was thereafter extended for further 5 years period, in respect of a part of the property owned by the Appellant on the monthly rental of \$ 1000.00, to run a Medical Surgery of the Respondent.
5. The Respondent, allegedly, failed to honor the said agreement by failing and/or neglecting to pay the monthly rental to the Appellant from March 2011, who at the time material had become the trustee of the said property.
6. Accordingly, the Appellant on 05th January 2012 served a notice to the Respondent through his Solicitors for the recovery of the rental, which was said to be in arrears of \$11,000.00, and for the vacant possession. The Respondent did not comply with same and noticed the Appellant's Solicitors by letter dated 7th January 2012 stating that he is not in arrears and would not vacate the premises.
7. Subsequently, the Appellant through his Solicitors sent another letter dated 13th January 2012 to the Respondent advising about the imminent legal proceedings and the would-be cost involved, in the event of his failure to vacate and there being no response the Appellant on 8th February 2012 filed the said claim before the Magistrate's court under action No. 30 of 2012 for

the recovery of the alleged arrears of rental in a sum of \$ 11,000.00 together with the interest and cost on indemnity basis.

8. The Respondent filed his statement of defence on 24th April 2012, refuting the claim of the Appellant and moved for the Appellant's claim to be stuck out. He also made a counter claim for a sum of \$ 49,525.39 together with the costs.

C. THE TRIAL:

9. The parties , having agreed on number of facts and 18 issues to be determined by the learned Magistrate , proceeded for the trial with the consolidation of connected case No; 29 of 2012 , wherein the Appellant gave evidence for and on his behalf, while the Respondent, apart from adducing his evidence , called the Appellant's estranged wife, **Santi Devi**, as his witness.
10. It was after hearing those witnesses at a full-scale trial and entertaining the written submissions, the learned Magistrate delivered the impugned judgment dismissing both the claims and the counter claims, stating that his Court had no jurisdiction to adjudicate the matter.

D. GROUND OF APPEAL:

11. Following 6 grounds of appeal have been advanced for and on behalf of the Appellant.
 - a. *That the Learned Trial Magistrate erred in law and in fact in holding it does not have jurisdiction to deal with the matter.*
 - b. *That the Learned Trial Magistrate erred in law and in fact in taking into consideration the pending property settlement proceedings between the Appellant and the Appellant's wife.*
 - c. *That the Learned Trial Magistrate erred in law and in fact in taking into consideration the pending property settlement proceedings between the Appellant (as a trustee of the property) and the Respondent and that the Appellant's spouse (in the absence of authority) is not privy to the contract.*

- d. That the Learned Trial Magistrate erred in law and in fact by not applying the principles of Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1951] ukhl 1 with regards to privity of contracts.
- e. That the Learned Trial Magistrate erred in law and in fact in not evaluating the Appellant's evidence with regards to the contract between the Respondent and therefore falling into error in concluding it is a matrimonial property related matter.
- f. The Learned Trial Magistrate erred in law and in fact in rejecting the Appellants' evidence to contradict the same.

E. DISCUSSION:

- 12. When the contents of the impugned judgment are carefully scrutinized, it appears that the learned Magistrate , after hearing the Respondent's evidence and that of his witness Ms. Shanti Devi, who happened to be the estranged wife of the Appellant, has been significantly influenced to form a wrong opinion to the effect that this matter would be better resolved by the family Court, disregarding the fact that the Appellant filed this claim **not** against his former wife, but only against the Respondent for the recovery of arrears of rentals. The paragraph 11 of the impugned judgment is reproduced below for the sake of easy perusal.

"11. The Court finds that this is matter would be better resolved by the family Court. The Defendant had paid the required rent not to the husband or to the trust but to his wife. The Plaintiff's wife confirmed that the Defendant had paid all his rental dues and does not owe anything to her family. The Plaintiff's concern is that the rent should have been paid to him as the trustee of the trust. Be as it may the wife contends that there is a pending property settlement proceeding in the Magistrate. The entitlement of each would be determined in this proceeding. In line with proviso in section 16(2) of the Magistrate Court Act, the Court finds that it does not have the jurisdiction to deal with this matter." (Emphasis mine).

- 13. The learned Magistrate, by the above conclusion seems to have, wittingly or unwittingly, driven the Respondent (Defendant) to the family Court

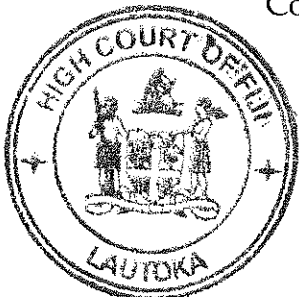
directing him to resolve his dispute with the Appellant, through the property settlement matter which is, admittedly, pending before the family Court between the Appellant and his said former wife Ms. Santi Devi. The fact that the parties to this action (Appellant and Respondent) had only called upon the learned Magistrate to adjudicate the dispute between them by placing before the Court 7 agreed facts and 18 issues, seems to have escaped the attention of the Learned Magistrate.

14. The property settlement before the Family Court is a matter purely between the Appellant and his former wife and the Respondent need not be driven to the Family Court to resolve his dispute with the Appellant and the Appellant too cannot be asked to drag the Respondent to the Family Court, where only he and his former wife DW-2 are in tussle.
15. The learned Magistrate was duty bound to adjudicate the matter before him between the Appellant and the Respondent on the issues presented to him and need not have concerned about the interest of Santi Devi, who was only a witness, unless she was made a party to the proceedings before him. The concern expressed by the learned Magistrate in this regard is found in pages 76, 77, 78 and 79 of the copy record.
16. Having made the above observations, the learned Magistrate has arrived at an erroneous finding to the effect that *"in line with the proviso in section 16(2) of the Magistrate's Court Act, the Court finds that it does not have jurisdiction to deal with this matter"* and proceeded to dismiss the claim of the Appellant and the counter claim of the Respondent.
17. The learned Magistrate has, seemingly, relied on proviso **iv** of the aforesaid section 16 (2) of the Magistrate Court Act, in arriving at the above wrong decision, when the dispute before him was between the **Appellant** and the **Respondent** over the alleged arrears of rentals and not a dispute over the validity or dissolution of the Marriage between the Appellant and the defence witness Ms. Santi Devi, who is his former wife.
18. The learned Magistrate was well and truly clothed with the jurisdiction to deal with and adjudicate the matter and need not have driven the parties to the Family Court and dismissed the matter that was rightly filed before him.


19. In view of the above, I find that the grounds of appeal adduced on behalf of the Appellant are with full of merits and the impugned judgment cannot withstand them. Accordingly, I find that the appeal has to be allowed.
20. When this Appeal was first mentioned before me on 28th September 2018, being the notice returnable date, with the presence of learned senior counsel for both the parties, my above observations being intimated to them and they, having appraised the above position, readily agreed to have the impugned judgment vacated and have the matter be referred back to the Nadi Magistrate's Court for the pronouncement of a fresh judgment by another Magistrate at the station, after adopting the evidence already led. I thank both the Counsel profusely for helping to minimize the process before this Court and for agreeing to adopt the evidence already led before the learned Magistrate.

F. FINAL ORDERS:-

- a. The Appeal in HBA-16 of 2018 is hereby allowed.
- b. The impugned judgment of the learned Magistrate of Nadi, pronounced on 14th August 2018 (in common to action Nos 29 & 30 of 2012) is hereby set aside.
- c. A fresh judgment shall be entered by another Magistrate at the Magistrate's Court of Nadi, after adopting the evidence already recorded.
- d. Considering the circumstances no costs ordered and the parties shall bear their own cost.
- e. A copy of this judgment shall be dispatched forthwith to the Magistrate's Court of Nadi, together with the original record.



At Lautoka
16th October, 2018


A.M. Mohammed Mackie
Judge