

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 36 of 1983

Between:

MOHAMMED NASIR KHAN s/o

Mohammed Yakub Khan

Appellant

- and -

TAHIRA BEGUM d/o

Nabi Buksh

Respondent

J. Reddy for the Appellant
A. Patel for the Respondent

Date of Hearing: 10th November, 1983.

Delivery of Judgment: 22nd November, 1983.

JUDGMENT OF THE COURT

Jeffries, J.A.

This is an appeal by Mohammed Nasir Khan s/o Mohammed Yakub Khan (hereinafter referred to as "the appellant") against an order by Mr. Justice Dyke made on 25th July, 1983, sitting at Lautoka, when he refused an application by appellant to stay the execution of a Writ of Fieri Facias. It is convenient here to deal with a preliminary point taken by respondent that pursuant to s.12(2)(f) of the Court of Appeal Act appellant required leave, which had not been obtained, because the judgment

appealed against was interlocutory. We have little doubt the judgment is not interlocutory, but regardless of that point we did give leave.

On 15th July, 1983, the same judge had already refused an application to set the judgment aside in which Tahira Begum d/o Nabi Buksh of Ba, Fiji, cultivator (hereinafter referred to as "the respondent") as plaintiff had entered, by consent, judgment in the sum of \$52,789.00 on 11th March, 1983, against appellant. Behind the foregoing account there has been a complex network of commercial transactions into which this court is not going to journey for several reasons. First, for the decision this court has to make in this appeal they are essentially irrelevant. Secondly, there are contained in various affidavits already filed, and in a new set of proceedings issued by appellant, which will be referred to below, accusations and counter accusations of the most serious misconduct. It would be quite impossible for this court on the papers without seeing and hearing witnesses to make any decisions on those issues. Thirdly, as stated, there has been a new action commenced by appellant against respondent arising out of the complex commercial transactions and the entry of judgment of 11th March, referred to above which, for its disposal, will require a full, and it looks at this stage, lengthy hearing. In those proceedings the appellant, as plaintiff, claims he was a dupe in an elaborate scheme of lending and borrowing, and his consent to entry of judgment was obtained by fraud and duress. This court in view of the pending proceedings takes special care to avoid intruding in any way into their conduct.

Having stated the foregoing, it is still necessary to say something of the facts that led to this

appeal to make the decision intelligible. An action was commenced on 17th January, 1983, by writ of summons and statement of claim by respondent naming appellant as defendant. The cause of action was based on a bill of sale and respondent/plaintiff claimed a total sum of \$51,268.66. It is important to record at this point in the judgment the appellant/defendant chose at that stage to act for himself. He entered an appearance and later filed a statement of defence. Respondent/plaintiff's solicitor Dr. M.S. Sahu Khan, who is also her son, moved on her behalf to strike out the defence. The case was set down for hearing on 11th March, 1983, before Mr. Justice Dyke. Appellant/defendant had dealings with Dr. Sahu Khan acting for respondent/plaintiff which resulted in appellant/defendant appearing in person before an Acting Deputy Registrar (because the judge was unavailable) on 10th March, 1983, when appellant/defendant agreed, orally and unambiguously in writing signed by him, to judgment being entered in favour of respondent/plaintiff in the sum of \$52,789.00, which included interest up to 10th March, 1983. This hearing of 10th March instead of 11th March was alleged to have been at appellant's request and for his convenience. However, it ought to be stated before this particular action taken by respondent/plaintiff against appellant/defendant Dr. Sahu Khan had acted for appellant as his solicitor and within days of the actual entry of judgment by the judge it would appear he then undertook professional services on his behalf by travelling to Auckland and issuing writs. So it would appear that before and after the period mid January to mid March, which for policy reasons stated earlier in the judgment we steer clear of, a solicitor/client relationship existed between Dr. Sahu Khan and appellant.

The learned judge on 11th March gave judgment in accordance with terms of settlement filed. On the previous day appellant had indicated he would settle the judgment by 30th March, 1983, and there was evidence to support that in the terms of settlement by which he agreed to pay interest from 30th March, 1983, to date of payment.

We need not explore the events following the hearing of 10th March but the judgment was not met. In the meantime appellant consulted other solicitors and on his behalf they moved to set the judgment by consent aside. Affidavits were filed and a hearing took place before the learned judge on 24th June, 1983, when argument was presented. Even if it is granted that the main ground of argument for appellant at that hearing was that the judgment as entered by the court on 11th March was bad in law nevertheless it is also plain a substantial ground was that the judgment had been obtained by fraud or misconduct. The respondent at that hearing and subsequently has been represented by other counsel. The ruling, dismissing the application to set aside, was delivered on 15th July, 1983, and said, inter alia, "The defendant now seeks to set aside the judgment entered, and to set aside the terms of settlement agreed by him verbally and in writing. No new facts are alleged, no fraud or mistake are alleged, and I disregard the argument by counsel for the defendant that the facts suggest fraud or mistake. The court cannot take cognisance of vague statements like that, and could only do so where instances are specifically pointed out." It is to be noted there is no appeal against that decision.

Immediately following the aforesaid dismissal respondent took steps to execute her judgment by way of

Writ of Fieri Facias. The appellant also took steps and on 19th July, 1983, issued a writ of summons and statement of claim against respondent making serious allegations of fraudulent misconduct by her solicitor and agent Dr. Sahu Khan about which we intend to say no more. At the same time appellant moved for a stay of execution of the writ. That application came before Mr. Justice Dyke on 25th July, 1983, supported by affidavits and very lengthy submissions on the facts and law by respondent. The learned judge dismissed the application with costs. In his reasons he noted his judgment of 15th July, 1983, dismissing the application to set aside was not being appealed. He stated that he viewed the application as an attempt by appellant to achieve by stay of execution what he had failed to do on the application to set aside. He was again critical of the avoidance by appellant, as he had done in the judgment dismissing the application to set aside, the issue of his appearance of 10th March, 1983, before the Deputy Registrar when he orally and in writing consented to judgment, and promised to pay by 30th March. The learned judge could be excused for having overlooked the affidavit filed by appellant which had attached to it the statement of claim issued some days earlier in which there was a full account of those vents and which appellant adopted as being correct. To the judge the clarity of the proceedings of 10th March influenced him in his decision to refuse the application for stay. It is against that judgment this appeal is brought.

It does not greatly assist a complicated and somewhat intractable case to express regrets about what has, or has not, been done in the past. However we cannot forbear observing that most of the material which

is before us now apparently could have been before the learned judge in the court below on the summons to set the judgment aside. Basically the case then, as now, is fraudulent misconduct, and in the judgment dismissing the application to set aside the argument of counsel (not counsel who appeared in this court) for applicant (appellant in this court) reflected this approach which is indicated by the extract of the judgment already reproduced. The complaint of the judge at that stage was that they were "vague statements" which he felt he could not act upon. By the action 441/83 commenced on 19th July, 1983, a few days after the ruling, the formerly inchoate allegations against Dr. Sahu Khan and his principal had then been made explicitly, but it is to be noted he is not a party himself to that action. We think if the full allegations had been squarely placed before the learned judge on 24th June with a writ already issued, or about to be issued, he may have reached a different decision. However, we also appreciate the choice of precisely the most appropriate course to follow, with the natural and proper reluctance to allege fraud other than by writ and statement of claim, does not always present as clearly at the time as it might later. In stating the foregoing we are not overlooking that that decision against appellant is not appealed against, and what we have before us is the same judge's exercise of discretion in refusing to stay a writ at a later date.

We have reached the conclusion that no matter what happened earlier by 25th July, allegations of fraud by appellant were contained in the statement of claim and the prayer for relief is to set aside the judgment of 11th March, 1983. No doubt under pressure from respondent's pursuit of her remedies appellant since taking independent legal advice has acted very promptly to protect his position.

The allegations are of fraudulent, and cognate, behaviour in the obtaining of the judgment. We continue to adhere to our previously expressed stance which was not to intrude on the forthcoming litigation but in reaching the decision we have we think it is proper to say we are of the opinion the papers before us indicate there is a serious question to be tried between the parties and the litigation is not vexatious, or simply obstructive. At the hearing we were told by counsel for respondent that a defence has been filed to this action (a copy of which was not before us) but no other step has been taken. If the execution process were not delayed pending result of the trial serious and avoidable harm could be occasioned to the appellant. Given the very unusual facts and allegations of this case we are now convinced that the correct path to a just result between these parties is for the stay to operate until the judgment of the Supreme Court in 441/83 and then a clearer situation will be able to be reviewed by all parties.

At the hearing in the lower court appellant had offered to obtain a bank guarantee for \$51,268.00 pending disposal of the writ. After filing an appeal to this court he obtained a stay by lodging the sum of \$52,789.00 in court pending the disposal of the appeal. Counsel, on behalf of his appellant client, stated his client was prepared to accept as a condition of stay that the money remain in Court pending disposal of the action 441/83 by judgment in the Supreme Court.

The appeal is allowed and execution of the judgment in action No. 23/83 by Writ of Fieri Facias is stayed on condition the sum of \$52,789.00 paid into Court by appellant lies in court pending disposal of

action No. 441/83 in the Supreme Court.

Costs to be subject to the order of the Court
in action 441/83.

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Vice President

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Judge of Appeal

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Judge of Appeal

