

IN THE FIJI COURT OF APPEAL

181

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 50 OF 1990

(Lautoka Civil Appeal No. 469 of 1986)

BETWEEN:

PANKAJ BAMOLA  
ANAND PRIYA MAHARAJ

APPELLANTS

-and-

MORAN ALI

RESPONDENT

Mr. V. M. Mishra for Appellants  
Mr. G. P. Shankar for Respondent

Date of Hearing : 9th June, 1992

Date of Delivery of Judgment : 18th June, 1992

J U D G M E N T

The Appellants had sued as Executors and Trustees of the Estate of Sada Nand Maharaj, the deceased their father.

They claimed that the Estate is the owner in equity of about 130 acres of freehold land in Certificate of Title No. 5636 situated at Vaileka, Ra.

The Title is said to be registered in the name of Wairuku Land Purchase Co-operation Society Limited.

The Respondent was alleged to have been occupying an area of one sixteenth acre of the 130 acres belonging to the Estate.

The Appellants alleged that they had given several notices to the Respondent but he had refused to vacate and had in fact built a small dwelling house on the piece of land. A further written notice dated 1st February 1983 was given to the Respondent, but in spite of that he still refused to vacate.

This dispute led to the following chronology of events that give rise to this appeal:

1. On 23rd July, 1986, the Appellants filed Writ of Summons claiming possession and an injunction to restrain the Respondent from trespassing on the land they claimed was theirs, plus damages.
2. On 9th September, 1986 the Writ of Summons was served on the Respondent.
3. On 13th July, 1988 the Appellants issued and served on the Respondent Notice of Intention to Proceed, dated 9th June, 1988.
4. On 8th September, 1988 the Appellants served on the Respondent a Notice of Motion dated 23rd August, 1988 seeking Judgment.

5. On 23rd September, 1988, the Motion for Judgment was adjourned to 25th November, 1988. The Respondent did appear on the Motion.
6. On 25th November, 1988, the Court in Chambers granted the orders sought by the Appellants. The Respondent was not present at this hearing.
7. On 25th January, 1989, the sealed order for possession and injunction were served on the Respondent.
8. On 23rd August, 1989 the Appellants filed application seeking leave to issue Writ of Possession.
9. The application for leave to issue Writ of Possession was served on the Respondent on 2nd September, 1989.
10. On 14th September, 1989, the Respondent filed application seeking to set aside the Order of 25th November, 1988, and to be given leave to defend.

We note that the Respondent (Defendant) was required to cause an appearance to be entered for him within 8 days after service of the Writ of Summons on him. The Respondent had failed to enter appearance, or give notice of intention to defend, for nearly 2 years. A notice of intention to proceed was served on

the Respondent on 13th July, 1988, still the Respondent did not respond. Again a motion seeking, inter alia, vacant possession was served on the Respondent on 8th September, 1988. Again the Respondent took no action.

On 23rd September, 1988 when the motion was returned, it appears that the Respondent did attend Court. The motion was adjourned to be heard on 25th November, 1988, on which date the Respondent did not appear and the Court proceeded to grant the orders sought. A sealed copy of this order was served on the Respondent on 25th January, 1989.

Nearly eight months had gone by from service of the order with no action on the part of the Respondent to seek to set the order aside until he was served on 2nd September, 1989 with an application by the Appellants seeking leave to issue Writ of Possession, returnable on 15th September, 1989.

Only then did the Respondent, belatedly on 15th September, 1989 file application seeking to set aside the Default Judgment of 25th November, 1988, and to be allowed leave to defend.

He filed two affidavits supporting his application; the first by himself annexing a proposed Statement of Defence and a second by one Krishna Sami Mudaliar, the Chairman of Wairuku Land Purchase Co-operative Society Limited.

The grounds relied upon by the Respondent in his own affidavit were:

1. That his parents were tenant of the land that he and his brothers occupy for a long time;
2. That he went to see the Plaintiff solicitor who advised him to see Bal Ram who was the Plaintiff's agent;
3. That he, in the presence of Hari Krishna, Krishna Sami Mudaliar and Mr. Kirpal, an officer of Co-operative Department, saw Bal Ram who duly agreed to discontinue the action because he, Moran Ali and his brothers were the tenants, and
4. That he relied on Bal Ram's assurance and did not do anything in the matter.

In the proposed Defence it was pleaded that since 1957 his mother had a 99 year tenancy at an annual rental of \$20 and since she died, he and his brothers are entitled to succeed.

Krishna Sami Mudaliar deposed in his affidavit that in or about September, 1988 he and others with the Respondent did have a discussion with the Plaintiff's agent Bal Ram. He deposed that Bal Ram had been the agent for the Plaintiffs and he agreed to withdraw and discontinue the action against the Respondent.

That was the Respondents contention for not having taken any action at all in the matter.

Mr. Bal Ram filed affidavit denying he had full authority on behalf of the Plaintiffs. He agreed that Krishna Sami Mudaliar, Kirpal and the Respondent did go to see him but that he did not agree to discontinue the action.

The learned trial Judge alluded to the Respondents contention that Bal Ram had promised he would withdraw the action. His Lordship then noted that "it must be admitted that there was not only delay from the side of the Defendant but considerable delay from the side of the Plaintiffs in bringing the matter to finality after the Writ was served on the Defendant". His Lordship then held: "In these circumstances I feel the order made by this Court on 25th day of November, 1988 be set aside and leave be given to the Defendant to defend".

The following grounds of appeal were taken:

*"1. That the Learned Judge erred in law and in fact and applied wrong principles in dissolving and/or setting aside the Injunction Order made on the 25th day of November, 1989.*

*2. The Learned Judge erred in law and in fact in setting aside and/or in dissolving the Injunction and giving the Defendant relief when the Defendant was in blatant breach and defiance of a legitimate Court Order.*

*3. The Learned Judge erred in law and in fact in setting aside Injunction Order without there being a proper application for dissolution of Injunction.*

4. *The Learned Judge erred in setting aside and/or dissolving the Court Order when the Defendant was in contempt and had not purged his contempt.*

5. *The Learned Judge erred in law and in fact in not considering whether the defence had any merit.*

6. *The Learned Judge erred in law and in fact in exercising his discretion when there was no affidavit of merit and further erred in setting aside or dissolving the judgment without there being any adequate explanation for delay in applying to set aside judgment by the Defendant."*

For the reasons we give in relation to grounds 5 and 6 we do not consider it necessary to deal with the issues raised in grounds 1 to 4.

#### Grounds 5 and 6

The Default Judgment obtained on 25th November, 1988 was regularly obtained pursuant to Order 13 rule 4 and in compliance with Order 32 rule 5. It is also true that the Court has discretionary power to set aside such an order obtained ex parte, on such terms as it thinks just - per Order 13 rule 10 and Order 32 rule 6.

However, in order for the Court to properly exercise the discretion whether or not to set aside such a regularly obtained Default Judgment, it has been consistently held that certain basic preconditions must be fulfilled by the party making the application. These are:

1. Reasons why Judgment was allowed to be entered by default.
2. Application must be made promptly and without delay.

3. An affidavit deposing to facts that show that the Defendant has a defence on the merits.

It is not possible to conclude from the brief ruling of the trial Judge whether these issues exercised his mind, although we note from the records Plaintiffs Counsel submitted written submissions addressing them. However, we do deal with them now.

The only reason advanced by the Respondent as to why he had taken no action and allowed Judgment to be entered was that he and others had seen Bal Ram, who was the Plaintiffs agent and he had agreed to discontinue the action. This was supported by Krishna Mudaliar who said this was in or about September, 1988.

We note however that he appeared on the return date of the motion seeking Judgment on 23rd September, 1988 when it was adjourned to 25th November, 1988. He did not appear then. He was served a sealed copy of the Order of 25th November, 1988 on 25th January, 1989. He took no action for nearly 8 months. The notice of motion seeking Judgment, the obtaining of the order and service of a sealed copy of it to the Respondent were all after the time in about September 1988 that he had discussion with Bal Ram.

We are therefore not convinced that that reason sufficiently explains why Judgment was allowed to be entered by default.

The Respondent was served a sealed copy of the order on 25th January, 1989. He took no action until he was served on 2nd September, 1989 with an application for leave to issue Writ of Possession returnable on 15th September, 1989. He belatedly filed application to set aside the order of 25th November, 1988, on 15th September, 1989, nearly 8 months from the date he was served with a sealed copy of the order.

No adequate explanation has been advanced for this delay. In these circumstances we do not believe that application was made promptly and without delay to set aside the order.

Finally, we do not consider that the Respondents affidavit sufficiently disclose facts that show he has defence on the merits. The fact that his parents were tenants does not establish any claim of right in him. The proposed defence do not plead any defence on the merits.

In the end result we are of the opinion that the learned Judge erred in the exercise of his discretion to set aside the order of 25th November, 1988 and granted leave to the Respondent to defend. The appeal is therefore allowed and we affirm the order of the Court of 25th November, 1988 and grant leave to the Appellants (Plaintiffs) to issue Writ of Possession, but we propose to hear the parties whether any time should be allowed to the Respondent (Defendant) to vacate.

Costs of this appeal and the applications in the High Court  
by Appellants (Plaintiffs).

*Michael Helsham*

.....  
Justice Michael Helsham  
President, Fiji Court of Appeal

*Sir Moti Tikaram*

.....  
Sir Moti Tikaram  
Resident Judge of Appeal

*Amiet*

.....  
Justice Arnold Amet  
Justice of Appeal