

IN THE FIJI COURT OF APPEAL

290

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 43 OF 1990

(Civil Action No. 1173 of 1984)

BETWEEN:

SURESH SUSHIL CHANDRA CHARAN
ANURADHA CHARAN

APPELLANTS

-and-

SUVA CITY COUNCIL

RESPONDENT

Mr. G. P. Shankar for the Appellants
Ms. T. Jayatilleke for the Respondent

Date of Hearing : 18th June, 1992

Date of Delivery of Judgment : 18th August, 1992

J U D G M E N T

This is an appeal of a Judgment by Justice Byrne delivered on 12th July 1990.

At all times material to this appeal the Appellants (Plaintiffs) were trading under the name of Check Point Restaurant were the lessees of the shop premises whence their business was carried on. The Respondent alleged that their rent had fallen into arrears and it attempted to issue distress for the rent that was claimed to be owing.

Two or three notices purporting to be issued pursuant to the Distress for Rent Act were issued, and the Bailiff, on 9th November 1984, proceeded to seize goods of the Plaintiffs; this seizure was made pursuant to the second or third notice, it does not matter which, but which has been referred to as the 2nd notice or 2nd distress. The goods so seized were carried away and apparently sold.

The Appellants commenced proceedings on 29th November, 1984 in the High Court. A number of matters were alleged as giving rise to a cause of action, and damages for what was claimed to be wrongful distress were sought. What concerns this Court now is that aspect which was a claim that the distress had been illegally or invalidly levied, there had been wrongful seizure of the goods of the Appellants and that they were entitled to the replacement of the goods or their value and damages on a number of grounds.

The case was heard by a Judge of the High Court who gave judgment in 1987. The matter was taken on appeal by the Appellants to the Court of Appeal and that Court gave judgment on 9th September 1988. The judgment dealt with three matters that it was said had been decided by the trial Judge. These were called the main issues in the appeal and were as follows:

"(a) *the malicious prosecution in the breach of covenant of the peaceful enjoyment of the premises.*

(b) 1st distress under the wrong warrant.

(c) 2nd distress - removing goods and chattels without first seizing, distraining or impounding them."

(record pp 25-6)

In respect of the first and second of these issues the Court of Appeal held against Appellants. The third involved the wrongful distress claim under the second notice, and the alleged unlawful removal. Of this the Court said in its judgment:

"We have however to consider whether the distress seizure and sale of the chattels was lawfully exercised and if not whether the Respondent is liable for the bailiff's actions.

In view of the course of action we propose to take we have purposely not fully considered the appellants' argument."

The judgment of the Court of Appeal continued thus (p 6, record p 30):

"On a comparison of the inventory the bailiff made when he levied distress, with the chattels which the auctioneers listed in his dockets indicating chattels of the appellants which he sold, there are some items which are not listed on the inventory. There are also perishable items sold which under section 4 of the Distress for Rent Act are exempt from distress...

As to those perishable items, whether the appellants should have proceeded under subsection (2) of section 4 of the Act is a matter we do not have to consider. That subsection provides a procedure to be followed if exempt goods are seized. Application is made to a magistrate.

There could also be legal argument regarding section 3(2) if the distress was levied otherwise than in accordance with the Act. That subsection provides a penalty for a bailiff who levies distress contrary to the Act.

The appellants also claim that more chattels than were listed and sold were also taken away illegally."

After stating that no rules had been made under the Act for regulating seizure and sale of chattels, the Court of Appeal went on:

"There could, therefore, be legal argument as to whether the council could be held liable for the bailiff seizing goods he had not listed in the Notice of Distress.

The learned Judge considered none of these matters which we have raised. He is no longer in Fiji and the only course open to us is to order a rehearing of the claim for damages arising out of the second seizure.

We allow the appeal on the third issue and set aside that part of the learned judge's judgment relating to the claims of the appellants based on the alleged illegality or irregularity of the second distress."
(ibid)

The matter went back before a Judge of the High Court, but we do not have the terms of the actual order that was made.

It came on for hearing in September 1989. It is quite clear that the matter of the validity of the distress generally was raised in evidence and argued; we will refer to this as total invalidity. It is also clear that there was raised as a separate issue the removal of a number of goods that were not on

what was called the bailiff's inventory; for convenience we will refer to this as partial invalidity.

The Judge dealt with the matter of partial invalidity. But as to the matter of total invalidity the Judge said:

"In essence Mr. Charan argued that neither he nor his wife had ever been given a Notice of Distress as required by the Distress of Rent Act Cap. 36 and consequently the whole seizure effected by the Bailiff was illegal. It is not clear reading the judgment of the Court of Appeal whether the Plaintiffs made such a claim there but I believe that if they had the Court would have mentioned it in its judgment and it did not do so. The Court however at pages 5 and 6 of the judgment said that they had to consider whether the Distress seizure and sale of the Plaintiffs' chattels was lawfully exercised and if not whether the Defendant is liable for the Bailiff's actions. This resolves itself into a question of whether the Bailiff seized goods which he was not authorised in law to seize and if so whether the Defendant is responsible in law for that illegal seizure.

In their evidence the Plaintiffs claim that more chattels than were listed on an inventory tendered as Exhibit P.4(b) were taken away illegally and sold. In Exhibit P.5 tendered by the Plaintiffs it is alleged that some 35 items were seized under the Distress. Items Nos. 16 to 32 are perishables and so exempt from seizure under Section 4(1)(e) of the Act. This was not disputed by Counsel for the Defendant but any claim for loss arising from such seizure must be made before a Resident Magistrate and not this Court.

According to the Plaintiffs the following goods which were not part of the Inventory given to them by the Bailiff were seized and removed:"

(record pp 75-6, emphasis added). Then there appears a list of the goods together with the value of each, totalling \$1644.50.

It seems clear to us that the reference which his Lordship made to pages 5 and 6 of the judgment of the Court of Appeal was to that portion which referred to partial invalidity and which we have quoted earlier. This is made clearer by the fact that after canvassing certain matters the Judge went on (record pp 78-79):

"No Rules have been made by the Chief Justice so that only those in the Act apply. In my view it is quite clear that the Bailiff is empowered by law only to seize the goods which he specifies in an Inventory appended to the Notice of Distress. This is clear from Form 5 but it is also the case at common law. The undisputed evidence before me is that the various items which I have mentioned earlier in this judgment were not on the inventory given by the Bailiff but were nevertheless seized and removed by him. Consequently it is clear in my view that such seizure was unlawful and the Plaintiffs are entitled to damages."

After canvassing various other matters his Lordship concluded (record p 80):

"I am satisfied on the balance of the probabilities that he did not and that the Defendant is liable to the Plaintiffs in damages for the goods illegally distrained. Accordingly there will be judgment for the Plaintiffs in the sum of \$1644.50."

There seems no doubt that the matter of total invalidity was never dealt with by the Judge, and hence any question of damages not considered. It is also clear that the matter of damages arising out of the partial invalidity was not alluded

to, although this appears to have been raised at the hearing (record p 73).

We therefore reached the conclusion that the appeal should be allowed.

We add further that it was submitted on behalf of the Appellants that the Court on the re-hearing should consider a claim for conversion of the goods that it is claimed were wrongly removed from the Appellants' premises. It is quite clear from the record that this matter was not raised by the Appellants at the hearing before his Lordship and that he confined the evidence as appears at record p 66. The matter was not thereafter attempted to be raised, and it was not mentioned in evidence, argument or in the judgment. Counsel for the Appellants virtually conceded that it could not be raised in this appeal. With that we agree.

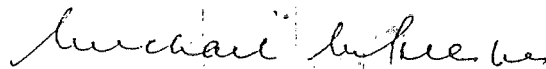
We mention that we have not overlooked a submission made on behalf of the Respondent that the appeal should not be allowed because the Appellants accepted the amount which was found by his Lordship to be the value of the goods taken in the partially invalid distress. This amount was offered by the Respondent and accepted by the Appellants after the Appellants has instituted this appeal and cannot be taken as a waiver of their right to pursue the appeal or any other reason why the appeal should not

have been heard by this Court. The same would apply to the further hearing.

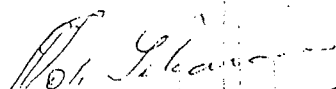
We note that the amended grounds of appeal seek the setting aside of two interlocutory orders of the High Court. This matter was not raised before us, and must be treated as having been abandoned.

The order of the Court is therefore that the appeal be allowed on ground 1 of the Amended Notice and Additional Grounds of Appeal to the extent hereafter indicated and that all other grounds of appeal be dismissed. The matter is remitted to the High Court for hearing and determination of the issue referred to herein as total invalidity and to assess damages in the event that liability for damages is established.

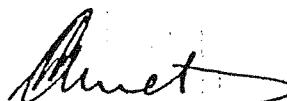
Appellants costs of appeal to be their costs in the proceedings.



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



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Sir Moti Tikaram
Resident Judge of Appeal



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Mr. Justice Arnold Amet
Judge of Appeal