IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 47 OF 1992
(High Court Civil Action No. 146 of 1991)

BETWEEN:

DEVI CHAND — APPELLANT

-and-

AUSTRALIA AND NEW ZEALAND BANKING GROUP — RESPONDENT

Mr H M Patel for the Appellant
Mr Ram Chand for the Respondent

Date of Hearing : 3rd February 1994
Date of Delivery of Judgment : 9th February 1994

JUDGMENT OF THE COURT

The appellant is the lessee and occupier of the land in Crown Lease No. 8719 being Lot 12 Plan R 167 known as Lakena Manoca (Part of) in the Island of Tailevu in the District of Bau. In 1986 he executed a mortgage in favour of the Bank of New Zealand. In terms of Decree No. 21 of 6 June 1991 that mortgage became vested in the Respondent.

On 10 August 1989 the Respondent served on the Appellant a Mortgage Sale notice by reason of default by the Appellant in payments due under the mortgage. There was a subsequent sale of the property but the Appellant remained in occupation. The Respondent then applied by summons under s. 169 of the Land Transfer Act cap. 131 for an order for immediate possession of the property.

It should be noted that the Respondent was not one of the classes of persons specified under s.169 as being entitled to apply under that Section, and much of the confusion which later arose must be attributed to this incorrect attempt to use the provisions of that section.

The summons came on for hearing before Jayaratne J. who does not appear to have drawn attention to the Respondent's lack of standing, but who turned his attention to the question of whether there was strict evidence of proof of a notice to quit. If the proceedings had been correctly commenced under s.169 then the question of proof of a notice to quit would have been an essential matter, and perhaps it was this which diverted His Lordship's attention from the fact that the summons should have been dismissed out of hand.

In the result, after considering the evidence, Jayaratne J said, **"I have no such proof of service of quit notice before me and I consider it fatal."** His Lordship then went on to say **"Mr Patel also said there are triable issues and suggested an open court trial without depending (on) affidavit evidence. I fix the case for open court hearing on all issues."**

The Respondent then filed a Statement of Claim seeking an order for immediate possession and damages and other relief. To this the Appellant filed a Statement of Defence and the matter then followed the course of a normal action. It came before Byrne J who, on 23 September 1992, held that a notice to quit had been

served and made an order for immediate possession. From that Judgment the Appellant now appeals.

The Notice of Appeal contained three grounds of appeal, but at the hearing counsel for the Appellant abandoned the third ground (which had four parts to it) and relied solely on the other two grounds which were argued together. The result was that there was only a single question for consideration by this court, namely, whether, in view of the Ruling of Jayaratne J. as to service it was open to Byrne J. to consider and pronounce upon the question of service, and, if it was, whether his finding that there had been service was correct.

It was argued first that the Ruling of Jayaratne J. which we have set out earlier determined the matter and amounted, in effect, to res judicata. We think this argument can be briefly disposed of. At no stage did Jayaratne J. find that service had not been effected. He found no more than that there was before him no sufficient proof. Plainly, it remained open in other proceedings for the matter of service to be brought before the Court on proper evidence.

The question then was whether there was before Byrne J. evidence which entitled him to hold that service had in fact been effected.

This matter became somewhat confused by the fact that, in the first affidavit of the Respondent's Manager, Mr Tooying Koong, he

deposed that the Appellant had been served with a Notice to Quit dated 4 October 1990. In a subsequent affidavit he sought to correct this by saying that the Notice of 4 October 1990 was merely a draft prepared by the Bank's solicitors, and that a fresh notice was typed on the Bank's letterhead and this was the notice which was served on the Appellant on 9 October 1990. The Appellant consistently denied that he had ever been served with a Notice to Quit.

At the hearing before Byrne J. oral evidence was given by Mr Koong that the Notice of 9 October 1990 was served on the Appellant in Mr Koong's presence by Mr Praveen Chand, an employee of the Bank. Mr Chand then also gave oral evidence that he had served the document on that day. Notwithstanding the Appellant's denial of having received it, the Judge was entitled to accept the evidence for the Respondent and to hold, as he did, that service had been effected.

This being the case the order for possession was correctly made and the appeal must be dismissed.

The Respondent is entitled to costs, but these must be on a limited basis. On the summons under s. 169 Jayaratne J. ordered that costs should be in the cause. In view of the fact that the summons under s. 169 should never have been issued we do not

consider the Respondent is entitled to any costs for that proceeding. It is entitled to costs on the hearing before Byrne J., and on the appeal.

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(Sir Moti Tikaram)
Acting President Fiji Court of Appeal

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(Sir Peter Quilliam)
Justice of Appeal

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Mr Justice Savage
Justice of Appeal