IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 42 of 1987

Between:

NARSEY POLRA — Appellant

- and -

R.C. KUMAR & COMPANY LIMITED — Respondent

Mr. G.P. Shankar for the Appellant
Mr. H.K. Nagin for the Respondent

Date of Hearing: 14th September, 1988.
Delivery of Judgment: 11th November, 1988.

JUDGMENT

The appellant instituted two civil actions against the respondent, namely No. 634 of 1985 and 305 of 1986.

The first action was a claim for $9,199.98 being the balance alleged to be owing under an Agreement dated the 1st October, 1984.

Under that agreement the appellant sold to the respondent his stock-in-trade and "other effects".

The second action claims the sum of $33,435.89 alleged to be the balance owing for goods sold and delivered. The statement of claim alleges that the defendant/respondent agreed to pay interest but the rate is not stated nor is a claim for interest included in the claim for relief.

We propose to first consider the later action 305 of 1986 which was instituted by writ filed on the 3rd June, 1986.

On the 18th July, 1986 the appellant purported to enter final judgment by default on the grounds that the defendant had failed to deliver a defence. The record indicates that a defence was filed in court on 26.6.86 but the record is silent as to whether it was delivered to the appellant's solicitor.

The appellant then purported to apply under Order 14 of the High Court Rules for judgment for $33,435.89 and costs.

Although the summons for judgment is not in the record, the appellant's affidavit in support indicates it was sworn on the 22nd July, 1986 and filed the same day. Mr. Shankar concedes the application under Order 14 was made after final judgment was entered up and perfected on the 18th July, 1986.

When asked whether the appellant could legally seek an order for judgment under Order 14 in the circumstances, Mr. Shankar contended it was in order because the judgment was set aside by consent before the hearing of the Order 14 application.

Mr. Shankar and Mr. Nagin appeared before Mr. Justice Kearsley on the 25th July, 1986 presumably as a result of the Order 14 application, when the default judgment was set aside by consent. No formal application to set aside judgment was apparently made.

The Learned Judge then proceeded to make a number of orders regarding the Order 14 application.

Neither counsel nor the Learned Judge appreciated that the Order 14 application was a nullity and should not have been before the court prior to the action being set aside. It purported to seek summary judgment in action 305 of 1986, an action which had been terminated or concluded by entry of what appears to be a regular final judgment.

Notwithstanding this situation the Learned Judge handed down a decision dated the 16th January, 1987 dismissing the Order 14 application.

From that decision the appellant now appeals on two grounds :

"(a) THAT the learned hearing Judge failed to properly evaluate and consider the affidavit evidence and other materials before the Court;

(b) THAT the orders made by the supreme Court are wrong and/or erroneous."

Mr. Shankar's Notice of Appeal refers to a decision of the Learned Judge dated the 16th January, 1987. There were in fact two decisions by the Learned Judge both dated the 16th January, 1987, the other being in respect of an application brought by the respondent in Action 634 of 1985 wherein the respondent sought the setting aside of the default judgment entered in that action and consolidation of the two actions.

Mr. Shankar should have properly framed his notice to disclose that the appeal was in respect of both decisions or commenced two appeals one in respect of each action.

Judgment in default of filing of a defence in Action 634 of 1985 was entered on the 26th November, 1985.

The record indicates that Mr. Nagin wrote to Mr. Shankar's firm by letter dated 1st November, 1985 advising that a statement of defence would be filed and asking for leave until 230th November, 1985 to file a defence.

There is nothing in the record to indicate that Mr. Shankar refused to extend time for a defence to be filed and four days before the 30th November judgment by default was entered.

While the rules are clear, it is a very common practice between solicitors everywhere to seek extension of time to file a pleading. In civil actions by consent of parties rules can be waived.

Mr. Nagin in his affidavit in support of the application to set aside judgment states he had no reply to that letter.

In view of the order we propose to make we would only comment that Mr. Nagin's letter called for the courtesy of a reply even if it was only to inform Mr. Nagin that extension of time was not granted.

Mr. Nagin's application for time was made before the time for filing of defence had expired and he could have had a defence of sorts filed if advised that extension of time was refused or he could have sought extension of time from the court.

When Mr. Nagin became aware that judgment had been entered up before the 30th November, 1985 he stated in a letter of 10th December, 1985 written to Mr. Shankar's firm :

"We are quite taken aback by such action by your firm in view of the fact that we have accommodated your Mr. Shankar on numerous occasions when he was in difficulty."

The appellant took the matter further and by notice dated 9th December, 1985 initiated action to wind up the Company by notice given under the provisions of the Companies Act.

The Order 14 application in Action 305 in 1986 was a complete nullity since that action had been concluded by final judgment. The Learned Judge should not have entertained, at the hearing of the Order 14, an informal application to set aside the judgment.

This is sufficient to dispose of the appeal against the Learned Judge's dismissal of the appellant's Order 14 application. We would go further and state that if the Learned Judge had jurisdiction to entertain the application the evidence before him supported his decision and we would not in any event interfere with it.

So far as the second decision is concerned, in Action 634 of 1986 we would also not disturb the Learned Judge's decision.

The application to set aside judgment was in our view properly allowed. The Learned Judge gave reasons for his decision with which we agree.

The Learned Judge (inter alia) criticised the statement of claim pointing out that it was pleaded that a sum due under a written agreement provided for the balance owing to be payable by instalments and that there was an implied term that in default the whole balance became due and payable.

The statement of claim was defective in that it did not allege that the respondent had made default. That was a fatal omission and judgment could not legally have been entered up without first remedying that defect by amendment of the statement of claim. That would have entailed reservice of the statement of claim.

We see no need to consider Mr. Nagin's legal objections.

On the evidence before him the Learned Judge in any event was correct in setting aside the judgment on the merits of the respondent's application.

As regards the order consolidating the two actions Mr. Nagin's application preceded entry of judgment in Action 305 of 1986. Whether leave was required to appeal against that order is a matter we do not decide since we are firmly of the view that accounts between the parties will have to be fully investigated in both actions to arrive at the balance owing by one party to the other and consolidation will ensure that the position regarding the respective claims will be investigated and will be disposed of at the one hearing with a saving in time and or expense to both parties.

The appeal is dismissed with costs to the respondent.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal