

IN THE FIJI COURT OF APPEAL  
CIVIL APPEAL NO. 48 OF 1987

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Between:

MOTOR GROUP OF FIJI LIMITED

Appellant

- and -

COMMISSIONER OF INLAND REVENUE

Respondent

Mr. V. Parmanandam for the Appellant  
Mr. G.V. Leung for the Respondent

Date of Hearing: 29 June 1988

Delivery of Judgment: 8 July 1988

JUDGMENT OF THE COURT

This is an appeal against the decision of Rooney J. whereby he refused the Appellant/Defendant's application to set aside judgment entered against it for \$8,023.07 in default of filing an appearance.

The Respondent's claim was for arrears of tax upon employees emoluments (\$6,418.46) and late payment penalty thereon for the year 1985 (\$1,604.61).

The Appellant moved the Court to set aside judgment on grounds contained in the affidavit of Hazrat Ali Asgar a director of the Appellant Company.

His affidavit alleged, inter alia:-

- "2. THAT the Particulars of Claim says a balance outstanding of \$6,418.46 (SIX THOUSAND FOUR HUNDRED EIGHTEEN DOLLARS AND FORTY SIX CENTS) without giving any particulars.
3. THAT the amount payable to each employee is not shown.
4. THAT I am informed and do verily believe that one TONY FINAMORE has been treated as an employee when in fact he was a Consultant and that his fees form the bulk of this claim."

Rooney J's order which gives rise to this appeal reads as follows:-

"Application to set aside judgment is refused on the ground that no defence has been disclosed in the affidavit of Hazrat Ali Asgar dated 10.1.87."

At the hearing of this appeal Mr. Parmanandam urged us to allow the appeal on the ground that the learned judge wrongly exercised his discretion in refusing the application. He submitted that this arose from the failure of the judge to properly scrutinize Hazrat Ali Asgar's affidavit which clearly raised a triable issue.

It is significant that the Appellant's contention that Tony Finamore has been treated as employee when in fact he was a consultant and that his fees formed the bulk of this claim, was neither challenged nor denied in the Court below.

Mr. Leung, Counsel for the Appellant conceded that by definition a consultant's fees cannot be treated as employee's emoluments. He however did not concede that payments made to Tony Finamore constituted consultation fees. On the other hand he was not in a position to say whether payments made to Finamore were in fact emoluments. Therefore there was clearly in our view a triable issue which if decided in the Defendant's favour would have provided it a substantial defence on merits. Failure to recognise this fact

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has in our view led the trial judge to exercise his discretion wrongly. It was open to Rooney J. to set aside the judgment on terms. He for instance could have ordered the Defendant to pay cost to-date as a condition of setting aside judgment. We say this because the Defendant disclosed no grounds at all why it failed to enter an appearance.

As observed by Lord Atkins in Evans v. Bartlam [1937] A.C. at page 480 the principle on which the Courts act in such cases is:-

".....that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

In our opinion this appeal must succeed. The appeal is therefore allowed. The default judgment entered against Appellant on 16th October, 1986 is set aside. It is further ordered that the Appellant file a defence to Respondent's claim within 14 days of the date of the delivery of this judgment with all necessary procedural steps under the High Court Rules to be complied with thereafter.

The Appellant will have the cost of this appeal but the Respondent is to have all costs and disbursements thrown away as a result of the Appellant's failure to enter an appearance to the writ and also the cost of the application to set aside judgment entered on 16th October, 1986.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal