IN THE FIJI COURT OF APPEAL

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At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 61 OF 1990
(Civil Action No. 121 of 1984)

BETWEEN:

VIJAY PRASAD — APPELLANT

-and-

DAYA RAM — RESPONDENT

Mr. V. Maharaj for the Appellant
Mr. M. K. Sahu Khan for the Respondent

Date of Hearing : 3rd August, 1992
Date of Delivery of Judgment : 10th August, 1992

J U D G M E N T

The unfortunate history of this matter may have had some bearing on the decision which was ultimately given and on the appeal to this Court from that decision.

The plaintiff (respondent) issued a Writ with indorsed statement of claim dated 24th February 1984. The claim was for a sum owing by way of rent and for a sum owing as a result of two dishonoured cheques. There was also a claim for interest. According to an affidavit of service by the bailiff and indorsed on the Writ, it was served on the defendant (appellant) on 23rd May 1984. There was no appearance by the defendant, and judgment in default of appearance was signed on 21st August 1984. A Writ of fieri facias was issued on 27th November 1984. There is no

doubt that an attempt to levy execution on the Writ was made about this time, but it was returned unsatisfied. There is no doubt that the defendant became aware of the judgment at the same time. He claims that he was not served with the original Writ and that he only became aware of the proceedings against him and the judgment at this stage, and that, because there were no goods upon which execution could be levied, he was told that he would receive another summons and that he could take the matter up then.

He did receive another summons, a judgment debtor summons returnable before a Magistrate early in 1986. He took the matter up there, was told that he could make an application to have the judgment set aside; the summons was adjourned to permit him to do so.

By summons dated 12th May 1986 the defendant applied to the High Court to have the judgment set aside "pursuant to Order 13 Rule 9 of the Rules of the Supreme Court and the inherent powers of the Court" (indorsement on summons). It is relevant to set out the grounds upon which the application was made. They were:

> *"(1) The sum claimed was not liquidated damages;*
> *(2) The claim was not for liquidated damages only;*
> *(3) The eight day after service of Writ had not expired;*
> *(4) The affidavit of Service was defective,*
>
> *and on the grounds appearing in the affidavit filed in support thereof...."*

In the affidavit in support the defendant claimed that he had never been served with the original Writ. He claimed to have a

good defence, and annexed a copy of his intended defence. In that he alleged that there were no arrears of rent owing, but that in any event any rent owing was irrecoverable on the ground of illegality.

The matter of the application to set aside the judgment first came before a Judge of the High Court on 11th July 1986. It was adjourned on that day, and on 10 subsequent occasions up to 7th October 1988. On that last mentioned day there was no appearance and the application was struck out.

On 26th July 1989 a motion was filed on behalf of the defendant making application "to re-instate the defendant's application to set aside the default entered herein....." (sic). That application was made "pursuant to Order 13 Rule 9 of the Rules of the High Court".

This came before a Judge on 8th September 1989. It was adjourned on that day and on 3 subsequent occasions. On 11th May 1990 it came before Mr. Justice Saunders in Chambers for hearing. The total record of what ensued is this:

In Chambers

No appln ever made to set aside -

A. K. Narayan - No affdvt in reply - no service of writ etc

Ct Let it be set aside on condition the amount claimed is paid into Ct within 30 days.

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The formal order was drawn up and entered on 23rd November 1990. It is clear that the Judge granted the motion to restore and then made an order on the application to set aside the judgment.

A notice of appeal against that order was filed by the defendant on 27th November 1990. In it the he sought an order that that part of the order of the Judge imposing the condition of payment into Court be set aside. The grounds of the appeal were:

> *"1. THAT the Learned Judge erred in law and in fact in imposing a condition of payment in setting aside the said Judgement when the Judgement was irregular.*
>
> *2. THAT the Learned Judge failed to consider the evidence of the Appellant that the Writ of Summons had not been served on the Appellant.*
>
> *3. THAT the Learned Judge failed to consider all the relevant matters in exercising his discretion to impose the condition upon setting aside when the Appellant had a good defence on the merits and in the circumstances stated in his affidavit sworn on the 12th day of May, 1986."*

In spite of submissions to the contrary it is quite clear that there was power to make the order that was made. Order 13 of the High Court Rules deals with "Failure to Give Notice of Intention to Defend". Rule 1 of the Order deals with the power to sign judgment where a Writ is indorsed with a claim for a liquidated demand and the defendant fails to give notice of intention to defend. Rule 10, headed "Setting aside Judgment", states:

> *"10. Without prejudice to rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

The High Court Rules which came into force on 31st March 1988 repealed the rules theretofore applicable and governed the present matter, even though the original Writ was issued in 1984. The contrary was but faintly argued.

Another submission can be as quickly disposed of. It was said that the claim was not for a liquidated amount, and that the Writ was therefore irregular. It is quite clear that the Writ was for a liquidated amount; it was a claim for a specific sum owing by way of arrears of rent, and for a specific sum owing as a result of the dishonour of two cheques. The addition of a claim for interest in the manner claimed in the Writ in this case does not prevent the claim from being treated as a claim for a liquidated demand (O.13 r.1)

One of the main grounds of appeal was that the Judge should not have imposed the condition which he did in the light of sworn evidence that the Writ had not been served on the defendant. Now there was sworn evidence that the Writ had been served; it was indorsed on the writ. This should have been known at the time the application to set aside the judgment was made. It seems to be explicit in grounds (3) and (4) of that application, as set out above. However, the denial of service, or non-service, seems to have been the matter upon which the defendant relied, which is supported by the cryptic note of the

Judge "No affdvt in reply - no service of writ etc". There being in fact an affidavit which asserted that service had been properly effected, it was not necessary at that stage of the proceedings for the plaintiff to file another one in reply to the defendant's allegation that there had not been service. The absence of any affidavit in reply was not, therefore, a matter from which the defendant could obtain any assistance in the application. It is unfortunate that the appeal book or record book did not include the bailiff's affidavit, and counsel for the defendant before us was not aware of the existance of the bailiff's affidavit.

The only other matter that was raised by the defendant in this appeal as a reason for removing the condition imposed by the Judge was again a reliance upon the absence of any reply to the assertions in the affidavit of the defendant. It will be recalled that annexed to the affidavit in support of the application to set aside the default judgment there was a draft statement of defence. In that defence it was asserted that any moneys claimed to be owing by way of arrears of rent were irrecoverable because the premises involved were "covered" by a certain Native Lease, and that the consent of the Native Land Trust Board had not been obtained to any lease, which rendered it illegal. It was claimed that this assertion had not been replied to by the plaintiff. It was also claimed that this showed that the defendant had a good defence on the merits, and that in the absence of any reply it was not a proper exercise of his discretion for the Judge to impose the condition which he

did. As mentioned earlier, the note of the Judge makes no reference to this, whether the matter was raised or not, and what reliance if any he placed upon it. The fact that the matter was dealt with in Chambers no doubt explains the absence of any reasons.

In the present case the assertion of illegality, or indeed other claims in the proposed statement of defence, which were not replied to do not vitiate the exercise of the discretion of the Judge. Those assertions were, of course, essential if the defendant were to be allowed to have the judgment set aside and to be let in to defend. But there is no rule of law which says that the assertions which a person in the position of the defendant makes in order to achieve a status to enable him to obtain an order to set aside a judgment must be denied or otherwise dealt with by the other party before a Judge can exercise his discretion whether to make or refuse an order, and whether or not to impose conditions in the event that he does do so. Each case must depend on its own facts.

In this case the matter had been pending for no less than 6 years. Judgment in default of appearance had been signed. The defendant's application to have that judgment set aside had been struck out for want of appearance by the defendant. That application did not raise as a specific ground the fact that he had not been served with the original Writ; rather it seems to point to technical deficiences relating to service. The Judge was entitled to adopt a course that (i) would ensure that the

matter was finally dealt with (ii) that this would happen promptly and (iii) that where, as here, the defendant admitted being a tenant of the plaintiff, there would be funds to meet any rent that was found to be owing. We find no reason to interfere with the exercise of his discretion in the manner that the Judge adopted.

The formal order of the Court will be: Appeal dismissed. Order of the Judge made on 11th May 1990 is affirmed except that the amount claimed in the Writ, namely $3,234.00 is to be paid into Court by the defendant on or before 9th day of September, 1992. In the event that such amount is not so paid the application to set aside the judgment entered on 21st August 1984 shall stand dismissed.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal