IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 19 OF 1993
(High Court Civil Action No. 266 of 1991)

BETWEEN

DHIRAJ LAL HEMRAJ
SAMUEL DUGALD HENDERSON — APPELLANTS

and

VINOD KUMAR RAMANLAL PATEL — RESPONDENT

Mr C B Young for the Appellants
Dr Sahu Khan for the Respondent

Date of Hearing : 15th February, 1994
Date of Delivery of Judgment : 24th February, 1994

JUDGMENT OF THE COURT

In these proceedings the Court was constituted by two Judges. The Acting President had certified that in his opinion it was impracticable to summon a Court of three Judges. The Court was, therefore, duly constituted pursuant to section 6(2) of the Court of Appeal Act (Cap.12). At the commencement of the hearing of the appeal we informed counsel of that fact; counsel for both parties stated that they had no objection to the constitution of the Court by two Judges.

This Appeal comes to this Court by way of leave, granted by the Honourable Mr Justice Saunders on the 7th May 1993, to appeal from an Order made by him on 23rd April 1993.

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That Order was made by the learned Judge after hearing an application by the appellants (plaintiffs in High Court Action No. 266/1991), seeking summary judgment under Order 14 Rule 2 against the respondent (defendant) in the sum of $431,686.64 together with interest. The application was refused with costs awarded to the defendant. The formal Order of His Lordship sealed on 11 May 1993 concluded with these words: "It is this **day ordered that the Application for Summary Judgment under Order XIV is refused with costs to be taxed."**

In his reasons for judgment delivered on 23 April, 1993, His Lordship concluded with these words :- **"The application is refused with costs to defendant."**

The acknowledgment of service filed on 28 October 1991 records inter alia, **"The defendant does intend to contest the proceedings."**

Accordingly it is relevant to note that the form of the plaintiffs' (appellants') summons and the contents of the supporting affidavit were unexceptionable, being sufficient compliance with Rule 2 and, without more, would have justified an order for judgment for the plaintiffs in the form sought.

Again it is worth noting at this stage that under rule 3, headed Judgment for Plaintiff, unless the Court, on the hearing, either dismisses the application or the defendant satisfies the Court that there ought be a trial, it will give such judgment for the plaintiff as it deems fit on the material before it.

In the present case there was no ground for dismissing the application, as that term has been interpreted and applied under this rule by courts over many years. (See the following references in the White Book (1991): 14/1/2 (preliminary requirements), 14/7/2 (dismissal where the case is not within the Order.)

Again, it is worthy of note that the defendant in his affidavit filed on 11 March 1991 asked that the application be dismissed with costs, it being frivolous and vexatious. In the second affidavit filed on his behalf he prayed to the Court that the matter be decided by full hearing of the evidence before any judgment was entered.

For reasons which will be expanded later, we are of the view that decisions under O.14 should express clearly what the judge intends should be the future course of the action. Leaving aside the question of dismissal of the summons for reasons we have discussed above, essentially, it was open to the Honourable Mr Justice Saunders to take one or more of the following courses:-

> *"(1) give unconditional leave to defend;*
>
> *(2) give conditional leave to defend;*
>
> *(3) refuse (1) and (2);*
>
> *(4) give such judgment for the applicants on their claim as he found clearly established;*
>
> *(5) make such order or orders as he thought fit, for evidence to be presented to clarify or support any portion of the alleged claim or defence in the hope of finalising the hearing of the application;*

(6) adjourn the further hearing of the application to allow any party to adduce further evidence to clarify or support any of the material before him, again in the hope of finalising the application;

(7) give such directions for the future conduct of the action as he thought fit."

This Court should not be put into the position of having to guess at, or infer, which course or courses the learned Judge had, or might have had in mind, to follow. Likewise it should not have to guess at the basis upon which Counsel brought the application for leave to appeal.

This leads us to consider the extent of the right of appeal in this class of application. Essentially the matter is covered by the provisions of S.12 of the Court of Appeal Act (Cap. 12. Ed 1978).

In considering cases on appeal from Courts in England from decisions given under their O.14 (which substantially accords with our O.14), the effect of S.18(1) of their Supreme Court Act 1981 which effected some changes to O.14 should not be overlooked. See the discussion at 14/3 -14/35 and 41 of the White Book 1991.

For present purposes the relevant sub-sections of S.12 of our Act provide as follows :-

"Ss.(1) provides that, subject to Ss.(2), an appeal lies from any decision of a judge in chambers;

Ss.(2) provides in (b) thereof that no appeal shall lie from an order of a judge giving unconditional leave to defend an action;

Ss.(2)(f) provides that no appeal will lie without the leave of the Judge or the Court of Appeal from any interlocutory order or judgment made or given by a judge of the Supreme Court except in certain specified circumstances.

Ss.(3) provides :

An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this Section."

Accordingly if unconditional leave is refused, the order is appealable as of right under S.12(1)(a).

The first question that has to be resolved (if indeed it can be), is what was the effect of His Lordship's order? Regrettably, to answer this and other questions that arise on this appeal, it is necessary to set out the material before the learned Judge in some considerable detail.

On 15 October 1991 the plaintiffs issued a writ of Summons and Statement of Claim, alleging that the plaintiffs as receivers were entitled to receive the above sum and interest from the defendant.

The claim stated that the defendant was indebted to the plaintiffs in the sum of $431,684.64 "in respect of a loan given by the Company to the defendant on or about 28 February 1990."

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The plaintiffs (appellants) issued the summons for judgment "under Order 14 Rule 2" on 7 November 1991 and supported it by an affidavit from the first named plaintiff, one of the Receivers. After swearing that he was "a joint receiver and a partner of Messrs Price Waterhouse, Chartered Accountants of Suva of R.V. Patel and Company (Merchants) Limited," he alleged that the defendant "is and was at the commencement of the action, justly and truly indebted to the plaintiff in the sum of $431,684.64, in respect of a loan given by the Company to the defendant at the defendant's request on or about 28th February 1990." No precise details of the nature or circumstances of the loan appear.

The defendant replied to this with an affidavit filed on 11th March 1992 wherein he alleged, inter alia, that :-

> *"(a) the plaintiffs had not been properly appointed as Receivers and denied their right "to make the claims in this matter";*
>
> *(b) the Company had not "loaned to me the sum of $431,684.64 as claimed" and he denied all liability therein;*
>
> *(c) the debt was not incurred and is not still owing;*
>
> *(d) there is a defence to the claim;*
>
> *(e) the application is frivolous and vexatious and should be dismissed with costs."*

The affidavit of the first mentioned plaintiff filed on 23 December 1992 replied that the challenge to the validity of the appointment of the receivers was disposed of by the decision of

the Court of Appeal in Civil Appeal No. 32 of 91 when the appointments were ruled valid.

This last mentioned affidavit also alleged that by a letter dated 24 October 1990 the defendant wrote to Messrs Coopers & Lybrand of Lautoka "who were the auditors of the Company, admitting owing a sum of $431,686.64 to R.V. Patel & Company (Merchants) Limited as at 28th of October 1990." A copy of this letter was annexed. It reads :-

> *"Messrs Coopers & Lybrand*
> *P.O. Box 54*
> *LAUTOKA*
>
> *24th October, 1990*
>
> *Dear Sir*
>
> *I, VINOD K. R. PATEL, hereby confirm that I owed M/s R.V. Patel & Co. (M) Limited unsecured loan of $431,684.64 at 28th February, 1990.*
>
> *Signed."*

No explanation was given by or on behalf of the plaintiffs for the belated production of this important document. Neither was any attempt made to enlarge upon the circumstances of its coming into being. Likewise no attempt was made to seek the leave of the learned trial judge to question or challenge the matters set out in the affidavit of the managing clerk in the office of the Solicitors for the defendant filed on 2nd April 1993. The relevant paragraphs of that affidavit are set out hereunder :-

"2. THAT I have read the contents of the Affidavit of Dhiraj Lal Hemraj sworn on the 23rd day of December, 1992 and filed herein on 13th of January, 1993 referred to as ("the said Affidavit").

3. THAT the defendant is overseas from late last year and accordingly has not been able to have a reply to the said Affidavit answered.

4. THAT we had not been able to contact the Defendant in this matter and it was only on 1st day of April, 1993 that we have been able to contact him and take instructions.

5. THAT I have personally spoken to the Defendant and he has informed me and I verily believe that the Annexure "A" in the said Affidavit was signed by him only for process of accounting on the advice of the auditors for accounting purposes and at the relevant time the auditors has asked the Defendant to so execute the same but the Defendant informed me and I verily believe that he certainly did not take the loan of $431,684.64 (FOUR HUNDRED THIRTY ONE THOUSAND SIX HUNDRED AND EIGHTY FOUR DOLLARS AND SIXTY FOUR CENTS) from the Company R.V.PATEL AND COMPANY (MERCHANTS) LIMITED.

6. THAT the Defendant informed me and I verily believe that he strongly denies owing the amount claimed or any sum at all and will provide full evidence on the circumstances surrounding the said purported annexure "A".

7. THAT accordingly, the Defendant prays to this Honourable Court that the matter be decided by full hearing of evidence before any judgment be entered.

8. THAT in any event the Defendant says that the Defendant was a Director of the Company namely R.V.PATEL AND COMPANY (MERCHANTS) LIMITED and accordingly, the Company could not lend the money to the Plaintiff as claimed in any event as this will be unlawful."

For reasons which will later appear, we have deemed it advisable to set out in detail the relevant material before the learned Chamber Judge. We should add that the norm in most applications under this rule is to avoid rather than indulge in

a close examination of all of the facts which would be relevant in the hearing of the action should it proceed.

As we have already said, Order 14 of the High Court Rules follows substantially its counter part (O.14) in the English Rules. Decisions on that Order and cases applied and discussed on each of the rules have been reported and reviewed in the White Book (The Supreme Court Practice has replaced the Annual Practice) over many years. Generally, it may be said that the principles are very well established. Order 14 has been a much used and much applied Rule of Court. Today any problems which which are encountered mostly arise from the application of those principles to the particular facts of each case.

The relevant part of the reasons for judgment of His Lordship delivered on 23 April 1993 is as follows:-

> *"Although defendant has not served a defence, his affidavits in reply to the summons show clearly that he denies borrowing from the plaintiff company and raises the legal argument that in any event, such borrowing would be unlawful, and the company cannot benefit from an unlawful contract to which it was a party. He claims in addition that any acknowledgment of a debt was on the advice of the company auditors for accounting purposes.*
>
> *There is a dispute on facts and an argument on law and in these circumstances I am not prepared to give summary judgment for the plaintiff."*

It is worthy of note that the learned Chamber Judge himself gave leave to appeal against his own decision.

The conduct of the proceedings in the High Court and in this appeal has several unsatisfactory aspects. Firstly, the form of Order. Whilst in general it accords with His Lordship's ruling, it does not expressly say that the defendant has unconditional or even conditional leave to defend the action. Did His Lordship's mind ever turn to this question? To give conditional leave is surely to the same effect, for purposes of appeal, as a refusal to give unconditional leave. See Gordon v Cradock 1964 1QBD 503. As stated earlier, by S.12(3) this would be deemed to be a final order. Where was the need to seek leave or the power to grant it?

None of these questions was raised before us. However, after reserving our decision and before arriving at any final conclusions, we sought the advice of the legal representatives for the parties.

Mr Young for the appellants (plaintiffs) responded to our request. In his response he treated the order of His Lordship refusing the application for Summary Judgment as a "dismissal". But his skeleton submissions dated 31 January 1994 ended:- "Accordingly, it is submitted His Lordship erred in allowing the defendant leave to defend in the circumstances". In ordinary parlance, a refusal to grant has the same effect as a dismissal of an application. But, as we have seen, under O.14, a "dismissal" is most appropriate to indicate a failure by the applicant to establish the necessary preliminaries before the defendant has to show cause.

Mr Young referred us to the decision of the Court of Appeal in Maganlal Brothers Limited v L.B. Narayan & Company C.A No. 31 of 1984. The judgment of the Court was delivered by O'Regan J.A. It is a very helpful judgment on O.14 and generally the principles expressed accord with those which we accept. As will be seen, we rely heavily upon much of it.

It was an appeal from a decision of Dyke J. involving an application for judgment under O.14. It rather parallels our case in some regards. Indeed if it had been produced at the appeal before us, it could have concentrated counsel's minds on the real issues and made the Court's task far easier. The short facts were these:-

The plaintiff applicant's material appears to have been adequate to constitute a prima facie case for judgment. It does not seem to have been a clear case for a "dismissal" if that was the only material before the learned Judge.

The defendant respondent failed to appear at the hearing despite every reasonable opportunity being extended by the Court. A defence had been delivered on his behalf but was not verified by affidavit. There was no other material filed before the Judge on behalf of the defendant.

Some parallel exists between the judgments of Dyke J and Saunders J.

On 13th January, 1984, Dyke J. delivered judgment. He dismissed the application. His reasons for judgment are set out as follows, in the judgment of O'Regan J.A.:-

> *"Well on the face of it, the statement of defence certainly shows a defence. It is a denial of owing the plaintiff any sum at all. It is brief, but then so was the claim. There were also legal grounds pleaded in the alternative, but whether those grounds are well founded or not hardly matters since the main ground is clear enough. However, annexed to the plaintiff's application are copy letters, the first the letter of demand by the plaintiff, and the second an apparent admission by the defendant that the requested sum is owing, and requesting to be allowed to pay by monthly instalments of $100.*
>
> *The plaintiff's first ground was under O.14 of the Supreme Court Rules, but the defence filed on the face of it does indicate a defence ....."*

The judgment of O'Regan J.A. continued :-

> "The matters for consideration by the Judge on the determination of this matter are contained in Rules 3 and 4 of Order 14, the tenor and effect of which are conveniently summarised in Halsbury's Laws of England (4th Edn) Volume 37 paras. 413-415, the relevant portions of which read:
>
> *"413. Where the plaintiff's application for summary judgment under Order 14 is presented in proper form and order, the burden shifts to the defendant and it is for him to satisfy the court that there is some issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just .....*
>
> *The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must 'condescend upon particulars', and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence."*

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And in a note (Note 4) to the paragraph it is stated that:

> *"The normal everyday practice is for the defendant to show cause by affidavit, and except in a clear case, it is rare for the court to allow a defendant to show cause otherwise than by affidavit. A defence already served may be a sufficient mode of showing cause, but not if it is a sham defence served early to avoid showing cause by affidavit: see McLardy v. Slateum (1890) 24 Q.B.D. 504."*
>
> "In the present case, the defendant did not file an affidavitbut relied on a defence which he had filed contemporaneously with his entry of appearance. The first paragraph of the defence was a denial of the debt, which having regard to the acknowledgment contained in the letter of S.C. Pratap & Company of 25th August, 1984 could ex facie, only be true if payment had been made after 25th August, 1984. Having regard to that factor and the onus imposed on the respondent by O.14 r.3, the learned Judge clearly should not have rejected the application without requiring the respondent to go on affidavit - which, perhaps, it was unwilling to do."

We think the last sentence was equally appropriate in this case and that Saunders J. should have so proceeded, either by requesting a further affidavit from the defendant himself or allowing further evidence, bearing in mind the uncertain and unsatisfactory nature of the material before him.

When this appeal was before us and it was agreed that Saunders J. was no longer a Judge of the High Court of Fiji, Counsel were asked whether either had any application to make regarding this Court's completing what seemed to us was an inconclusive and inadequate hearing. No such application or request was forthcoming.

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We come now to what we think is the crux of the case before us as it was before the Court in Maganlal's case.

We return to the reasons for judgment of O'Regan J.A. He continued:

> *"Rules 3 and 4 of Order 14 are complementary. It seems to us that if a plaintiff's application for judgment under Rule 3 is declined, the defendant should normally be granted leave to defend. Such leave may be unconditional or conditional.*
>
> *And when such leave is given the Court is required to give directions as to the further conduct of the action pursuant to O.14 r.6.*
>
> The learned Judge apparently did not turn his mind to these matters. At all events his reasons for judgment are silent as to them and his order was merely that the application be dismissed. Had he adverted to them he would no doubt have given consideration to the question as to whether or not leave to defend should have been conditional. In paragraph 415 of Halsbury's Laws of England (4th Edn) Volume 37 it is stated that:
>
> > *"Conditional leave to defend will be granted where the court forms the view, on the material before it that the defence is a sham defence, or is shadowy or there is little substance in it ....."*
>
> On the facts which we have already discussed, if leave had been granted it may well have been conditional."

We adopt entirely all of this part of O'Regan J.A's decision. It is most appropriate to this aspect of the present appeal.

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In concluding his judgment on this aspect, O'Regan J.A. explained why the Court was in effect compelled to regard the decision as an appeal against a dismissal of an application for judgment and consequently appealable as of right. He then went on:

> *"As matters turned out, the foregoing observations are of no present concern. They, of course, would have been had the Judge complemented his initial order with one or other of the orders we have just discussed. But the circumstances are such that we have no option but to treat this appeal as one pursuant to section 12(1)(a) of the Court of Appeal Act (Cap.12) which allows an appeal against any decision of the Supreme Court, including one of a Judge sitting in chambers. We see this essentially as an appeal against the dismissal of an application for judgment. And it is allowed."*

It is not necessary to say whether or not we agree completely with that final conclusion. We have little doubt, however, on the facts of that case that the Court believed that "justice was done" by so ordering.

Messrs Sahu Khan & Sahu Khan for the respondents responded to our request for advice and assistance. They had previously been supplied with a copy of the response of Young & Associates. In essence by their letter they stated that in their view "the Appellant cannot appeal against the learned trial judge as the same is clearly caught by S.12(2)(b) of the Court of Appeal Act." The letter goes on to discuss Maganlal's case, the Appeal Rules and their relevance to this Appeal. Their submission terminated by stating:- "On that preliminary point the appeal ought to have been dismissed".(the underlining is ours)

However, for all of the reasons expressed above by us, we are of the view that this unsatisfactorily handled application should be remitted to the High Court with an order that it be heard de novo by a Judge of the High Court, on the material presently before the Court together with such other evidence as either party may adduce and which the learned Judge may decide is appropriate and relevant to the questions to be decided.

We order that all costs of this appeal, the costs before Saunders J and those before the Judge hearing the application de novo be reserved for His Lordship's consideration.

E. A. Williams

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Sir Edward Williams
Judge of Appeal

I. R. Thompson

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Mr Justice Ian R Thompson
Judge of Appeal