IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0022/95
(High Court Civil Action No. 436 of 1994)

BETWEEN

SAKATAR SINGH S/O BAKSHISH SINGH — APPELLANT

v.

WESTPAC BANKING CORPORATION — RESPONDENT

Mr A.C Kohli for the Appellant
Mr J. Howard for the Respondent

Date and Place of Hearing : 2 November 1995, Suva
Date of Delivery of Judgment : 9 November 1995

JUDGMENT OF THE COURT

This is an appeal against a judgment of Fatiaki J. given in the High Court at Suva on 9th March 1995. His Lordship dismissed an application to set aside a judgment by default entered by the Respondent on 12th October 1994 for the sum of $20,941.95 plus interest and costs.

Before us Mr Howard took the preliminary point that an application to set aside judgment in default of appearance is an interlocutory application. He submitted that S.12 of the Court of Appeal Act Cap. 12 required the Appellant to have leave to appeal either from the judge or from the Court of Appeal. Section 12 refers to an interlocutory order or interlocutory judgment. No such leave has been granted or applied for. He

referred to Carr v Finance Corporation of Australia (1981) 147 CLR 247. Mr Kholi on behalf of the Respondent submitted that case did not apply in Fiji and that an order refusing to set aside a judgment by default was a final order. He quoted Halsbury 4th Edition Volume 37 para 527:-

> *"Two tests have been propounded as to whether a judgment or order is final or interlocutory. The first, which is the prevalent judicial view, is that the court will have regard to the nature of the application, not to the nature of the order made. The basis of this test is that a judgment or order must be interlocutory in character unless it is made on an application which must operate in such a way that, whatever judgment or order is given or made on it, it must finally dispose of the dispute or controversy between the parties. The other test is that the court will look at the order made by the court below, and not at the nature of the application, so that if the order finally disposes of the rights of the parties it is final, but if it does not, then it is interlocutory. The truth is that the decisions as to whether a judgment or order is final or interlocutory are difficult to reconcile."*

Section 17 of the Court of Appeal Act provides that the Court of Appeal may entertain an appeal on any terms which it thinks just. For reasons which will appear in this judgment we are of the view that if the judgment is not set aside the Appellant is likely to suffer greater injustice than the Respondent would if the judgment is set aside. If it is necessary therefore we extend the time for making application for leave to appeal, dispense with any need to file and serve a notice of application for leave and grant leave to appeal.

His Lordship set out the relevant dates as follows:-

> *"(1) On 8.9.94 the plaintiff bank issued its Writ of Summons out of the High Court Registry in Suva;*
>
> *(2) On 21.9.94 the Writ of Summons together with an Acknowledgement of Service was personally served on the defendant at Ba Town;*
>
> *(3) On 6.10.94 the solicitors for the plaintiff bank filed a search for Notice of Intention to Defend which was endorsed "NO DEFENCE ENTERED";*
>
> *(4) On 12.10.94 default judgment was entered; and*
>
> *(5) On 28.10.94 the defendant's motion to set aside default judgment was filed."*

The Writ required the Appellant to file an acknowledgement of service stating whether he intended to contest the proceedings within 14 days of service. That acknowledgement therefore had to be filed by the 5th of October. A clerk in the office of the solicitor for the Appellant swore an affidavit filed in this case that on the 26th September 1994 he sent an acknowledgement of service together with $11 filing fee. It appears that the acknowledgement did not reach the High Court at Suva. It may be because it was sent to Lautoka. The backing sheet of a carbon copy of the acknowledgement refers to the Appellant's solciitor's agents in Lautoka. The mortgaged property is in Ba, all dealings took place with the defendent's Ba branch and witnesses are from Ba. The High Court in Lautoka would seem to have been the proper registry for the commencement

of the action. When asked, Mr Howard, whose firm is in Suva said the action was filed in Suva because there were lengthy delays in Lautoka.

The carbon copy of the acknowledgement dated 26th of September however was annexed to the clerk's affidavit and this stated that the Appellant intended to contest the proceedings. The clerk's affidavit goes on to say that on 12th of October 1994 *"my principal Mr G.P. Shankar took to High Court Registry Suva statement of defence for filing. I am informed by Mr G.P. Shankar and I verily believe that he was told judgment has already been entered on 6th October 1994 and therefore defence was not accepted."* Obviously that information should have been given by Mr Shankar himself and not simply by the clerk deposing to what Mr Shankar told him. Further the judgment was entered on the 12th October 1994 not 6th October 1994. We note however that on the backing sheet of the judgment by default there is a stamp of the High Court of Fiji showing the judgment was filed on 6th October 1994 even though it was not entered until the 12th October 1994. It does seem that although the judgment by default was entered as a result of mistakes or inefficiencies on the part of the solicitors for the Appellant, the Appellant himself did intend to defend the claim from the time the Writ was served on him. It also seems likely that he did consult his solicitors before the time for filing a statement of defence expired. In Evans v Bartlam (1937) 2 ALL ER 646 at 650 Lord Atkin said:-

"It was suggested in argument that there is another, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion."

Faced with a judgment by default however which on its face was properly entered by the Respondent the learned judge accurately set out the basic principles applicable to setting aside judgments by default. He said:-

" I adopt the `statement of principle' which guides the court's exercise of its discretion in applications such as the present as set out in para 403 of Halsburys 'Laws of England` Vol. 37 (4th edn.) which reads (inter alia):

"In the case of a regular judgment, it is an almost inflexible rule that the application must be supported by an affidavit of merits, stating the facts showing that the defendant has a defence on the merits,... For this purpose, it is enough to show that there is an arguable case or a triable issue."

and a little later in the same paragraph :

"There is no rigid rule requiring the applicant to explain why he allowed judgment to go by default, but nevertheless, at least in the case of a regular judgment, such explanation is obviously desireable to enable the court to exercise its discretion, especially as to any and if so what terms should be imposed."

The Statement of Claim sets out the Respondent's claim for the sum of $20,941.95 alleged to be owing by the Appellant for advances made to him at his request. It appears that that amount was made up of principal and interest up to the 1st of August 1994. It goes on however to say that demand was made for the original sum on the 30th of April 1992.

On 31st of July 1992 the Appellant issued in the High Court of Fiji at Lautoka a claim against the Respondent (the Lautoka action). The claim referred to advances made by the Respondent to the Appellant which were secured by mortgages over the Appellant's native land leases. It sought amongst other relief an injunction restraining the Respondent from exercising its powers of selling under the mortgages. That aspect of the claim came before Sadal J. on the 4th of December 1992 and His Lordship said that the authorities established that a Mortgagee will not be restrained in the exercise of its right under a mortgage unless the Mortgagor pays into Court the amounts sworn by the Mortgagee to be due under the mortgage. He refused the injunction. No such payment was made by the Appellant. The Respondent says it has attempted to sell the properties held by the Appellant but has not had any success in doing so. It appears that it is for that reason that it has gone ahead with the separate Statement of Claim dated the 6th September 1994 on which judgment by default was entered.

It is quite clear however that the amount claimed in the Statement of Claim in respect of which the judgment by default was entered is the same amount as the amount that was in dispute in the Writ issued by the Appellant against the Respondent in 1992. The Statement of Defence filed in the Lautoka action by the Respondent says:-

> *"that the Plaintiff is indebted to the Defendant in the sum of $18,991.44 as at 30th April 1992 with interest accruing at 14.5% thereafter and the Plaintiff is in default of his repayments to Defendant which default was established pursuant to a written demand dated 30th April 1992 for the said sum personally served on the Plaintiff on 5th May 1992."*

Fatiaki J. said:-

> *"so far as I can ascertain the "Lautoka Action was primarily instituted by the Defendant in an effort to restrain the exercise by the Plaintiff Bank of its Mortgagee rights and to obtain general damages. That differs fundamentally from the liquidated claim in the present case for the recovery of monies lent and advanced to the Defendant which have become due and payable"*

In the Lautoka action the Appellant alleged that the Respondent had debited forged cheques to his account. He disputed the amount of liability on that basis and further alleged that unauthorised items had been debited to his account. It appears also that the Respondent holds a crop lein over cane land and has been receiving the proceeds of that lein. In its statement of defence to the Lautoka action the Respondent admitted receiving such cane monies. One of the claims in the

Lautoka action was for an order that the Respondent supply the Appellant a statement of accounts. By an affidavit sworn on the 6th of August 1992 a copy of which was before Fatiaki J., the Appellant deposed that up to date he had not received any detailed account or explanations or answers to his letters and that the Respondent continued to receive cane monies. His Lordship acknowledged in the judgment under appeal:-

> *"that the main argument said to be `common' to both actions, is that there is a serious dispute as the amount of his liability to the plaintiff bank because the plaintiff bank improperly accepted and cleared forged cheques and debited other unauthorised items to his account."*

He went on to say:-

> *"no application has been made however for a summary order for an account under Order 43 of the High Court Rules as might be expected given the nature of the Defendant's defence nor has any attempt been made to identify the forged cheques, the amounts involved or the dates when the same were debited to the Defendant's account."*

It does not appear however that the Respondent has given any details as to how the amount claimed is made up. One would think that it would be elementary that a Bank would advise what amounts it had received by way of cane money and what amounts had been debited to the Appellant's account. No evidence was put forward to say that this information had been given by the Respondent Bank. The Appellant undoubtedly is entitled to an accounting from his Bank and details of the amounts which make up

the Respondent's claim against him. He has indeed asked for a such an account in the Lautoka action which has now been brought on, admittedly after a substantial delay. In the absence of the Bank supplying such details in its claim we feel bound to hold that there is a serious defence supported by the affidavits and pleadings in the Lautoka action which were before Fatiaki J.

Under S.13 of the Court of Appeal Act the Court of Appeal has all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court. Order 13 R.8 of the High Court Rules which refers to setting aside and varying any judgment provides that the court may impose such terms as it thinks fit.

We are of the view that the default judgment entered in this case should be set aside on the following terms:-

1) The action is to proceed to hearing in accordance with the rules, save that:

   (a) No acknowledgement of service and notice of intention to defend need be filed.

   (b) A statement of defence is to be filed and served within 14 days of the date of delivery of this judgment.

2) In addition the Appellant must pay the sum of $10,000.00 into Court to be held in an interest bearing account pending determination of this action and the Lautoka action. Such amount is to be paid within 30 days of the date of delivery of this judgment.

3) We make no orders as to costs on this appeal.

Appeal allowed, judgment set aside.

Orders as in 1, 2 and 3 above.

We express the view that in the circumstances the appellant should not have to pay costs on this appeal to his solicitors.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal

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