IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 330 of 2010

BETWEEN : **PHUL MATI** of Koronivia, Nausori, Domestic Duties as executors and trustees granted by the High Court of Fiji Grant No. 29200 as Attorney for Durga Prasad of Auckland, New Zealand, Dental Assistant vide Power of Attorney No. 22124.

PLAINTIFF

A N D : **1. JAI SHREE LAL,** Carpenter
2. ARVIN LAL, Taxi Driver
3. SURAJ LAL, Taxi Driver
all of Navuso, Nausori

DEFENDANTS

BEFORE : **Justice Deepthi Amaratunga**

COUNSELS : **Mr. S. Kumar** for the Plaintiff
Mr. S. Chandra for the Defendant

Date of Hearing : **25th May, 2012**
Date of Decision : **24th June, 2013**

DECISION

A. INTRODUCTION

1. The Plaintiff had obtained default judgment against the Defendants. The Default judgment sought to cancel a subdivision plan and a declaration that a proper subdivision be carried out by a registered surveyor and cost of the said survey be shared pro rata, by the beneficiaries. The Defendants seek to set aside the default judgment and state that they had obtained registered certificates of titles hence they are indefeasible.

B. ANALYSIS

2. In the affidavit in support the Defendant had annexed a communication of the solicitor for the Plaintiff dated 27th January, 2011 informing of the present action but the solicitor for the Defendant had ignored or not taken any action to defend. The affidavit in support state that the Defendants had clearly instructed the solicitors of the Defendants on 28th January, 2011 to defend this action. There is an affidavit of service of the writ of summons filed on record indicating that the writ of summons was also served to the Defendants.

3. The solicitors of the Defendant, who are the present solicitors of the Defendants, had not taken any step and the default judgment was entered on 17th August, 2011. For nearly six months the solicitors for the Defendant had not taken any action though they were retained even prior to the service of the writ of summons since they were informed of the action prior to the service of the writ of summons through communication between the lawyers relating to the same property which is annexed to as "A" to the affidavit in support.

4. Order 19 Rule 9 of the High Court Rules 1988 allows the Court to set aside or vary any Judgment. The rule states as follows:

> *"The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

5. The Defendants solicitor who appeared at the hearing indicated irregularities of the default judgment. The Defendants deny the service of the writ of summons. The affidavit of service of the writ of summons filed, but the said affidavits of service do not state at an addresses where they were served. Whether the process server was a registered bailiff or not clear enough. Even the addresses of the Defendants were not stated in the writ of summons and the court cannot consider proper service in such a situation. Though these were not raise in the affidavit in opposition the irregularities are self evident on record and I have considered them as serious irregularities as the Defendants deny the service of the writ of summons. I cannot accept the affidavit of service filed by the Plaintiff

as a proof of service. There are no addresses of the Defendants in the writ of summons and the alleged server does not indicate the places of service to all the Defendants separately. In the circumstances the service of the writ of summons is not proved and the default judgment obtained needs to be set aside unconditionally.

6. The issue raised by the Defendants was that the default judgment was not served to the Defendants and this is not an irregularity prior to the obtaining of the default judgment and that is not an irregularity of obtaining default judgment irregularly and cannot be considered as irregularity to set aside the default judgment. I have already decided to set aside the default judgment on a different ground of irregularity. Even if I am wrong on that, I will consider the merits of the defence as a further ground for setting aside the default judgment.

7. The Supreme Court Practice 1997 (Volume 1) page 145, as follows:-

> *"Regular judgment – if the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason, "per Huddleston B ibid. p. 129 approving Hopton v Robertson [1884] 8. T.L.R. 445, and Watt v Barnett (1978) 3 Q.B.D. 1983. p 363)*
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> *For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. For the meaning of this expression, see Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. The Saudi Eagle [1986] 2 Lloyd's Rep. 221, C.A., and note 13/9/14,* ***"Discretionary powers of the court,"*** *below. On the application is set aside a default judgment the major consideration is whether the defendant has disclosed a defence on the merits, and this transcends any reasons*

> *given by him for the delay in making the application, even if the explanation given by him is false (Vann v Awford [1986] 83 L.S. Gaz. 1725; The Times, April 23, 1986, C.A.). The fact that he has told lies in seeking to explain the delay, however, may affect his credibility, and may therefore be relevant to the credibility of his defence and the way in which the court should exercise its discretion (see para 13/9/14, below)".*

8. The issue is what is the yardstick that has to be applied in determining merits of the Defence. It is futile to set aside the default judgment obtained regularly, if the defence does not show merits or where the Plaintiff could obtain summary judgment after the setting aside of the judgment and, filing of the defence. So, it is essential to consider merits of the defence and affidavit in support needs to aver those facts that indicate merits for consideration. The Plaintiff had obtained a judgment on default and to set aside the same the court needs to consider the merits and the degree of the said merits is analogous to the consideration in summary judgment.

9. In Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyd's Rep 221, it was held that in order to set aside the default judgment, the proposed defence advance "**must carry some degree of conviction**" and this principle was further advanced in judgment of Moore-Bick j in International Finance Corporation Utexafrica S.p.r.l (2001) CLC 1361 at p 1363 it was held

> "A person who holds a regular judgment even a default judgment, has something of value, and in order to avoid injustice he should not be deprived of it without good reason. Something more than merely arguable case is needed to tip the balance of justice to set the judgment aside. In my view, therefore Mr. Howard is right in saying the expression "realistic prospect of success" in this context means a case which carries a real conviction." (emphasis is added)

10. The House of Lords have evolved the burden of proof of the allegations in statement of defence to a realistic prospect of success or that it must carry some degree of conviction this is clearly higher than an arguable case. This cannot be ascertained without analyzing the facts before the courts, and on the facts before me the Defendants had in their affidavit in support had averred that already 19 certificates of titles had been issued and the solicitors had been in communication with the issue even prior to the institution of this action. House of Lords has held that the threshold for arguable defence should be at a higher level and defined it as "realistic prospect of success". The contention of the Defendant is that those titles that were obtained prior to the institution of this action were obtained by mutual consent and the said titles had obtained indefeasibility since registration.

11. Under Torrens system , the registration of the title is everything as held in the case of Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005) Justice Gates (as his lordship then was) held in an application for eviction in terms of Section 169 of the Land Transfer Act and stated

> '[13] **In Fiji under the Torrens system of land registration, the register is everything:** Subramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles (1906) 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:
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> "It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been

limited by judicial decision to actual fraud by the registered proprietor or his agent: Assets Co Ltd v Mere Roihi'

12. The exception to the indefeasibility of titles under Torrens System is 'fraud' and this cannot be ascertained without examining the evidence at the trial. The writ of summons does not allege fraud directly, and the Pleadings are not at its best, but state in paragraph 9 that Defendants without the consent and the concurrence of the Plaintiff had taken the dry and higher grounds subdivided by the registered surveyor Edmond Chand and allocated themselves and their brothers and sisters larger blocks of dry land. These are facts that needed proof and the correspondence between the solicitors and the titles obtained establish a degree of conviction that needs to be tested at hearing. So, the allegations contained in the statement of claim needs to be tested at hearing as the Defendants are claiming indefeasibility of the title they had obtained in pursuant to the subdivision which the Plaintiff is seeking to cancel.

C. CONCLUSION

13. The default judgment is set aside for irregularity as to the service and or on the merits of the defence. The Defendants are granted 14 days to file and serve their statement of defence. The parties to bear the cost of this application.

D. FINAL ORDERS

a. The Default judgment obtained on 17th August, 2011 is set aside.
b. The Defendants directed to file and serve a statement of Defence within 14 days from today.
c. The matter is to take normal cause.

Dated at **Suva** this **24th day** of **June, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva