IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 77 of 2011

BETWEEN : **DAVID HENRY TYNAN** of 40 Crest Street, Beenleigh 4207, Queensland, Australia, Director.

PLAINTIFF

AND : **SUBHAS MANI** of 59 Moala Street, Samabula, Suva in the Republic of the Fiji Islands, Businessman.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. Vakaloloma A. V.** for the Plaintiff
Ms. Devan R. S. S. for the Defendant

Date of Hearing : 31st October, 2011
Date of Decision : 9th July, 2013

DECISION

Catch Words

Setting aside of default judgment, irregular judgment, extent of irregularity, arithmetical or slip or error does not make a judgment irregular for setting aside, whether inclusion of interest in the default judgment an irregularity for setting aside, Meritorious defence, effect of non renewal of Bill of Sale in terms of Section 14 of Bills of Sale Act.

A. INTRODUCTION

1. The Defendant filed the summons dated 26th July, 2011 seeking setting aside the default judgment. The Plaintiff state that the Defendant had executed a bill of sale over the alleged debt hence there is no merits of the application to set aside the judgment obtained regularly. In the affidavit in support the Defendant explains the delay in the filing of the statement of defence and also dispute the alleged debt and also takes a legal objection to the Bill of Sale in its proposed statement of defence and state that the Bill of Sale was not renewed in terms of

the Section 14 of the Bills of Sale Act, hence it is void in law. The averments contained in the affidavit in support, regarding the dispute as to the alleged debt of the Plaintiff, is not challenged at this hearing as they had not been denied and or properly dealt in the affidavit in opposition.

B. ANALYSIS

2. The Defendant had filed an affidavit in support of the setting aside of the default judgment. The said affidavit indicated the negotiations between the parties even prior to the action was filed and the reasons for the delay in filing the statement of defence is explained, as such negotiations were continuing between the parties. The fact of negotiations between the parties regarding the alleged debt is admitted in the affidavit in opposition even prior to the institution of the action and there needs only some explanation as to the delay and the Defendant had explained it for the purposes of this summons to set aside default judgment.

3. The default judgment contained a judgment for the interest at the rate of 10%, but whether this would make the default judgment irregular needs a consideration.

> The Supreme Court Practice (White Book) 1999, Volume 1, in p. 142 states that:
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> *"13/1/5 Claim for Interest - ….if the claim for interest indorsed on the writ, whether it is pleaded as part of the statement of claim indorsed thereon or as part of the general endorsement, is for interest on the liquidated demand from the date the cause of action arose at a rate not higher than the rate payable on judgment debts at the date of the writ, and continuing at the same rate until payment or judgment, whichever is the earlier, the claim for interest will be treated for the purposes of r.1(1) as a liquidated demand, since its amount can be duly calculated as a mere matter of arithmetic…."*

Also, the Supreme Court Practice 1999, Volume 1, in p. 361 states that:

"19/2/6 Judgment for interest - ….a claim which includes a claim for interest remains a claim for a liquidated demand."

4. It is clear that mere fact of inclusion of interest on a claim does not by itself convert a liquidated claim to an unliquidated one, but in Fiji the law relating to interest is governed by Law Reform (Miscellaneous Provision)(Death and Interest) Act and that has to be looked into before determination of the issue.

5. The Law Reform (Miscellaneous Provision) (Death and Interest) Act, Cap 27. Section 3 states as follows

> "**3**. In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section-
>
> *(a)* shall authorise the giving of interest upon interest; or
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> *(b)* **shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise**; or
>
> *(c)* shall affect the damages recoverable for the dishonour of a bill of exchange." (emphasis added)

6. Under the provisions of this Act, the award of interests on damages is discretionary and not a matter of right, but this will not apply if there was an agreement between the parties regarding the issue of interest or to any debt upon which interest is payable as or right. The Court has the discretion to grant or not to grant interest after looking at the circumstances of the case, if the exceptions contained in the proviso (a), (b) and (c) of Section 3, do not apply to the claim. The award for interest in the Default Judgment cannot stand without the Court exercising its discretion to grant interest unless the claim is based on the exceptions contained in the proviso to the Section 3 of the Law Reform (Miscellaneous Provision) (Death and Interest) Act.

7. In the statement of claim at paragraph11 and 15 the Plaintiff is seeking interest at the rate of 10%, which was based on the Bill of Sale, this cannot be considered as irregular as it was '*sum not exceeding that claimed by the writ in respect of the demand …*' as required in the *Order 19 rule 2(1)* of the *High Court Rules*. According to the statement of claim the said interest was agreed between the parties in the Bill of Sale and falls in to the proviso (b) of the Section 3 of Law Reform (Miscellaneous Provision) (Death and Interest) Act.

8. Even if I am wrong on that the issue is whether the said irregularity of inclusion of interest is sufficient to set aside the default judgment, in Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd [1998] 4 All ER 763 it was held that *'the court would not set aside a default judgment which suffered from irregularities if there was sufficient evidence before the court from which it was able to conclude that the substantive content of the judgment was right. Further, where the amount in the default judgment was wrong, the court would vary the judgment to the correct amount rather than set it aside.'*

9. Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd [1998] 4 All ER 763 Park J held at page 757 as follows

> **'Assume a case where the writ and the judgment did suffer from some irregularities. Nevertheless assume also that, by the time that the application to set the judgment aside comes to beheard, time has passed and almost certainly a great deal of information about the case, verified by affidavits, will be before**

> **the court**. If, from the affidavits and exhibits, the court concludes that, even though there were irregularities in the writ or the judgment or both, the substantive content of the judgment is right, the court will not set the judgment aside. The only effect if it did would be to put the parties to further expense and delay to reach a regular judgment for the same amount.' (emphasis is added)
>
> (At paragraph d on page 757)
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> 'Further, it is the same in principle if the court is satisfied from the affidavits and exhibits that, although the amount in the default judgment was wrong, it(the court) knows what the correct amount was. **The court will not set the incorrect judgment aside and make the plaintiff start again. It will vary the judgment to the correct amount.**
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> Of course, if the material before the court shows that the judgment was or might have been wrong but the court cannot, without a trial, be confident of what the correct judgment should have been, it will set the judgment aside.'

10. In the light of the said judgment it is clear that if there was an error of inclusion of interest, it can be corrected and the default judgment can vary to rectify the error. I do not think that this can be extended to a case where irregular procedure was adopted since the irregularity needs to be at the root of the default judgment rather than on some arithmetic or other calculation or mere slip or omission on the form of the default judgment, which can be corrected if the substantive content of the default judgment is correct. In my judgment the default judgment is regular and cannot be set aside on any irregularity.

11. The main consideration for setting aside of default judgment obtained regularly is the merits on the defence. The Defendant does not state that the judgment

was obtained irregularly. There is no such allegation contained in the affidavit in support. The default judgment is based on the amount outstanding for money loaned by the Plaintiff. A Bill of Sale was entered between the parties for a AUD # 150,000 and the details of money alleged loan and payments by the Defendant were detailed in the statement of claim and the money claimed in the statement of claim was a liquidated amount. There is no allegation that the amount claimed in the default judgment as an unliquidated amount. The statement of claim in detail indicate how the outstanding debt arose to the Plaintiff. The amount stated in the default judgment is AUD 134,751.87

12. 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)".

13. The Plaintiff's contention is that he had provided the capital requirements for the defendant's business and that was secured by a Bill of Sale. While admitting the Bill of Sale being executed between the parties the Defendant state that the agreement was to supply the bolts and bearings to the sum stated in the said Bill of Sale, but state that the Plaintiff did not supply the agreed items to the Defendant to the value stated in the Bill of Sale.

14. In the circumstances the Defendant is alleging a certain position that is contrary to Bill of Sale executed between the parties. The Defendant is precluded from taking such a contention while the Bill of Sale is operational. The proposed statement of defence at paragraph 24 state that Bill of Sale was dated on 17th January, 2002 and registered on 18th January, 2002 and was void by virtue of Section 14 of the Bills of Sale Act of Fiji. (Cap 225) as the Plaintiff failed to renew the Bill of Sale as required by the said Act.

15. Bills of Sale Act of Fiji state as follows under 'Registration to be renewed every five years'

> **"*Registration to be renewed every five years***
>
> 14. The registration of a bill of sale **must be renewed**, or further renewed, as the case may be, **at least once every five years**, and, if a period of five years elapses **without such renewal or further renewal the registration shall become void."**

16. In the Halsbury's Laws of England the mode of renewal of Bills of sale is described as follows.

> Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS

590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/7. BILLS OF SALE/(3) SECURITY BILLS OF SALE/(ix) Registration/I. RENEWAL OF REGISTRATION/1782.Mode of renewal.

"1782. Mode of renewal.

The renewal of a registration of a bill of sale[1] is effected by filing with the registrar[2] an affidavit[3] stating the date of the bill and of its last registration, and the names, residences[4] and occupations[5] of the parties to it as stated in it, and that the bill of sale is still a subsisting security[6]. The particulars relating to the parties must be those stated in the bill, even though they are there stated incorrectly, although the correct particulars may be added[7]. Failure to comply with these requirements renders the renewal of registration void[8].

Where local registration of a bill of sale was effected upon first registration of the bill[9], the registrar is required[10] to transmit to the district judge[11] concerned a copy of the affidavit of renewal[12] bearing a certificate by the registrar, showing the date on which the renewal of registration was effected and the date on which the copy of the renewal affidavit is transmitted to the district judge[13]. There is no provision for local registration of a bill of sale, or of renewal of a bill of sale, where the grantor or the chattels comprised in the bill have moved to a place outside the London insolvency district subsequently to the date of original registration."

Foot Notes

1 As to the statutory definition of '**bill of sale**' see para 1638 et seq. As to **bills of sale** at common law see para 1620 et seq.

2 As to the registrar see para 1758 note 5.

3 A form of affidavit is set out in the **Bills of Sale** Act 1878 s 11, Sch A (see s 11), but for the modern form see Form PF181QB; and *Practice Direction--Forms* PD 4 para 4. A fee of £10 is payable for renewal of the bill (Civil Proceedings Fees Order 2004, SI 2004/3121, art 2, Sch 1 Fee 9.1 (Sch 1 substituted by SI 2005/3445)) and is stamped on the affidavit. No separate fee is payable for filing of the affidavit.

4 The statutory form (see note 3) does not in fact require statement of the residence of the parties but only of an address at which communications may be expected to reach them (see para 1768), and it is clear that repetition of this in the affidavit of renewal is to be considered a statement of the 'residence' set out in the bill.

5 The statutory form (see note 3) does not require the bill to state the occupation of the parties (see para 1769), and if none is stated in the bill then none need be set out in the renewal affidavit. The form gives an optional form of renewal affidavit (see the **Bills of Sale** Act 1878 s 11; and para 1781) and this refers to the 'descriptions' of the parties. This term usually has a wider meaning than 'occupation' (see para 1769), but, in view of s 11, this must be interpreted in the form as a reference to the description of the grantor's occupation, if given in the bill.

6 **Bills of Sale** Act 1878 s 11.

7 *Re Morris, ex p Webster* (1882) 22 ChD 136, CA.

8 *Re Morris, ex p Webster* (1882) 22 ChD 136, CA.

9 As to local **registration** see paras 1776-1778.

10 Ie by the **Bills of Sale** (Local **Registration)** Rules 1960, SI 1960/2326, r 3. See also para 1776 note 12.

11 The **Bills of Sale** Act 1878 refers to the 'county court registrar' but that office was restyled 'district judge' by the Courts and Legal Services Act 1990 s 74(1): see para 1776 note 9.

12 Ie the affidavit referred to in the text which is made for the purpose of renewing the **registration** under the **Bills of Sale** Act 1878 s 11: **Bills of Sale** (Local **Registration)** Rules 1960, SI 1960/2326, r 2(2).

13 **Bills of Sale** (Local **Registration)** Rules 1960, SI 1960/2326, r 3 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1) (a), (3)). (emphasis added)"

17. The Plaintiff in the affidavit in opposition had annexed the said Bill of Sale dated 17th January, 2002 but was unable to state whether it was renewed or not and silent on that vital issue and the annexed Bill of Sale does not indicate any renewal and the counsel was unable to show such renewal at the hearing. According to the Section 14 of Bill of Sale Act, if such renewal is not done it is a void document. If a document is void there is no legal effect from that document hence the Plaintiff cannot rely on said bill of sale for the recovery of its alleged debt. This creates more than an arguable case and the proposed statement defence contains a meritorious defence. Apart from this the Defendant had contended the Plaintiff never supplied goods to the value the Plaintiff was claiming and in the absence of valid Bill of Sale or any other agreement between the parties regarding the said debt the said allegations also creates a triable issue, and these facts were not refuted in the affidavit in opposition and needs

to be tested in court at trial and the proposed statement of defence contains a meritorious defence. The delay of delivery of decision is regretted.

C. CONCLUSION

18. The Plaintiff filed this action to recover the alleged debt. The claim is based on the Bill of sale executed on 17th January, 2002 and registered on the following day. The Section 14 of the Bills of Sale Act of Fiji state that the validity of the registration is only for five years and upon the expiration it needed renewal and if not it is void in law. The Defendant in its proposed statement of defence stated that the said Bill of Sale was never renewed and there was no response for that contention by the Plaintiff. The present action was filed on 5th March, 2011 and the Defendant had shown a meritorious defence that indicated some prospect of success on the materials available to me at this moment. The default judgment entered regularly on 11th April, 2011 is set aside subject to a cost of $1,500 to be paid within 21 days. The Defendant is granted 21 days to file and serve its statement of defence. If the cost not paid the stamen of Defence is deemed struck off. The cost of this application is cost in the cause.

D. FINAL ORDERS

a. The default judgment entered on 11th April 2011 is set aside.
b. The Defendant is ordered to file and serve a statement of defence within 21 days subject to a cost of $1,500 being paid within 21 days.
c. If the cost not paid within 21 days the statement of defence is deemed struck off.
d. The cost of this application will be cost in the cause.

Dated at **Suva** this **9th day** of **July, 2013**.

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Justice Deepthi Amaratunga

High Court, Suva