

In the High Court of Fiji at Labasa

Civil Jurisdiction

Civil Action No. 37 of 2014

Between: Ulamila Utonivesi by her next friend
Plaintiff
And: Ubay Chand
First defendant
And: Dalip Chand & Sons Limited
Second defendant

Appearances: Mr. S. Prasad for the plaintiff
Mr. Kholi for the first and second defendants

Date of hearing: 15th May, 2015

JUDGMENT

1. By notice of motion filed on 24th March, 2015, the first and second defendants move that the judgment entered by the Master be set aside, execution of the judgment be stayed and the defendants be granted leave to file statement of defence.
2. In an affidavit in support, Rohinil Chand, Managing Director of the second defendant company states that :
 - a. He received writ of summons in this action on 16th July, 2014, and handed the writ to their insurers, New India Assurance Company Limited. The Manageress of the New India Assurance Company, Ms Sudha Mala informed him that :

upon receipt of the writ in this action she handed the same to their cleaner/ messenger Reshmi Lata and asked her to create a claim file for the said vehicle and to give it to another staff to action it. Unbeknown to Ms Sudha Mala, Rehsmi Lata took the claim and placed it in the "Own Damage" vehicle file for the bus instead of creating a "Passenger Liability" file...The staff upon seeing the file cover was of the view that the solicitors had already been instructed in this writ. She did not peruse the contents of the file.

- b. Default judgment was entered on 19th September, 2014.
 - c. He was served with the Notice of Assessment of damages on 4th October, 2014.
 - d. Order was made on 11th March, 2015, and served on him.
 - e. Ms Sudha Mala informed him and he “*verily believe that on the same day she called for the file and discovered the mistake made by her cleaner/messenger*”.
 - f. His company has a meritorious defense in this action.
3. The affidavit in opposition filed by the plaintiff’s next friend states that:
- a) Writ of Summons was served twice on the New India Assurance Company Ltd by his Solicitor on 16th April, 2014.
 - b) That file and the writ would have been seen many times “*while dealing with, and flipping through the so called “Own Damage” claim.*
 - c) “*It is also an act of sheer negligence to depend on cleaners and messengers to attend to important issues like a personal injury claim*”.
 - d) The defendants were bound to check with their insurers, if arrangements were made by the insurers to compensate the plaintiff or deny the claim. The insurers had no intention to defend the action.
 - e) The defendants have no defence.
 - f) The defendants are responsible for their own negligence, carelessness and recklessness.

4. The determination

- a. I find the explanation given by the defendants unsatisfactory. I find it unacceptable that the Manageress of the New India Assurance Company Ltd, insurers of the defendants entrusted their clients’ interests to its “*cleaner/messenger..to create a claim file..and to give it to another staff to action it*”. The question is why was there no follow up by the defendant or its insurers, as quite correctly pointed out by the plaintiff.
- b. I am inclined to agree with the plaintiff that the writ would have been seen by the defendant and its insurers on many occasions, and the defendant decided to concede to the judgment, until they found “*the judgment amount was beyond what they expected it to be*”.

- c. Moreover, the defendants continued to be negligent, when the notice of assessment of damages was served as well. For that lapse, the Managing Director of the second defendant states that he was “*under impression that New India was looking after his interest as it had always done*”.
- d. I do not accept the explanation of the defendants.
- e. At the hearing, Mr Kholi, counsel for the defendants said that the injustice to the plaintiff by the delay can be compensated by costs and interest.
- f. I will now consider whether the defendants have put forward a meritorious defence .
- g. The affidavit in support filed by Rohinil Chand states that :

- *The bus had been inspected by their mechanic on the morning of 27th April, 2014, and had been driven from Labasa to Savusavu without encountering any problem. Whilst it was returning from Savusavu and whilst ascending Urata Hill it caught fire.*
- *The bus had been certified for fitness by the Land Transport Authority and had current certificate of road worthiness.*
- *The bus caught fire suddenly and neither our company nor our driver had any inclination that this would happen.*
- *The fire was due to sudden mechanical defect over which we had no control. ..*
- *If there had been any fault on our part or that of the driver then police would have charged the driver. The police did not charge the driver and annexed hereto and marked “B” is a copy of letter from police dated 24th March 2015.*
- *the plaintiff in this claim had already suffered injuries and was traveling from to Labasa for treatment.*

- g) The letter from the Police reads:

.Report was attended and investigation conducted together with the National Fire Authority officers. Some of the passengers suffered multiple bruises, tenderness, swelling and there were also evidence of burnings. The case was filed away in 2013 since it was an accidental incident.

- h) The draft statement of defence denies the particulars of negligence and puts the plaintiff to the strict proof thereof. It is stated that the plaintiff’s injuries did not arise from the accident.

- h. Mr Prasad, counsel for the plaintiff submitted that this is a case of *res ipsa loquitur*. The bus had wiring problems. That was the cause of the accident, as stated by the National Fire Authority in its REport .
- i. The affidavit in opposition has attached a Vehicle Fire Investigation Report of 27th April,2012, which provides :

Origin/s of Fire: Where the alternator wire runs across the speed rod.

Suspected Cause of Fire(ignition Source) :Electrical short circuit of the alternator wire.

Spread of Fire: When the short circuit occurred, wire insulation cover burnt and spread to the side of the engine and on to the engine cover.

- j. The defendants allege that the bus suddenly caught fire on its return journey from Savusavu to Labasa. It is argued that the bus had been certified for fitness by the LTA and had been inspected by their mechanic on the morning of the accident. Finally, it is stated that the driver of its bus was not charged by the Police.
- k. In my view, the defence have disclosed a *prima facie* defence. The defence carries some degree of conviction.
- l. The law on setting aside default judgment is settled.
- m. Lord Atkin in *Evans v Bartlam*, [1937]AC 473 at page 480 declared:

The Court, however, laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly (there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule 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. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two

rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

n. This passage was cited by the FCA in *Fiji Sugar Corp. Ltd v Ismail*, [1998]FJCA 1.

o. In *Wearsmart Textiles Ltd v General Machinery Hire Ltd*, (Civil Appeal No. ABU 0030/97S) the Court stated that the defendant must show that he has a meritorious defence. The Court stated further:

Dealing with the discretionary powers of the Courts under English Order 13 r. 9 sub-rule 14 the Supreme Court Practice 1997 (the White Book) (Vol. 1 p. 145) cites the Court of Appeal's judgment in Alpine Bulk Transport Co. Inc. vs Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986) 2 Lloyd's Rep. 221 as authority for following propositions:

"(a) it is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside."

p. Mr Koli argued that if the judgment is set aside and the defendants are allowed to defend, if the plaintiff succeeds after a hearing she will be entitled to the fruits of the judgment. Their insurers will be able to pay the judgment sum together with costs. On the other hand, if the plaintiff is paid the judgment debt, she would have spent the money by the time the appeal of the defendant is heard. Mr Koli agreed to deposit the judgment sum in an interest bearing account.

- q. I set aside the judgment entered by the Master and allow the defendants to file statement of defence on the condition that the full sum awarded in the judgment together with interest is paid to the Chief Registrar's an interest bearing account.

5. Orders

- a. I set aside the judgment entered by the Master on 11 March,2015, and allow the defendants to file statement of defence, on the condition that the sum of \$ 48,275.00 awarded together with interest at 6% per annum from the date of the judgment of the Master, is deposited in the Chief Registrar's interest bearing account, until the determination of this case.
- b. The defendants shall pay the plaintiff cost of this application in a sum of \$ 2000 summarily assessed within 10 days of this judgment.
- c. The matter is to be called before the Master for directions.

7th October, 2015



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge