

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 368 of 2015

**BETWEEN : MOHAMMED FAZEL FAREEK
PLAINTIFF**

**AND : SAKIT ALI
FIRST DEFENDANT**

**AND : NAIR'S TRANSPORT COMPANY LIMITED
SECOND DEFENDANT**

**AND : ABDUL SALMAN KHAN
THIRD DEFENDANT**

**AND : ABDUL SHAMIM
FOURTH DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr R Prakash with Ms K Maharaj [Mishra Prakash & Associates]

DEFENDANT : Mr R. Harper [O'Driscoll & Co]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 18 October 2018

INTERLOCUTORY RULING
[Setting Aside Default Judgment]

INTRODUCTION

1. This is the First and Second Defendants' application dated 2 June 2016 to set aside the Default Judgment which was entered against them on 25 April 2016.

Said application is made pursuant to Order 13 rule 10 of the High Court Rules.

They have filed an affidavit of Sakit Ali the First Defendant Support of the Application.

2. The Plaintiff who is opposing the application has filed an affidavit of Aisha the Plaintiff's mother and next friend through whom he has instituted the matter.

3. The First and Second Defendants hence forth filed an affidavit of one Subhashni Prasad in reply to the Plaintiff's Affidavit in Opposition.

HOW THE DEFAULT JUDGMENT WAS ENTERED?

4. On 30 November 2015, the Plaintiff by his motor and next friend Aisha caused a Writ of Summons to be issued against the First and Second Defendant and two others namely Abdul Salman Khan and Abdul K Shamim.

5. The Plaintiff was a passenger in a motor vehicle registration number BLUBRD.

The First Defendant was a driver of a bus registration number CH 198 owned by the Second Defendant.

The Third Defendant was the driver of BLUBIRD which is owned by the Fourth Defendant.

The two vehicles were involved in a collision. The Plaintiff alleges the same was caused and/or contributed by the negligent and/or reckless and/or unskilful driving on the part of the First Defendant and/or Third Defendant.

As a result of the collision the Plaintiff alleges to have sustained injuries and is claiming damages.

6. The Plaintiff on 16 March 2016 filed an Affidavit of Service deposited by one Muni Prasad. As per to the Affidavit Mr Prasad effected service as follows:
- i. On 4 March 2016 he served Sakit Ali the first Defendant at 38 Davuilevu Housing, Nausori.
 - ii. On 2 December 2015 Nair's Transport Company Limited at Lot 81, 9 miles, Nasinu.
 - iii. On 6 January 2016 he served Abdul Salman Khan the Third Defendant at Lot 26 Topline, Caubati, Nasinu.
 - iv. On 11 December 2015 he served Abdul K Shamim the 4th Defendant at Lot 26 Topline, Caubati, Nasinu.

Document served was the Writ of Summons with Statement of Claim, Acknowledgment of Service, Consent of Next Friend or Guardian Ad Litem.

7. Service was effected within the 12 month period from date of issuance of the writ of summons.
8. On 18 April 2016, the Plaintiff's Counsel filed a search for Acknowledgement of Service with a praecipe to seal the default judgment against all the defendant.
9. Subsequently a judgment by default was sealed on 25 April 2016 as follows:
- "No Acknowledgment of Service of Writ of Summons having been filed and served by the above named **SAKIT ALI, NAIR'S TRANSPORT COMPANY LIMITED, ABDUL SALMAN KHAN and ABDUL K SHAMIM** the First, Second, Third and Fourth Defendants herein **IT IS THIS DAY ADJUDGED** that there be interlocutory Judgment for the Plaintiff against the First, Second,*

Third and Fourth Defendants jointly and severally and Damages, Interest and Costs to be assessed by the Court."

10. Following this, the Plaintiff on 20 May 2016 filed his summons for assessment of damages. The said summon was listed for First Call on 30 June 2016.
11. However, prior to 30 June 2016 the First and Second Defendant filed their application to set aside the default judgment.

GROUNDS ON WHICH THE APPLICATION IS MADE TO SET ASIDE THE DEFAULT JUDGMENT.

12. The First Defendant in his affidavit filed in support of the application admits on paragraph 2 that he was given a Writ of Summon in this matter in January 2016.

He is yet to be served with the default judgment.

The Second Defendant was served with a Writ of Summon as well which was passed on to New Indian Assurance Company Limited, the insurer of the bus.

Mr O'Driscoll in May 2016 submitted an Acknowledgment of Service and Statement of Defence to the High Court Registry.

He and the Second Defendant denies liability as according to him the private car came from the other side of the road and hit the bus head on. The car was out of control.

Hence the liability for the accident lies with the driver of the private car.

He and the Second Defendant thought Defence was arranged for on their behalf.

Plaintiff will not be prejudiced if leave is granted to set aside the Judgment and Defendant files it's Statement of Defence since the damage has not been assessed yet.

According to him liability should established on merits and not by way of default.

No Default Judgment orders were served on them and as soon as they became aware of the same they had make the necessary application to set aside the Default Judgment.

He agrees compensation to Plaintiff by way of cost would be just.

In the proposed Statement of Defence, the First and Second Defendant say the accident occurred due to the sole negligence of the Third Defendant as driver of the vehicle BLUBRD.

13. In their Affidavit in Reply Subhashni Prasad an Assistant Manager with New India Assurance Company Limited informs that the Writ of Summons was sent to them with a concerning letter.

This was referred to the insured the Second Defendant since there was no report of incident with New India. Nothing was heard until later when instruction was sent to Mr O'Driscoll and Company to defend the matter. Mr O'Driscoll attempted to file Acknowledgment of Service and

Statement of Defence but could not as Default Judgment was in place hence the current application was lodged.

New India Assurance Company Limited could not file a defence without a claim from the insured.

The default judgments were not served.

The delay is only for two weeks before the discovering of the Default Judgment and until filing of the application to set aside the default judgment.

The Second Defendant had formalised its claim with New India in May 2016.

THE PLAINTIFF'S OPPOSITION

14. The New India Assurance Company Limited are the Third Party Insurers for the bus CH 198 was also served with a Writ of Summons and Statement of Claim on 1 December 2015.

As per annexure A1 the documents were served on New India Assurance Company pursuant to Provision of the Motor Vehicle (Third Party Insurance) Act.

The Default Judgment were entered on the basis that none of the Defendants had filed an Acknowledgment of Service and no Notice was given that the Defendants intended to contest the proceedings.

Subsequently a summon for assessment of damages was issued.

The First and Second named Defendant have been served with the notice.

The fourth Defendant is yet to be served.

Despite service of the Writ of Summon and Statement of Claim the First and Second Defendant failed to defend the claim.

The Third Party Insurers were served with the Writ of Summon and Statement of Claim in the 7 day period as per the Act and not when it was passed along to them by the Second Defendant.

They also failed to take steps to defend the proceeding allowing the default judgment to be entered.

There are no reasons or credible explanation provided as to why they let the judgment to be entered.

The Plaintiff has suffered severe injuries including brain damages and reduction of mental capacity. There are expenses incurred and continues to incur for his treatment and cure. He has not received any compensation or financial assistance to meet the medical treatment and care given.

If Judgment is set aside there will be delay.

LAW

15. Order 13 rule 2 of the High Court Rules allows a Plaintiff to enter interlocutory judgment against the Defendant for damages to be assessed and cost if the Defendant fails to give Notice of Intention to Defend.

Such judgment are said to be not a judgment on Merits –**Timoci Tavataranawai v. Peter Chay, a Suva Civil Action No HBC 426 of 2002** delivered on 29 June 2004.

16. Pursuant to Order 13 rule 10 *“the court may, on such terms as it thinks just, set aside or vary any judgment entered.”*
17. Pathik J. in **Chandra v. Rokoqica a Suva Civil High Court Action No. HBC 45 of 2000 (B)** held that in cases of a regular judgment and in application for setting aside *“there must be an affidavit of merit, i.e. an affidavit stating facts showing a defence on the merits.”*

His Lordship further went on to cite passage from the Supreme Court Practice 1993, Order 13 rule 9 on page 137 to 138:

“the major consideration is where the Defendant has disclosed a defence on the merits, and this transcends any reason given by him on the delay in making the application even if the explanation given by him is false [Vann –v- Awford (1968) 83. L.S. Ciaz. 1725, The Times April 23 1986 C.A.]

18. In **Pravin Gold Industry Limited T/As Govinda Vegetarian Restaurant v. The New India Assurance Company Limited a Suva Civil Action No. HBC 250 of 2002** delivered on 4 February 2003, Pathik J considered a summary of factors to be taken into consideration which is found under notes to Order 13 rule 9 of the Supreme Court Practice 1995 Volume 1 at page 142:

“the purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant cannot show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the Court will take into account the explanation of the defendant as to how the default occurred.”

DETERMINATION

19. Though the Defendants claim they were not served with copy order. This irregularity I find does not render the Interlocutory Judgment null and void but can be considered when exercising my discretion under Order 13 rule 10.
20. The First and Second Defendant submit their Counsel attempted to file a Statement of Defence but this was refused by the registry.

A perusal of the Court file does not show any records to confirm that any attempts were made to file a Statement of Defence.

21. There is a delay of only 2 months before entering the judgment and making the said application to set aside the judgment.

I do not find there is a substantial delay in making of the application.

22. The First and Second Defendant claims the accident was cancel due to the negligence of the driver of the private car. they deny liability.

I further note that on paragraph 7 of the Statement of Claim the Plaintiff pleaded as follows:

“That the Third Defendant was charged and convicted for the offence of Dangerous Driving occasioning Grievous Bodily Harm contrary to action 97[4][c] and 114 of the Land Transport Act 1998 in Suva Magistrates Court Case No 205/13 and was fined \$200.00 and disqualified from driving for 3 months. The conviction is relevant to the issues herein and the Plaintiff will seek to rely on the same to prove negligence and/or contributory negligence on the part of the Third Defendant at the trial of this action.”

23. I find the First and Second Defendants have shown the Court that they have a defence on merits. And I further agree that their liability should be established on merits and not by a default judgment.
24. For these reason, I will set aside the Interlocutory Judgment so entered against the First and Second Defendant.
25. Further orders are for the First and Second Defendants so file/serve their proposed Statement of Defence in 7 days.
26. Plaintiff to file/serve its reply to the statement of defence in 14 days.
27. There shall be cost awarded for the Plaintiff against the First and Second Defendants, which is summarily assessed at \$1,500 and is to be paid within 07 days from todate.




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Vandhana Lal [Ms]
Acting Master
At Suva.