

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

Civil Appeal No. HBA 10 of 2022

(On an Appeal from a Ruling given by the Learned Magistrate at Nausori on 4th September, 2020 in Civil Action No. 62 of 2019.)

**BETWEEN:**                    **SANJAY SINGH VERMA** of 31 Donu Place, Ragg Avenue, Suva,  
Businessman.

**APPELLANT/PLAINTIFF**

**AND:**                            **SAAD AMJAB AKA SAAD AMJAD** of 9 Miles, Nasinu,  
Businessman

**RESPONDENT/DEFENDANT**

**Counsel: Appellant/Plaintiff: In Person**  
**Respondent/Defendant: Ms Sauduadua. T**

**Date of Hearing: 03.3.2023**

**Date of Judgment: 22.3.2023**

**JUDGMENT**

**INTRODUCTION**

1. This is an appeal from interlocutory decision of Resident Magistrate (RM) handed down on 4.9.2020, setting aside of default judgment entered after formal proof of Plaintiff's claim. There is general discretion granted to RM in terms of Order 30 rule 5 of Magistrates Court Rules 1945. Accordingly if 'sufficient cause shown' RM may set aside a judgment entered without the absence of party 'upon terms fit'. RM in the judgment had made a finding that 'there was some fault from the court registry which contributed the defendant (sic) nonappearance on the hearing date'. This court is not in a position to judge the said finding as court below, is placed with the circumstances to judge a fact relating to fault of its registry. RM had analysed the facts relating to this finding in paragraph 15 of the decision of 4.9.2020 and had also taken judicial notice of the cause list and analysed the facts surrounding the magistrates' court before coming to conclusion that court registry was at fault. Once a RM had come to such a finding appellate courts are not in a position to reject the exercise of discretion of RM. Accordingly court below had exercised the broad discretion granted to set aside default judgment correctly as no litigant should be penalized

for fault of the court. This principle is stated in Latin maxim of *Actus curiae neminem gravabit* RM had exercised the broad discretion granted in Order 30 rule 5 of Magistrates Court Rules 1945 correctly by perusing cause list and journal entries and had come to a finding that there was a fault in the registry, and that had contributed to the default of first Defendant. In my mind the finding of the fact of such nature cannot be set aside by appellate courts as court below is more familiar with such facts and no party should be deprived of the day in court. Additionally, the decision of 4.9.2020 was an interlocutory decision and the Appellant -Plaintiff (Plaintiff) cannot show prejudice from that decision as he is not deprived of his claim and day in court. First Respondent –first Defendant (first Defendant) had filed a statement of defence and had also appeared in court several days and was enthusiastic about the action.

## FACTS

2. On 3.6.2019, the Nausori Court Registry issued the Plaintiffs Writ of Summons and Statement of Claim and the matter was listed on 10.7. 2019.
3. On 10.7.2019, the first Defendant was present and on 31.7.2019, First Defendant had filed his Statement of Defence and Plaintiff filed its Reply to Statement of Defence on 16.9. 2019.
4. On 17.9.2019, the Court set the matter set for hearing on 8.1.2020 and the Court below, also set the matter for Pre Trial Conference to be on 5.11.2019, presumably in court. Plaintiff was not present in court on 5.11.2019 when the matter was called first time but had come subsequently, but there was no evidence of pre trial conference.
5. For the first time when the matter was taken for trial on 8.1.2020 Plaintiff and first Defendant were represented by lawyers but the matter was not taken for hearing. On 25.2.2020, the Plaintiff sought an adjournment.
6. Again the court had fixed the matter for pre trial conference on 29.5.2020 and the trial on 3.7.2020. This matter was not called on 29.5.2020 for pre trial conference.
7. On 3.7.2020, Plaintiff was present but first Defendant was absent, and court proceeded to formal proof the action and the judgments delivered on 10.7.2020.
8. On 20.7.2020 an application was filed to set aside default judgment. The motion state it was filed by ‘solicitor for the Defendant’ but the perusal of content of the affidavit in support indicate that it was filed on behalf of 1<sup>st</sup> and 3<sup>rd</sup> Defendants.
9. There was no affidavit in opposition filed. Plaintiff agreed to set aside the default judgment entered against third Defendant be set aside subject to a cost and accordingly judgment against third Defendant was set aside upon payment of a cost.

10. So the application to set aside default judgment against first Defendant proceeded to hearing and it was set aside by RM on 4.9.2020 in following terms,
  1. The Default Judgement entered against the defendant on 10<sup>th</sup> July, 2020 is set aside.
  2. The Costs of the Application to be costs in the cause.
  3. 7 days to file notice of intention to appeal.
11. The substantive matter was listed for mention to fix hearing on 15<sup>th</sup> September, 2020.
12. Plaintiff filed Notice of Intention to Appeal on 10.9.2020. The grounds of appeal filed on 30.9.2020 and they are as follows:
  1. That the Learned Resident Magistrate erred in law and in fact by allowing a re-hearing on an assumption and on hear-say evidence that the 1<sup>st</sup> Defendants counsel allegedly had any discussion with a clerk at Nausori Court Registry.
  2. That the Learned Resident Magistrate erred in law and fact by making a finding that the 1<sup>st</sup> Defendant denied receiving any monies from the Plaintiff without properly directing himself to the documents tendered whilst conducting the formal proof by the Plaintiff/Appellant (mainly the Police Report) and admission, thereafter the Court should have noted that there is no possible success to the proposed defence of the 1<sup>st</sup> Defendant.
  3. That the Learned Magistrate has acted in contravention of the rules of natural justice and basic constitutional right of the Appellant, which is not to be heard only but to be properly heard.
  4. That the Learned Magistrate erred in law and in fact by not allowing a conditional re-hearing upon payment of the previous costs in favour of the Plaintiff before deciding on the application to set aside, the stance taken by the Magistrate is unfair and inconsiderate that the Plaintiff has already incurred those costs to bring this action to court and has paid various counsels from filing writ, interlocutory application and until conducting formal proof. By allowing a re-hearing to the 1<sup>st</sup> Defendants unconditional is appealable.
  5. That the Learned Magistrate erred in law and in fact by stating that it was a default Judgement whereas it was not. Instead, the matter was formally proved and a counsel was outsourced and the Plaintiff is prejudiced by the setting aside of the Formal Proof.

6. That the Learned Magistrate erred in law and in fact by not considering that on the 1<sup>st</sup> call date of the setting aside application the Plaintiff was consenting for a re-hearing provided the costs as per the formal proof judgement is paid and the 1<sup>st</sup> Defendants counsel was misleading the Court for alleged conversation they held with a Court clerk without any acceptance from the Registry and the Plaintiff did everything according to the Magistrate Court Rules to obtain the judgement. By setting aside the same the Magistrate has caused miscarriage of justice.
7. That the Learned Resident Magistrate erred in law and in fact by setting a precedent if not appealed, there is an attempt to have a second bite at the cherry by the Counsel for the 1<sup>st</sup> Defendant when it was undisputed evidence that on the hearing day (3<sup>rd</sup> July, 2020) the Plaintiffs' counsel wrote and emailed sorting the matter to be stood down till 2pm, that was read by the 1<sup>st</sup> Defendant's counsel at 8.10am and that was sufficient information that the hearing will proceed, by not considering all these the Learned Magistrate has caused gross misconduct and a miscarriage of justice.
8. That the Learned Magistrate erred in law and in fact by holding that JCR/Appellant will not be prejudiced. Not considering that the pandemic has not affected on an ad-hoc basis. The 1<sup>st</sup> Defendant was paid in November, 2018 and subsequently the Customs Agent in 2019, after almost two years of being deprived from the vehicle and/or refund of monies the Plaintiff is well and over prejudiced and by not considering that factor the magistrate has caused gross misconduct and a miscarriage of justice.
9. That the Learned resident Magistrate erred in law and in fact by listening to hear say stories of the 1<sup>st</sup> Defendant's counsel when she was allowed to discuss that the 1<sup>st</sup> Defendant has another claim against the Plaintiff/Appellant without asking for evidence, whereas the Claim in Court No; 2 is between Azhar Ali and Sanjay Singh Verma & Babita Verma via 57/2019 and the matter before this magistrate was 62/2019 whereby 1<sup>st</sup> Defendant is Saad Amjab and not Azhar Ali.

## **ANALYSIS**

13. Plaintiff filed action against three Defendants in the action in court below regarding a payment of money to buy a car for his son, by first Defendant.
14. According to statement of claim when the vehicle was imported it was cleared from customs by second Defendant and the fees were paid by Plaintiff but once it was cleared third Defendant had taken possession of the vehicle as a lien for an outstanding payment of first Defendant.

15. Plaintiff is seeking damages against first Defendant and he had filed a statement of defence denying the content.
16. Before the hearing on 3.7.2020, RM had fixed the matter for pre trial conference presumably before court but this was not conducted.
17. Plaintiff appeared at hearing but first and third Defendants did not appear and RM proceeded to formal proof in the absence of Defendants, and judgment was delivered on 10.7.2020. The default judgment entered against third Defendant was set aside, by consent.
18. On 22.7.2020 an application was filed, to set aside judgment obtained by default of first Defendant and third Defendant this shows that application was made promptly to set aside judgment obtained by default.
19. RM in his judgment dated 4.9.2020, having considered affidavit in support filed by a senior legal practitioner, and also taking judicial notice of cause list had conclude that there was a fault on the part of the registry in the court below and that had contributed first Defendant's default on the day of the hearing. Accordingly RM had set aside the default judgment entered.
20. RM in his decision had correctly applied the law contained in Order 30 rule 5 of Magistrates Court Rules 1945.
21. RM had also considered the case of *Shocked and another v Goldschmidt and others*, [1998] 1 All ER 372, where some grounds for setting aside judgment in the absence of a party was discussed. These were not exhaustive grounds and when the general discretion is granted to the court it is open to the court to set aside such judgment when justice meets so. It was held (Per Leggatt LJ)

"These authorities about setting aside judgment after a trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from them I derive the following propositions or 'general indications' as Lord Wright might have called them. (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delay in applying to set

aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.”

22. In this case RM had correctly applied the discretion granted under Order 30 rule 5 of Magistrates Court Rules 1945. There was affidavit in support filed and also RM had taken judicial notice of other surrounding circumstances such as cause list, which this court was not provided in the copy record. So court below can take all the circumstances in to consideration before setting aside its own judgment stating that there was a fault on the part of registry that had contributed to the confusion of the counsel for first Defendant. Court below is granted discretion to proceed with hearing in the absence of a party which RM used in favour of Plaintiff to proceed formal proof.
23. At the same time RM is granted discretion in terms of Order 30 rule 5 of Magistrates Court Rules 1945. This can be considered as a tool for case management in court below. So these tools are exercised considering circumstances of the case which can vary depending on the circumstances. The judgment of RM delivered on 4.9.2020 was interlocutory decision. In terms of Section 36(1) (b) of Magistrates Court Act 1944 any interlocutory order of Magistrate can be appealed.
24. When the appeal is from interlocutory decision appellate court should give priority to such matters as the trial is delayed till the conclusion of hearing of the appeal in this court. Accordingly, interlocutory decisions should not be set aside unless an appellant is prejudiced by such order at the hearing. In this instance Plaintiff is not prejudiced by allowing setting aside of judgment obtained due to a ‘fault of the registry’. This is an additional ground not to allow the appeal.
25. Plaintiff’s grounds of appeal are dealt briefly for completion
  - a. Ground 1. RM had taken judicial notice of cause list and affidavit in support which are not hearsay.
  - b. Ground 2. When there was a finding as to fault of the court this is not a reason
  - c. Ground 3- RM had fixed the hearing for setting aside of default judgment and had also granted Plaintiff to object to it. So no merit in this ground.
  - d. Ground 4- RM was correct in not allowing conditional hearing then he held it was a fault of the registry which was beyond control of parties.
  - e. Ground 5- the judgment of court below after formal proof was a decision

entered in the absence of first and third Defendants hence the applicable law is Order 30 rule 5 of Magistrates Court Rules 1945 and RM had applied this.

- f. Ground 6- such evidence was not available to RM at hearing in the affidavit in support or to take judicial notice.
- g. Ground 7- not relevant when RM had made a finding that the fault was with the Registry.
- h. Ground 8 there is no prejudice by delay as the application to set aside was made promptly.
- i. Ground 9- Hearsay evidence is not excluded in civil actions in terms of Section 3(1) of Civil Evidence Act 2002. RM had applied the available evidence at the hearing in order to exercise the discretion.

26. Accordingly the Appeal is dismissed.

27. RM is directed to give priority to this matter and fix the matter for hearing.

28. Considering the circumstances no cost granted.

#### **FINAL ORDERS**

- a. Appeal is dismissed.
- b. No costs ordered.
- c. Resident Magistrate is ordered to give priority to the matter and conclude the hearing.

**Dated at Suva this 22<sup>th</sup> day of March 2023.**



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**Justice Deepthi Amaratunga**  
**Judge High Court, Suva**