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RAM BRIJ

v.

AUDH RAJI AND ANOTHER

[SUPREME COURT, 1966 (Mills-Owens C.J.) 4th November]

B

Appellate Jurisdiction

Practice and procedure—order for delivery of defence—defence delivered after date specified in order but more than three days before hearing—judgment entered for plaintiff in default of defence—judgment later set aside—Magistrates' Courts Rules (Cap. 5) O.VI rr.6-10—O.XXXII r.11.

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Practice and procedure—judgment—judgment in default of defence—defence filed containing counterclaim—failure to have regard to counterclaim in making order for entry of judgment on claim.

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On the 18th May 1966, being the return date of a writ in the Magistrate's Court endorsed with a claim "balance amount due and owing by the defendants to the plaintiff under an agreement and a Guarantee dated the 25th February 1965 executed by the defendants in favour of the plaintiff", the magistrate ordered the delivery of a defence by the 8th June, 1966, and adjourned the hearing until the 29th June. A defence, containing also a counterclaim, was delivered on the 14th June. On the 29th June, on the application of the solicitor for the plaintiff, the magistrate gave judgment for the plaintiff on the ground of non-delivery of the defence within the time ordered. At a later date the defendants successfully moved in the Magistrate's Court to set aside the judgment. On appeal to the Supreme Court—

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Held: 1. The defendants were entitled to have the judgment set aside on the following grounds:—

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(a) The claim was not pleaded as a debt or liquidated demand and Order VI rr.6-10 of the Magistrates' Courts Rules permitting summary judgment were not applicable.

(b) The defence was in fact delivered within the time allowed by the Rules, namely not less than three days before the hearing, which for this purpose was the 29th June 1966.

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(c) The judgment had been ordered without consideration of the question whether there should be a stay pending the trial of the counterclaim.

2. The judgment was in effect a judgment in default of defence and rule 11 of Order XXXII applied to such a case.

Magistrates' Courts Rules Order XXXII r.11: Any judgment by default may be set aside by the Court or a magistrate upon such terms as to costs or otherwise as the magistrate may think fit.

Case referred to : *Spira v. Spira* [1939] 3 All E.R. 924.

Appeal by plaintiff from order of magistrate setting aside a judgment previously entered by the magistrate.

R. L. Regan for the appellant. A

D. N. Sahay for the respondents.

MILLS-OWENS C.J. : [4th November, 1966]—

This is an appeal by the plaintiff from an order of a magistrate setting aside a judgment previously entered by the magistrate. The plaintiff issued a writ claiming the sum of £350-12-6, the endorsed particulars of claim stating this to be “balance amount due and owing by the defendants to the plaintiff under an agreement and a Guarantee dated 25th day of February 1965 executed by the defendants in favour of the plaintiff”. The original return date was the 18th May and there were appearances by both parties on that day. The learned magistrate then made an order for the delivery of a defence by the 8th June and adjourned the hearing to the 29th June. A defence was delivered on the 14th June, that is to say 6 days late. On the adjourned day of the hearing, the 29th June, the case came on for hearing. The plaintiff’s solicitor immediately pressed for judgment on the ground of default in delivery of the defence within the time ordered. The magistrate gave judgment for the plaintiff, notwithstanding that a defence on the merits had been filed and that the defence contained a counter-claim in the sum of £145, and notwithstanding opposition by the solicitor for the defendants. No reference was made in this judgment to the counterclaim. The defendants then moved to set aside the judgment. This was opposed by the solicitor for the plaintiff. The learned magistrate made the order sought. B
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The defendants were, in my view, quite clearly entitled to have the judgment set aside, on a number of grounds. First, the claim was not pleaded as a debt or liquidated demand and accordingly rules 6 to 10 of Order VI of the Magistrates’ Courts Rules permitting summary judgment were not applicable. Secondly, the defence was in fact delivered within the time allowed by the Rules, namely not less than 3 days before the day fixed for the hearing, which for this purpose was the 29th June. For these reasons alone the defendants were entitled to have the judgment set aside *ex debito justitiae*. Further, the judgment had been entered without regard to the counter-claim, no regard being paid to whether it was a case for execution of the judgment to be stayed pending trial of the counter-claim. In so far as it is a matter of discretion whether or not to set aside a judgment obtained by default this clearly was the case in which it was quite apparent that the discretion was to be exercised in only one way, namely by setting aside the judgment. F
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The plaintiff’s counsel has argued that this is not a case of judgment “by default” to which the new rule 11 of Order XXXII of the Rules applies, basing this argument on the case of *Spira v. Spira* H

[1939] 3 All E.R. 924. That was a case of a summary judgment obtained under Order 14 of the R.S.C. Counsel argues that Order VI of the Magistrates' Courts Rules, in effect, deals with a similar situation, namely where the defendant fails to show a triable issue. I do not consider the case cited to be in point; the judgment in the present case was in effect a judgment in default of delivery of a defence and quite clearly the new rule II of Order XXXII applies to such a case. The judgment should never have been applied for. The application to set aside should never have been opposed, and this appeal should never have been sought. Accordingly the appeal is dismissed with costs both here and in the Court below, agreed at £15-15-0 and £5-5-0 respectively.

Appeal dismissed.