

AT LAUTOKA

Appellate Jurisdiction

Civil Appeal No. 14 of 1978

BETWEEN: DRAINAGE BOARD

Appellant

and

1. SUNDAR LAL & SONS

2. RAJ BALI s/o Mahadeo

Respondents

Messrs Kato & Ramrakha, Counsel for the Appellant  
Messrs B.C. Patel & N. Mohammed, Counsel for the 1st Respondent.  
Mr. Govind, Counsel for the 2nd Respondent.

J U D G M E N T

This appeal arises out of a suit in a Magistrate's Court in which one Sundar Lal sued Raj Bali for work done digging drains. His Statement of Claim alleges a debt of \$901.50 less \$747.00 paid by the defendant, Raj Bali, leaving a balance due amounting to \$154.50.

The writ was filed on 14/12/76 and was served on Raj Bali on 10/1/77 ordering him to appear on 16/2/77.

Judgment was entered by default on 18/2/77 but it was set aside on 14/9/77 on the application of the defendant, Raj Bali.

Leave was granted to defendant, Raj Bali, on 12/1/78, to join the Drainage Board as Defendant No. 2 and the latter were ordered to file a defence within 14 days.

On 9/2/78 the Board were given a further 14 days in which to file their defence, but on 9/3/78 not having complied with that order the Board nevertheless succeeded on a request for further particulars and were given yet a further 28 days in which to file a defence. It was ordered that the case be mentioned on 13/4/78.

On 13/4/78 the defendant who had still not filed a defence did not appear. Nevertheless the trial was listed for hearing on 28/4/78 and no application was made on the failure to file the defence.

The Board did not appear on the hearing date and judgment was entered against them. The learned Magistrate did not

indicate under what part of the Magistrate's Courts' Rules he made the order that judgment be entered for the plaintiff as against the Board.

The Board applied to the Magistrate to set aside the judgment on the ground that they were not aware of the hearing date. On 7/6/78 the Magistrate rejected the application pointing out that the Board were fully aware of the hearing date and had neglected to appear.

Now the Board appeals against that refusal but has abandoned ground one. The first defendant was for some obscure reason made respondent along with the plaintiff.

The second ground appears to be that the Board have a good defence. If they have any defence they have been unduly tardy in filing it after receiving repeated opportunities for so doing. If the Magistrate gave judgment simply because the Board did not appear he would, I take it, have been acting under O. xxx r. 3. but in that case the plaintiff would be obliged to give ex parte proof of his claim. No ex parte evidence was adduced by the plaintiff and if that were the sole ground upon which the judgment rested i.e. non-appearance of the Board the judgment would not have been valid.

However, the Board had been ordered to file a defence under O.xvi r.1, and they had failed to do so in spite of repeated opportunity. It was held in *Rasulan v. Sher Ali Khan* 8 F.L.R.1 at 2 that failure to file a defence when so ordered is tantamount to admitting allegations of fact in the plaintiff's Statement of Claim.

In the instant case the allegation of fact is quite clear, namely that the Board owed the plaintiff a specific and ascertained sum namely \$154.50 for work done. Following the ratio decidendi in *Rasulan v. Sher Ali Khan* (supra) the learned Magistrate would be in order in entering judgment for that sum without further proof.

The appeal is dismissed with costs which I fix at \$45.00 for each respondent.

LAUTOKA,

15th NOVEMBER, 1978.

(Sgd.) J.T. WILLIAMS,

JUDGE