IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 64 of 1985

Between:

SUREND KANT SHARMA
s/o Ram Prasad Sharma — Appellant

and

DORSAMI
s/o Chinsamy — Respondent

H.M. Patel for Appellant
M.F. Khan for Respondent

Date of Hearing: 8th November, 1985
Delivery of Judgment: 14th November, 1985

JUDGMENT OF THE COURT

O'Regan, J.A.,

The appellant commenced an action against the respondent in the Magistrate's Court at Lautoka in November 1982. On 15th December of that year the respondent was ordered to file a statement of defence within 14 days and the proceedings were adjourned until 16th March, 1983.

The action had to do with a building contract which contained a provision whereby the parties agreed

to refer any disputes "arising out of the execution of the said work and the question of payment ....." to arbitration. The respondent, wishing to avail himself of this provision, applied to the Magistrate's Court for a stay of the proceedings. On 9th February, 1983 the learned magistrate held that he lacked jurisdiction to entertain the application and dismissed it. The respondent then made a similar application to the Supreme Court which was set down for hearing on 18th March, 1983 - two days after the next date on which the action itself was to be called in the Magistrate's Court.

When the matter was called in the Magistrate's Court on 16th March, 1983 there was no appearance on behalf of the respondent. Counsel for the appellant applied for judgment in default of appearance and his application was granted. The record does not disclose whether counsel for the appellant informed the Court of the application pending in the Supreme Court on 18th March. If he did not, he was, in our opinion, in dereliction of his duty as an officer of the Court. If he did, the learned magistrate clearly should have deferred the entry of judgment until after the determination of the respondent's application to the Supreme Court.

The affidavit in support of the respondent's application reveals that when the case was called, counsel for the respondent was engaged in another courtroom in the same building. On being made aware that judgment had been entered counsel appeared before the magistrate, Mr. Anand, who had ordered the entry of judgment, explained the circumstances and made an oral application to have the judgment set aside. He also informed him of the proceedings pending in the Supreme Court to which we have already referred. The evidence discloses that the magistrate not only declined the application

but refused to make a note of the matter. And there is no note on the record of this episode in the proceedings and there is no note of it in a decision given on 7th July, 1985 in which the history of the matter is otherwise recorded. We cannot forbear from remarking that the events of that day did little for the image of justice.

The respondent did not proceed by way of appeal on the ground that this entry of judgment was irregular whilst the Supreme Court proceedings were pending. Instead he applied in the Magistrate's Court to have the judgment set aside and by doing so left it implicit that the judgment had not been irregularly entered.

When that application was called on 13th April, there was no appearance on respondent's behalf, and his application was struck out. Later the same day, with the consent of the appellant, the application was reinstated and adjourned to 11th May, 1983 to enable the appellant to file an affidavit. The application was subsequently twice adjourned and ultimately came on for hearing on 1st July, 1983 when the respondent applied for a further adjournment to enable him to file a further affidavit. That application was opposed and after hearing argument the learned magistrate adjourned the matter to 7th July, 1983 - as the record shows - for ruling. When the matter was called on that day there was again no appearance on behalf of the respondent. The learned magistrate after giving his reasons for so doing, declined the application for adjournment. Counsel for the appellant thereupon applied to have the application struck out. That application was granted and the respondent ordered to pay costs thereon.

On 5th August, 1983 the respondent applied to have restored his application to set aside the default judgment. In an affidavit in support, his solicitor deposed that she instructed counsel to appear on 1st of July; that those instructions were forwarded through

another solicitor whose clerk delivered only part of the solicitor's file to counsel; that counsel instructed another counsel who, finding himself with an incomplete brief, applied for an adjournment to give time for the filing of a further affidavit on behalf of the respondent. She also deposed that, through some confusion, neither her office nor she had been informed of the adjournment of the case to 7th July and that because of that she had neither appeared nor instructed counsel to appear on that date. Nothing by way of explanation was offered concerning the absence of the counsel she had instructed in the matter prior to 1st July or of the counsel to whom he had delegated or instructed and who had appeared on that date.

The application came on for hearing on 17th August, 1983 when it was adjourned to 14th September, 1983 on the appellant's application to enable him to file an affidavit in reply. On 14th September there was no appearance of or on behalf of the respondent and the application was again struck out. Later in the day, with the appellant's consent, it was restored to the list and further adjourned to 1st November, 1983 for hearing. At this hearing the Court was informed that the appellant had died about a month previously. No application was then made or since made in any of the proceedings to substitute his personal representatives in his stead.

On 1st November, 1983 both parties were represented. The respondent acknowledged, with a measure of understatement, that both the Court and the appellant had been inconvenienced, but submitted, however, that it was "not necessary" (for appellant) to disclose anything more than why it was struck out. Counsel for the respondent referred to the inordinate delay in the resolution of the case which this appellant had occasioned.

On 15th November, 1983 the magistrate dismissed the application. In his reasons for judgment he noted that "the defendant through no fault of his own but undoubtedly because of the way his case has been handled by his solicitors, has suffered" and he went on to say -

> "The fact that the plaintiff has died is a factor that cannot be ignored in this case in view of the pleadings. "

From that determination the respondent appealed to the Supreme Court. His grounds of appeal were -

(1) That the learned magistrate erred in law as well as in fact in rejecting the application to set aside the judgment;

(2) The rejection or dismissal of the application to restore the application to set aside judgment is unreasonable taking into consideration all the circumstances of the matter and in the interest of justice.

At the hearing no error of fact was mentioned and no submissions which touched upon the second ground were advanced. The appellant (now respondent in this Court) submitted that the original judgment was irregularly obtained but did not pursue that submission with any zest. The judgment was given in default in fulfilling the interlocutory order to file a defence, pursuant to O.XXXIV r.3. In Subodh Kumar Mishra v. Car Rentals (Pacific) Ltd. (Civil Appeal No. 35 of 1985), judgment in which was delivered on 8th November, 1985, we held that such a default judgment may be entered in respect of unliquidated as well as liquidated claims. It accordingly follows that the judgment in

this case was not irregularly obtained.

The learned Judge allowed the appeal and quashed the order made in the Magistrate's Court. In so doing he adverted to the affidavit of Vasantika Patel, solicitor for the appellant, in support of the application in the court below to the effect that she was unaware of the adjourned hearing date of 7th July, 1983 and the reasons therefor, to all of which we have already alluded, and seemed impressed that such was uncontradicted.

And he, as he put it, found himself "fortified" by the observations of the learned magistrate to which we have already made reference saying :

> " It seems to me that by those remarks the magistrate acknowledged that the appellant may well have been denied, without fault on his part, an opportunity of presenting a well founded defence. "

Unfortunately he does not seem to have adverted to the adverse effect the re-instatment of the matter might occasion the personal representatives of the appellant of the grave prejudice which would ensue to them if, in due time, the judgment were to be set aside - prejudice due to the unavailability of the deceased plaintiff to give evidence on the issues of fact at large in the defended action - a matter which clearly influenced the learned magistrate - nor to the numerous derelictions of their duty to their client on the part of the solicitors for the respondent but for which the action would in all probability have been heard and determined in his lifetime.

The matter before the learned magistrate was an application pursuant to O.XXX r.6 of the Magistrates' Courts Rules which confers upon the Court an unfettered

discretion to replace on the cause list any civil cause which has been struck out. It is trite to say that appellate courts when considering appeals against the exercise of such a discretion are not permitted merely to substitute their opinions for those of the Judge or magistrate at first instance. The extent of their jurisdiction in such instances, are stated in the well-known passage from the judgment of Lord Atkin in Evans v. Bartlam (1937) A.C. 473, at p. 480 :

> " ..... the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the Judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it. "

The learned Judge, no doubt, purported to act on the basis stated in the latter part of that statement. The appeal to this Court, however, is limited to points of law. We think that the consequences flowing from the demise of the original plaintiff to which we have adverted could well occasion grave injustice to the respondent's estate. It could well be that without his personal evidence that injustice would be irreparable. On the other hand, any hardship to the respondent arising from the refusal to reinstate the application to restore the action to the cause list may not have such dire consequences because of the potential cause of action he might well have against his solicitors. We think all these factors are of the greatest moment in the case and should have commended themselves to the learned Judge.

In Edwards v. Bairstow (1956) A.C. 14 at p. 36 Lord Radcliffe, speaking of appeals on points of law, said :

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> " If the case contains anything ex facie which is bad law and which bears upon the determination it is, obviously, erroneous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been an error in point of law. I do not think it matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only conclusion contradicts the determination, rightly understood, each phrase propound the same list. "

In the present case we think that the evidence is inconsistent with the learned Judge's determination and that accordingly the appeal must succeed.

The appeal is allowed and the orders made by the learned magistrate are restored. Leave is given to the personal representatives of the appellant to be substituted for him in the original judgment. The respondent is ordered to pay the appellant's taxed costs both in this Court and the Supreme Court.

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Vice President

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Judge of Appeal

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Judge of Appeal