IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 37 of 1985

Between:

JAI PRAKASH NAYARAN
s/o Deo Narayan — Appellant

and

SAVITA CHANDRA
d/o Lochan Singh — Respondent

K.C. Ramrakha and A. Patel for Appellant
V.K. Kalyan for Respondent

Date of Hearing: 4th November, 1985
Delivery of Judgment: 8 November, 1985

JUDGMENT OF THE COURT

O'Regan, J.A.

The respondent issued a writ and statement of claim out of the Supreme Court at Lautoka on 8th June, 1984 claiming $5,000 alleged to have been advanced to the appellant on 20th July, 1983, interest thereon, pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap. 27), at the rate of 13.5% from that date to the date of judgment and costs.

On 1st August, 1984, the appellant not having filed a defence within the time prescribed, the respondent entered judgment for $5,000 with interest and costs to be assessed.

On 14th August, 1984 she filed a Notice of Motion for the assessment of the interest and costs but on 12th September, 1984, before the same was heard, the appellant made application to have the default judgment set aside and filed two affidavits in support thereof.

In his first affidavit he denied that the respondent ever lent and advanced him the amount claimed or any part thereof. He went on to depose that his wife, Sanadika Devi, had borrowed $5,000 from the respondent, her sister, and volunteered that he had given the respondent a cheque, identified as No. 006274 as a security for such loan. Annexed to that affidavit was a draft defence to the action. It was a simple denial of the alleged loan or any part of it.

Some eight days later he filed a second affidavit in which he deposed to having instructed solicitors who had filed an appearance on his behalf. The affidavit then went on as follows :

> "3. Upon entry of appearance I tried to contact Sir Vijay R. Singh on numerous occasions and each time I rang I was told he was out.
>
> 4. Subsequently I became sick and could not contact my solicitors and therefore a statement of defence was not filed.
>
> 5. I have a defence of merit as disclosed in my affidavit of 5th September, 1984 and filed therein. "

By any yardstick that was a preposterous excuse for his failure to file a defence.

The respondent filed affidavits in reply. We find it necessary to refer only to one matter therein raised - the cheque No. 006274 to which appellant had referred. In her own affidavit she exhibited a photo-copy not only of the cheque but also of an endorsement on the reverse side of it which she deposed was written by the appellant. It reads :

> " Received from Miss Savita Chandra of Fiji Sugar Corporation Ltd the sum of $5,000 (five thousand dollars only) as a loan at a interest rate of 20% and to be paid by 30th November, 1983 by cheque No. 006274 A.N.Z. Bank.
>
> J.P. Narayan
> 20.7.83 "

The cheque was dated 30th November, 1983. It was made payable to the respondent or her order and was for $6,000. From his own deposition it is beyond doubt that it was his cheque. If the signature at the foot of the writing on the reverse side of the cheque was that of the appellant, then both his denial of the respondent's claim and his explanation of his transactions with her contained in his first affidavit were patently false. If on the other hand the signature was not his, the respondent was discredited and her case also.

The deposition as to the endorsement evoked no response from the appellant. Mr. Ramrakha submitted that the appellant was not ordered to file further affidavits. That indeed was so. The submission was advanced as if it were an absolution of the appellant from the making of a response. Of course, he did not have to respond. In our view, however, the course events had taken and the consequences if he did not respond, rendered it a matter of prudence that he should reply - if indeed he had a reply. And in the circumstances of the case, in the absence of a reply, we hold the inference

inescapable that what the respondent has said to be true. In those circumstances, the appellant's evidence as to triable issue having been discredited, and he having offered no reason of any substance explaining his failure to file a defence in due time, he did not make out a case for the discretion conferred by 0.19 r.9, to be exercised in his favour.

Mr. Ramrakha submitted that the judgment was irregular and should be set aside ex debito justitiae. In support of these submissions, he argued that the claim was not liquidated and that, accordingly, did not meet the prescription of 0.19 r.2

0.19 r.2, so far as it is relevant, provides :

> " (1) Where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under the rules for service of the defence, enter final judgment against the defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs ..... "

The underscoring is ours.

The demand for the amount loaned, of course, was a liquidated demand. Mr. Ramrakha's submission was that the interest portion of the claim rendered the total amount claimed an unliquidated amount and that accordingly 0.19 r.2 was of no application.

The claim for interest is at the rate of 13.5 per cent from 20th July, 1983 until the date of judgment and thus meets the prescription of a liquidated demand laid down in Knight v. Abbott (1882) 10 Q.B. 11 in that its amount is ascertainable as a mere matter of arithmetic

- see also our judgment in Subodh Kumar Mishra v. Car Rentals (Pacific) Ltd. - Civil Appeal No.35 of 1985 which we have just delivered. The interest claim is expressly stated in the statement of claim to be made pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act which, so far as it is relevant, provides :

> " In any proceeding tried in the Supreme Court for the recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between when the cause of action arose and the date of the judgment ..... "

Over many years until recently, it was thought and it was enshrined in the White Book that a summary judgment under the Rules of the Supreme Court Order 14 could not include interest - see p.127 of the 1967 edition where under the heading interest occurs the following passage :

> " Interest may not be awarded under O.14 under the Law Reform (Miscellaneous Provisions) Act 1934, s.3, since the proceedings are not a trial but an issue may be directed to be tried as to whether the plaintiff ought to be awarded such interest and if so, at what rate and for what period. "

The correctness of that note was doubted by Lord Oenning M.R. in giving judgment in Wallersteiner v. Moir (No.2) (1975) Q.B. 373 at p.387 and his observations were approved by the Court of Appeal in Gardner Steel Ltd v. Sheffield Bros. (1978) 3 All E.R. 399 with the result it is no longer necessary, in cases of debts carrying statutory interest for clearly defined periods of time, to direct trial of the issue in O.14 cases. In Maganlal Brothers Limited v. L.B. Narayan & Company (Civil Appeal

No.31 of 1984) this Court applied and followed the Gardner Steel case and accordingly the same consequences now flow in this country. We see no reason to differentiate O.19 r.2 cases from O.14 cases and we hold that the same consequences apply in this case.

In the Gardner Steel case, Ormrod L.J. had this to say :

> " .... If there is any question of difficulty about either deciding the date from which the interest should run or the calculation of the interest or the rate of interest, then of course it is open to the Judge to use the old procedure of directing that the interest should be assessed. But there can be no sensible reason for ordering interest to be assessed by somebody else when the issue is simple and plain. ..... "

In the present case the Court has already ordered the assessment of interest and it seems to us prudent to allow that course to proceed. However, for the future, unless there are difficulties such as those to which Ormrod L.J. referred, such a course will be unnecessary.

Before taking leave of the matter we record that in support of his submissions, Mr. Ramrakha referred to a list of Australian cases - Dalgety Futures Pty Limited v. Poretsky (1980) 2 N.S.W.L.R. 648 being the principal one on which he relied - in which the provisions of acts as to statutory interest differed from the provisions of section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) in this country and its English counterpart. The decisions of the English Court of Appeal and this Court on these latter provisions are germane to the issue arising in the present case and conclude it. It is for that reason that we say no more of the Australian cases cited than that we have read them and find that

they do not get to the heart of the matter with which we were concerned.

The appeal is dismissed. The appellant is ordered to pay the respondent's taxed costs.

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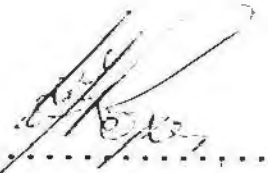
Vice President



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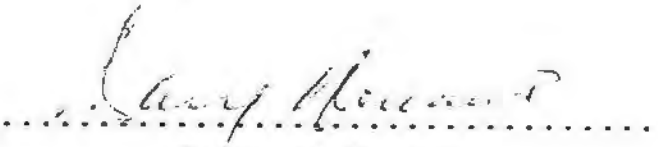

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