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IN THE FIJI COURT OF APPEAL

Civil Appeal No. 75 of 1985.

Between: SIVGIYAM SUBAIYA Appellant

- and -

DAYABHAI & OTHERS

G.P. Mishra & V.M. Mishra for the Appellant.
V.K. Kalyan for the Respondents.

DATE OF HEARING : 18th March, 1986.

DELIVERY OF JUDGMENT: 21st March, 1986.

JUDGMENT OF THE COURT

Roper, J.A.

On the 12th October 1984 the Respondents issued proceedings against the Appellants claiming the sum of \$13,959.53 said to be the principal and interest owing on two promissory notes both dated the 15th October 1973 and due on the 14th October 1978. One was for \$3650 and the other \$3000 with interest payable at 10% per annum. Each note refers to the consideration as being "for cash lent and advanced prior to the execution hereof" and forbearance "from pressing for the payment of the amount of the note up to the 14th October 1978." The note for \$3650 for some unexplained reason refers to additional

consideration in the form of \$100 that day advanced to the Appellants.

On the 15th November before they had seen the notes sued on, the Appellants filed a statement of defence pleading these defence:-

1. That they had settled the notes with Dayaram (now deceased and with his executor one of the plaintiffs) before his death.
2. The statute of Limitations.
3. That the Plaintiffs were moneylenders.
4. Reliance on the Bills of Exchange Act (Cap. 227) with an associated plea that the transaction was harsh and unconscionable in that the interest claimed exceeded the capital.
5. That the non cancellation of the notes was due to the "mutual faith" which had existed between Dayaram and the Defendants.

There was a further pleading denying the allegation that there had been demands, and promises to pay. It was alleged that only one demand had been made, and that on the 4th September 1984, and that there had been no promise.

On the 10th December 1984, after the Appellants defences to the action must have been known, the Respondents applied for an order (under Order 14 rule 1) for summary judgment on the ground that the Appellants had no defence to the claim. An application under the Order after a defence has been filed disclosing defences is unusual, and more often than not will result in the dismissal of the application but that was not raised in the Lower Court.

Dyke J. allowed the application and entered judgment and this is an appeal against that decision.

Affidavit evidence was adduced in support of, and in opposition to, the application for summary judgment. Affidavits were filed by Sivagiyanum for the Appellants and Dayabhai for the Respondents. The first affidavit in support by Dayabhai, which was prepared and sworn before the Statement of Defence was filed, simply pleads the terms of the promissory notes, exhibits the notes, and avers that there is no defence to the claim. In his affidavit in reply Sivagiyanum claimed that in 1961 and 1962 he had a moneylenders license and Dayaram used to give him money to invest in the moneylending business, which brought a 12% return to Dayaram. He said that he made an unwise loan and as a consequence \$3000 of Dayaram's money was lost. According to his story the \$3650 note related to that \$3000 and goods to the value of \$650 purchased from Dayaram, and the \$3000 note was in respect

of 10 years interest at 10% from 1963, when the \$3000 was lost, to 1973. He then went on to say that before Dayaram died all debts were settled by forgiveness of the \$3000 interest, and payment of \$2000 in respect of the \$3650 note. He then deposed as to matters bearing on the issue of laches or acquiescence.

In Dayabhai's affidavit in reply he proffered this explanation for the execution of the two notes : the Appellants had borrowed \$4800 from Trikamji & Sons in October 1973 repayment of which was guaranteed by Dayaram and his brothers. The Appellants failed to repay Trikamji so the Respondents became liable under the guarantee. The Respondents agreed to pay Trikamji at the Appellants request, and it was with that background that the notes were executed. He said that the Appellants also owed the Respondents \$1800 in respect of goods supplied so the notes covered this sum as well. (That appears to leave \$50 unaccounted for). The Respondents paid Trikamji \$4800 in two cheques, and the cheque butts were exhibited to his affidavit. \$3000 was paid on the 7th November and \$1800 on the 31st December 1973. The butts refer to "Loan Account Siyagiyanum and Subaiya".

Dayabhai goes on to deny that Dayaram was a money lender and that the delay in issuing proceedings arose because of the friendly relations between the Appellants and Respondents.

In his affidavit in reply Sivagiyam denied that the Appellants had borrowed money from Trikamji and said that it was Dayaram who had borrowed the money from Trikamji and paid it to the Appellants for money lending purposes. He said that Dayaram told him that Trikamji wanted repayment and the notes were then signed.

Sivagiyam did not specifically deny that the loan from Trikamji, whether it was to the Appellants or the Respondents, was made in October 1973, which cannot be reconciled with his statement that the money was passed on to him for his money lending business which operated in the years 1961 and 1962.

In a brief judgment Dyke J. rejected the pleas of settlement with Dayaram before his death, laches and acquiescence and said "clearly the Defendants have failed to show any reasonable defence."

We heard detailed submissions from Counsel on the availability of the defence of laches and acquiescence in a claim such as this, and other issues but it would be inappropriate for us to express our views on those matters because we are satisfied that the Appellants are entitled to their day in Court when the trial Judge must rule upon them. The law is clear that leave to

defend must be given unless it is clear that there is no real substantial question to be tried, or put another way, that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. In the present case there is a dispute as to the facts and the law and in our opinion there are at least two substantial questions to be tried, namely the issue of whether there was settlement with Dayaram before his death, and the allegation that Dayaram was a moneylender. On that latter issue there are curious features revealed in the affidavit evidence. Why, for example, were there two promissory notes, both signed on the same day, and neither for the sum of \$4800 said to be owing to Trikamji? Can the notes be related to the Trikamji transaction when they were signed on the 14th October 1973 but Trikamji was not paid, if the cheque butts can be taken at face value, until 7th November and the 31st December? Furthermore, if there was a loan by Trikamji in October 1973 why was it that in a few days the Respondents were called upon to repay under the guarantee? As for the alleged settlement with Dayaram, the delay in issuing proceedings may be some support for that allegation for Dayaram did not seek recovery in his lifetime, but in any event it is not an issue which can be resolved on affidavit evidence.

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The appeal is allowed and the judgment against the Appellants set aside with leave to defend and with costs to be costs in the cause.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal