IN THE FIJI COURT OF APPEAL
Civil Appeal No. 19 of 1987

Between: NAVITALAI RAQONA Appellant

- and -

BHIKA BHAI CO. LTD Respondent

Mr. V. Mishra for the Appellant
Mr. S. D. Sahu Khan for the Respondent

Date of Hearing: 24th September, 1987

Delivery of Judgment: 9th October ~~September~~, 1987

JUDGMENT OF THE COURT

Speight, V.P.

On 31st July 1985 the Respondent issued a writ of summons against the appellant claiming $9244.59 for balance of account and agreed interest in respect of goods sold and delivered from 30th March 1980 to 5th March 1985. No appearance was entered and judgment by default was entered on 10th October 1985.

On 23rd September 1986 appellant filed an application to set aside the judgment. The appellant's affidavit in support claimed that the debt was properly that of Toge Village Church Committee and Toge Cane Scheme and that when he had opened the account as trustee with the plaintiff company in 1981 he had plainly told Mr. Basant (Vasant) the true situation. He denied it was his personal liability.

As to delay he said that when served with the summons he had been referred by plaintiff's solicitor

Mr. Sahu Khan to Mr. Basant who told him the matter would be sorted out and not to worry. In view of the attitude later taken by Mr. Basant, this seems a surprisingly nonchalant reaction by the creditor.

He also annexed a document which could have been of significance on this question of liability - it was a letter from the Respondent to its solicitors dated 16 January 1985:-

> **" We authorise you to issue Writ of Summons against Toge Village Church Committee to recover a debt due and owing by the said Committee to me".**

In a reply affidavit Mr. Basant (Vasant) said that he had issued instructions in that form at the insistence of appellant who was trying to pass responsibility on to the Church, although he (Basant) did not know of those people and had only dealt with appellant. In any event no solicitor would act on such instructions - he would ask for some legal person who incurrred the debt and could be sued and it seems likely that that would be how Sahu Khan and Sahu Khan named appellant some six months later when the action commenced.

Basant produced some early invoices in 1981 showing debits made out in appellant's name, together with appellant's personal cheques in payment of same. It also seems from a letter from the Bank of New Zealand that the Toge Cane Scheme were reimbursing appellant for payment made from his account.

Mr. Basant also produced a document which we think really

clinches the matter in Respondent's favour.

It is a letter from Appellant dated 4 February1983 to Messrs Sahu Khan and Sahu Khan who at that stage had been acting for one Ganga Prasad against the Appellant, claiming a debt of $6000. The details of that claim do not appear relevant except to say that judgment had been entered against appellant, but had been set aside on terms that $6000 was paid into Court. Appellant therefore had the possibility that if he could win against Ganga Prasad he would retrieve that sum. The crucial point is that pending resolution of that matter he wrote to Sahu Khan and Sahu Khan as follows:-

"Messrs Sahu Khan and Sahu Khan
Barristers and Solicitors,
Ba.

Dear Sir,

Re : Supreme Court Action Number 539/1981 - Ganga Prasad and Myself

I have this day acknowledged my debt to MESSRS BHIKHABHAI AND COMPANY in the sum of $6018.69 (SIX THOUSAND AND EIGHTEEN DOLLARS AND SIXTYNINE CENTS).paid in the Supreme Court at Lautoka by me be refundable to me and I hereby authorise you to uplift the monies from the Supreme Court at Lautoka and further authorise and instruct you to pay $4,0000.00 (FOUR THOUSAND DOLLARS) out of the same to Messrs. Bhikhabhia and Company. $2,000.00 (TWO THOUSAND DOLLARS) to be paid to Mr. Ram Narayan. This authority is irrevocable.

Yours faithfully,

(sgd)
(Navitalai Raqona)

(sgd)
(Witness)
4.2.83

In the event he settled his Ganga Prasad case for $3,000 and did indeed pay the other $3000 to Sahu Khan and Sahu Khan "for necessary payment out to various debtors". The important point however is that he acknowledged a debt of $6018.69 as owing to Respondent in March 1983. No explanation has been given for the increase to over $9000, but the claim was to a 1985 date and also for interest so it is not surprising that there was an increase.

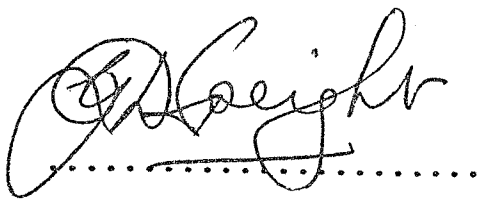
There can be no getting past the fact that the Appellant, who has the onus of proving a valid available defence has denied that this was his debt, yet is faced with a written admission of a substantial portion of it. The reply in his answering affidavit that he was misled into signing the acknowledgement is quite unconvincing.

At a later stage a plea was also made that the account was one for purchase on credit and that there was no proof of compliance with section 6 of the Sale of Goods Act. Had this been a defended action of course the supplier would have been put to proof of documentation. But the matter had passed beyond that. This was an enquiry to whether Appellant had discharged the onus of showing that he had a defence and could justify delay. Given that an admission of liability was produced in the face of total disclaimer when obviously the supplier had some documentation system, we do not think the Respondent was obliged to produce necessary invoices on an application by the Appellant to set aside.

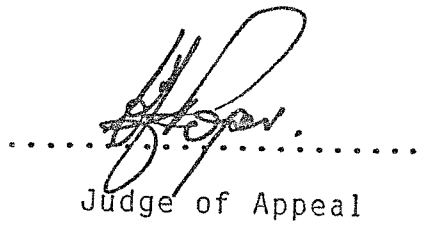
81

We agree with Dyke J. that Appellant had failed to show that his suggested defence had merit. Indeed it appears quite specious; especially when raised so late after judgment - although delay of course is not an absolute bar.

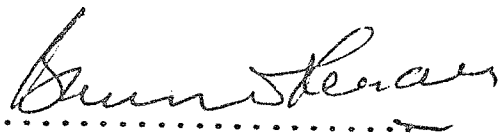
Appeal dismissed. Costs to Respondent to be taxed if necessary.



Vice-President



Judge of Appeal



Judge of Appeal