

IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 81 OF 1986

Between:

KALYANDAST/A TAILORS TRADING CO.

Appellant

- and -

A.N.Z. BANKING GROUP

Respondent

Mr. M. V. Bhai for the Appellant
Mr. Subhas Parshotam for the Respondent

Date of Hearing: 20th June, 1988

Delivery of Judgment: 1 July, 1988

JUDGMENT OF THE COURT

The appellant appeals against the decision of Sheehan J. dated the 9th of September, 1986 whereby he granted conditional leave to the appellant to defend this action. The condition imposed on the appellant was that within 30 days he was to pay "the sum claimed into Court".

Conditional leave to defend was granted pursuant to an application by the respondent Bank under Order 14 of the High Court Rules for summary judgment.

The appellant's complaint is that the learned Judge should have granted him unconditional leave to defend. His grounds of appeal should have been framed to indicate that the learned Judge erred either in not granting unconditional leave or erred in granting conditional leave.

None of the five grounds of appeal have been properly framed to cover the appellant's complaint. For example the first ground complains:-

"that the learned Judge erred in law in granting judgment as he did to the Respondent.....".

No judgment has been granted to the Respondent.

The appeal is against the exercise of the learned Judge's discretion.

While we could formally dismiss the appeal on the ground that there has been no appeal against the exercise of the learned Judge's discretion we have chosen to consider the fifth ground of appeal as a complaint that the learned Judge should not have imposed any conditions when granting leave to defend. Ground 5 is as follows:-

"THE LEARNED judge further denied justice to the Appellant when on one hand another judge previously granted the Respondent leave to defend the counter-claim of the Appellant without payment of any sum at all into Court, and set aside the judgment on the counterclaim; and on the other when there was no fault at all of the Appellant, he ordered the Appellant to defend in normal manner PROVIDED he paid into Court the judgment sum."

We can understand Mr. Bhai's complaint that the default judgment against the respondent for \$10,000 and costs was set aside without requiring the Bank to pay the money into court while his client who had been meticulous in complying with the Rules was required to pay the amount claimed into Court before being allowed in to defend.

The reason for the apparent differential treatment would appear to be the strength of the relative defences. The learned Judge found little merit in the appellant's defence and while he could in our view have been justified in granting the respondent's application he granted.

conditional leave to appeal. He stated as follows:-

" I find the defence so near to incredible that I am all but ready to enter judgment for the Plaintiff. But since the Defence has raised these issues, it is entitled to defend. However I direct that such Defence shall be on the condition the Defendant pay the sum claimed into Court within 30 days."

The law is quite clear and it is referred to in the "White Book" in the notes to O.14 at p. 130. The relevant notes refer to the Principles on which the Court of Appeal acts. Notes 14/3-4/29 state as follows:-

"Where conditional leave to defend is given, however, the Court of Appeal will not interfere with the discretion of the Judge unless there has been some error of principle or misapprehension of fact or unless undue weight has been given to a particular aspect of the facts".

The case referred to is GORDON V. CRADDOCK (1964) 1 Q.B. 503C.A.

On our perusal of the record the learned Judge exercised his discretion in a proper manner and we so hold.

The appeal is dismissed with costs to the Respondent.

J. Jiviraga
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President, Fiji Court of Appeal

R. G. ...
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Justice of Appeal

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Justice of Appeal