

COURT OF APPEAL

44

NAVITALAI RAQONA

A

v.

BHIKA BHAI CO. LTD

[COURT OF APPEAL—Speight, V.P., Roper, J. A., O'Regan, J. A.]

B

Civil Jurisdiction

C *(Practice and Procedure—Motion to set aside judgment signed in default of appearance—claim of no personal liability—documentation produced by respondent (judgment creditor) indicative of appellant's liability—appellant failed to discharge onus on him.)*

Hearing: 24 September, 1987.

Judgment: 8 October, 1987.

V. Mishra for the Appellant.

D

S. D. Sahu Khan for the Respondent.

E Appeal by Navitalai Raqona against a decision of the Supreme Court (Dyke, J.) whereby he refused an application filed on 23 September, 1985 by the appellant to set aside a judgment entered against him in default of appearance by Bhika Bhai Co. Ltd. (respondent) for the sum of \$9,244.59 for balance of account and agreed interest in respect of goods sold and delivered from 30 March, 1980 to 5 March, 1985.

F The appellant's application had claimed that the debt was properly that of Toge Village Church Committee and Toge Cane Scheme (the Scheme) that when he opened the account as trustee with the respondent in 1981 he had plainly told a Mr Basant (an executive of the respondent) the true situation. He denied liability. He explained the delay in not bringing the action by having been told by Mr Basant (on execution of the respondent) that the matter would be sorted out and not to worry.

G Evidence included the production of invoices in 1981 showing debits made out in appellants name with his cheques in payment; and a letter from the Bank of New Zealand that the scheme were reimbursing appellant for payment made from his account.

H There was also a letter addressed by appellant to the Solicitors for the respondent who at its date (4 February 1983) had been acting for one Ganga Prasad against the appellant claiming a debt of \$6,000. Judgment had been entered against him but had been set aside on terms that \$6,000 was to be paid into Court. He wrote thus to the Solicitors—

"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 Messr Bhikhabhai and Company in the sum of \$6,018.69 (Six thousand and Eighteen Dollars and Sixty-nine 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 \$4,000.00 (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 case for \$3,000 and paid a further \$3,000 to the Solicitors "for necessary payment out to various debtors". He explained this letter by saying he was misled into signing it.

Held: The hearing had been an enquiry into as to whether the appellant had discharged the onus on him of showing that he had a defence and could justify delay in applying. Having regard to the admission of liability produced in the face of total disclaimer when obviously the respondent had a documentation system, the respondent was not obliged to produce necessary invoices on this application.

The appellant had failed to show his defence on the merits.

Appeal dismissed.

Judgment of the Court

SPEIGHT, V.P.

On 31st July 1985 the Respondent issued a writ of summons against the appellant claiming \$9,244.59 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 the true situation. He denied it was his personal liability.

A 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:—

B "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 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 incurred the debt and could be sued and it seems like that that would be how Sahu Khan and Sahu Khan named appellant some six months later when the action commenced.

D 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.

E It is a letter from Appellant dated 4 February 1983 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 \$6,000. 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 \$6,000 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:—

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

Dear Sir.

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

G 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.

H

further authorise and instruct you to pay \$4,000.00 (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. A

Yours faithfully,

(sgd)
(Navitalai Raqona) B

(sgd)
(Witness)
4.2.83

In the event he settled his Ganga Prasad case for \$3,000 and did indeed pay the other \$3,000 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 cover \$9,000, but the claims was to a 1985 date and also for interest so it is not surprising that there was an increase. C

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. D

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 as 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. E F

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. G

Appeal dismissed.