

IN THE FIJI COURT OF APPEAL

323

CIVIL JURISDICTION

CIVIL APPEAL NO. 62 OF 1990

(High Court Civil Action No. 205 of 1990)

BETWEEN:

AMALGAMATED TRANSPORT LIMITED

Appellant

and

NARBADA BEN

(d/o Pranjivan Bhagwan)

Respondent

Date of Hearing: 12th August, 1992

Delivery of Judgment: 30TH SEPTEMBER, 1992

Mr M.A. Khan for the Appellant

Mr H.M. Patel for the Respondent

JUDGMENT OF THE COURT

The Respondent (Plaintiff in the High Court) issued a Writ of Summons on 7th June, 1990 claiming damages and costs from the Appellant (2nd Defendant) and its driver for injuries allegedly received from an accident on 21st of June, 1989 involving the Respondent and a bus belonging to the Appellant and driven by its servant or agent Mansoor Ali (1st Defendant). As a result of the accident the Respondent's leg had to be amputated below the knee. The 1st Defendant had, through his counsel on 13th of February, 1990, pleaded guilty to careless driving in the Magistrate's Court and he was convicted accordingly and fined. This

carelessness gave rise to the claim for damages against him and the 2nd Defendant the Appellant herein."

The Writ of Summons was served on the Appellant's registered office on 25th June, 1990.

Interlocutory Judgment was entered on 30/7/90 against both Defendants in default of service of a Notice of Intention to Defend and there was an order for assessment of damages.

A notice of Assessment of Damages was issued returnable on 30/8/90. It was fixed for hearing before the Chief Registrar.

On 30/8/90 the Chief Registrar commenced hearing the Summons for Assessment. Mr H.M. Patel appeared for the Plaintiff, Mr Nagin for the 1st Defendant and Mr Shiu Chandra Naidu for the 2nd Defendant. The Plaintiff and one witness completed giving evidence the same day and the Assessment hearing was then adjourned to 5th September, 1990 for continuation.

The assessment proceedings remain part-heard as they had to be adjourned from time to time on the application of the Appellant initially to await the result of the setting aside application and currently to await the outcome of this appeal.

An application to set aside the judgment together with a request for a stay order was in fact filed on 6th September, 1990 by the Appellant. Subsequently the 1st Defendant also filed an application to set aside the judgment. Both applications were

heard by Mr Justice L.M. Jayaratne on 19th October, 1990. He dismissed the applications in a written "Ruling" given on 16th November, 1990. The present Appeal before this Court is against that ruling or judgment dismissing the Appellant's application with costs. It might be relevant to mention at this juncture that the 1st Defendant had also appealed but has since wholly discontinued his Civil Appeal No. 64 of 1990.

The Grounds of Appeal in the Appellant's own words are summarised as follows:

*"That the Learned Judge erred in law and in facts in not exercising any discretion and or if he did so, then, applying wrong principles of law in so doing, particularly -*

- a. *when the Appellant had a good and valid defence on merit to the Respondent's claim.*
- b. *where the Appellant had raised valid defence and brought in issue the issues of contributory negligence on part of the Respondent.*
- c. *when reasons were given as to how the default judgment was entered in the first place.*
- d. *When the counsel for the Appellant had objected to the assessment of damages to be proceed with before the Chief Registrar and had applied to have the judgment by default entered against the Second Defendant/the Appellant be set-aside and that all proceedings including the proceedings for assessment of damages be stayed in view of the application to set-aside the said judgment which was subsequently filed and furthermore any participation before the Chief Registrar was on without prejudice to the rights of the Appellant to seek to have the said judgement set aside."*

It is the Appellant's contention that on 5th September, 1990 Mr M.A. Khan of Messrs Khan & Associates made an application for adjournment on his behalf but this was refused by the Chief Registrar and that Mr Khan participated in the assessment proceedings under protest and without prejudice to the Appellant's right to file necessary documents by way of Motion

and Affidavits to have the default judgment set aside. Plaintiff's case was closed on this day after her expert witness Dr D.D. Sharma gave evidence and after he was cross-examined by Mr Khan and Mr Nagin.

On the other hand it is the contention of the Respondent that the Appellant, through his counsel, fully participated in the assessment hearing and it was too late in the day for him to have the judgment set aside. He further argues that had the judgment been set aside it would have constituted great inconvenience and injustice to the Respondent. It is not in dispute that her principal witness Dr D.D. Sharma has migrated to New Zealand.

Be that as it may all the pros and cons of the merits of the application were fully argued before Jayaratne J. who had before him supporting affidavits from both sides.

Further, it is important to bear in mind that the default judgment was regularly entered and therefore the Appellant was not entitled *ex debito justitiae* to have it set aside.

We do not think there is any merit in the initial submission that the learned judge failed to exercise any discretion at all. Under O.13 r.10 he certainly had a discretion in the matter and he certainly exercised it. The only question is whether he exercised it properly. The onus is on the Appellant to show that he did not properly exercise the discretion vested in him that

is to say that he exercised his discretion under a mistake of law, or in disregard of recognised principles or under misapprehension of facts.

It is clear from the record and from the learned judge's own reasoned decision that he took into account all relevant factors which included the circumstances in which default judgment was entered, the delay factor, the nature of the proposed defence, the concept of vicarious liability, the stage to which assessment proceedings had reached, what transpired before the Chief Registrar, the relative hardship or possible injustice to the Appellant if application was refused and to the Respondent if it was granted. He also took into account the history of the litigation from the time that the cause of action arose. He came to the clear conclusion that it would be grossly unfair to set aside the judgment and stay assessment proceedings. Indeed he ordered *"that the assessment of damages be continued before the Chief Registrar from the place where it stopped as early as possible"*.

The Appellant has failed to demonstrate that the learned judge exercised his discretion under a mistake of law, or in disregard of recognised principles, or under misapprehension of facts. There are ample authorities to support the proposition that unless the Appellant is able to do this his appeal will not be entertained.

This appeal, therefore, must be dismissed with costs. There is every reason to concur with the learned judge's order that the assessment proceedings should be resumed as soon as possible and

we might add that it should also be concluded as soon as possible.

The formal Order of this Court is - appeal dismissed, High Court's decision affirmed and the Appellant is to pay Respondent's costs of this appeal.

*Michael Helsham*  
.....  
Justice Michael Helsham  
President, Fiji Court of Appeal

*Moti Tikaram*  
.....  
Sir Moti Tikaram  
Resident Justice of Appeal

*Mari Kapi*  
.....  
Sir Mari Kapi  
Justice of Appeal