IN THE FIJI COURT OF APPEAL
(AT SUVA)

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CIVIL JURISDICTION

CIVIL APPEAL NO. 48 OF 1991
(Civil Action No. 114 of 1991)

BETWEEN:

CHANDRA LACHMAIYA NAIDU — APPELLANT

-and-

CARPENTERS FIJI LTD — RESPONDENT

A N D

CIVIL APPEAL NO. 49 OF 1991
(Civil Action No. 109 of 1991)

BETWEEN:

HIMUN RAJENDRA NAIDU — APPELLANT

-and-

CARPENTERS FIJI LTD — RESPONDENT

Mr. V. Maharaj for the Appellants
Mr. H. Lateef for the Respondent

Date of Hearing : 18th November, 1992
Date of Delivery of Judgment : 27th November, 1992

JUDGMENT OF THE COURT

The respondent agreed to supply goods and services to Toorak Builders Limited (hereinafter referred to as the company) on credit. The appellant, Chandra Lachmaiya Naidu guaranteed these

credits to the amount of $15,000. These guarantees are contained in two separate memoranda of guarantee dated 11th September 1984 and 16th December 1986 respectively.

In a separate memorandum of guarantee dated 16th December 1986, the appellant, Himun Rajendra Naidu also guaranteed supply of goods and services by the respondent to the company to the amount of $10,000.

In each of these memoranda of guarantee, the following identical clauses appear:

> *"2. This Guarantee shall be a continuing Guarantee.*
>
> *3. .....*
>
> *4. This Guarantee shall be irrevocable, but in respect of future transactions, I am at liberty to give you one month's calendar notice in writing of the cessation of this guarantee."*

The respondent supplied goods to the said company in 1990 and 1991 to the value of $220,831.05. The company failed to pay for these goods. The respondent made demands for the payment of $15,000 and $10,000 respectively under the guarantees and the appellants refused to pay.

The respondent sued the appellants in separate actions (No 109 of 1991 and No 114 of 1991) as sureties for the sums guaranteed. The respondent applied to enter summary judgment under O.14 r.1 of the High Court Rules 1988 on the 26 March 1991

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in respect of each action. The applications for summary judgment in each case were heard on the 10th June 1991.

On the 18th July 1991, the trial Judge entered summary judgment in respect of Action No 114 of 1991 and gave his reasons for decision. On the same date, the trial Judge also entered summary judgment in respect of Action No 109 of 1991 and simply adopted reasons for decision in respect of Action No 114 of 1991.

The appellants have appealed against both decisions (Civil Appeal No 48 of 1991 and Civil Appeal No 49 of 1991). As the grounds of appeal in each case are identical, both appeals were heard together by consent of the parties.

Appeal No 48 of 1991

Counsel for the appellant submitted that the trial Judge erred in law and in fact in entering summary judgment in that:

(a) He failed to properly evaluate the affidavit of the appellant sworn on the 28th March 1991, and

(b) He failed to properly evaluate the Statement of Defence filed on the 28th March 1991, and

(c) He erronuously asserted that there was no affidavit in reply filed by the appellant and that it was a positive

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requirement in law that an affidavit in reply ought to have been filed.

These grounds of appeal raise the proper application of O.14 of the High Court Rules 1988. This order is already the subject of numerous decisions of this Court as well as the High Court. The relevant principles are set out by the Fiji Court of Appeal in the case of Maganlal Brothers Limited -v- L.B. Narayan & Company, Civil Appeal No 31 of 1984. The Court stated the principles in the following terms:

> *"The matters for consideration by the judge on the determination of this matter are contained in Rules 3 and 4 of Order 14, the tenor and effect of which are conveniently summarised in Halsbury's Law of England (4th Edn) Volume 37 paras. 413-415, the relevant portions of which read:*
>
> *'413. Where the plaintiff's application for summary judgemnt under Order 14 is presented in proper form and order, the burden shifts to the defendant and it is for him to satisfy the court that there is some issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just.....*
>
> *The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must 'condescend upon particulars', and, in all cases, sufficient facts and particulars must be given to show that there is a genuine defence'*
>
> *And in note (Note 4) to the paragraph it is stated:*
>
> *The normal everyday practice is for the defendant to show cause by affidavit, and except in a clear case, it is rare for the court to allow a defendant to show cause otherwise than by affidavit. A defence already served may be a sufficient mode of showing cause, but not if it is a sham defence served early to avoid*

showing cause by affidavit: see MacLardy -v- Slateum (1890) 24 Q.B.D. 504"

In the present case, the respondent filed an application for summary judgment and was supported by an affidavit of the Credit Manager, Mr Michael Low. The appellant did not file any affidavit in reply. The trial Judge in considering this, said:

> *"In this case there is no affidavit in reply to Michael Low's affidavit. it is a positive requirement, more than the statement of defence filed in this case.*
>
> *Such an affidavit is not only necessary, it must condescend upon particulars and should as far as possible deal specifically with the Plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts are relied on to support it."*

Counsel has conceded that the appellant did not file any affidavit in reply to the respondent's affidavit. However, he relied on another affidavit sworn by the appellant in relation to an application to issue a third party notice under O.16 of the High Court Rules 1988. The question of whether this affidavit may be admissable in an application for summary judgment was not argued fully in the High Court and before us, and therefore, this appeal should not be decided on the basis of this affidavit. We have assumed that there was no affidavit in reply. Is this fatal to the appellant's case in an application for summary judgment under O.14? The trial Judge concluded that in absence of any affidavit from the appellant, "there are no triable issues in the case for me to consider an open court trial".

We are of the opinion that, while the trial Judge was justified in his criticism of the lack of an affidavit, he fell into error when he failed to consider the Statement of Defence and the issues pleaded therein. The Statement of Defence was filed on the 28 March 1991. As we have pointed out earlier in our judgment, a defendant under O.14 may show cause by affidavit or otherwise. A Statement of Defence may be a sufficient mode of showing cause. see Maganlal Brothers Limited -v- L.B. Narayan & Company (supra). The Statement of Defence pleaded the following:

> *"2. The defendant further says that by an agreement dated the 30th date of September, 1989 the Defendant had sold all his shares in the Toorak Builders Ltd. to three persons, namely, Augusto Tassinari, Eliki Ucuboi and Bani Druavesi and had immediately after the said Sale the Defendant had given both written and verbal Notices to the Plaintiff of such sale and advised the Plaintiff that the Defendant will no longer be liable for payment of any future supply of goods and services to the Toorak Builders Ltd. under the terms of the Memorandum of Guarantee as from the date of the said Notice.*
>
> *3. The Defendant alleges that the purported Memorandum of Guarantee was revocable and the same had been properly revoked by the Defendant as aforesaid."*

The Statement of Defence alleges that the guarantee was revoked by notice in writing in accordance with clause 4 of the memorandum of guarantee. The affidavit in support of the application for summary judgment did not address this issue at all. Having regard to the fact that the notice of revocation was allegedly given in about October 1989 and that the goods and

services were supplied in 1990 and 1991, we are of the opinion that the Statement of Defence has raised a substantial issue as to liability which ought to be tried.

The formal order of the Court will be: appeal allowed with costs, the decision of the trial Judge dated the 18th July 1991 is quashed and the matter sent back to the High Court for trial.

Civil Appeal No 49 of 1991

The circumstances and the grounds of appeal in this matter are identical to those in Civil Appeal No 48 of 1991. The only material diffence in this case is that the amount claimed is for $10,000. In view of our ruling in the Civil Appeal No 48 of 1991, we would adopt the same reasons and conclusions in this matter. The order of the Court in this matter will be: appeal allowed with costs, the decision of the trial Judge dated 18th July 1991 is quashed and the matter sent back to High Court for trial.

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal

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Sir Mari Kapi
Judge of Appeal

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Mr. Justice Gordon Ward
Judge of Appeal