IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 8 OF 1993
(High Court Civil Action No. 312 of 1992)

BETWEEN:

MOHAMMED YUSUF — APPELLANT

-and-

BANK OF BARODA — RESPONDENT

Mr. Haroon Ali Shah for the Appellant
Mr. Anand Singh for the Respondent

Date of Hearing : 16th November, 1993
Date of Delivery of Judgment : 26th November, 1993

JUDGMENT OF THE COURT

These proceedings are a mess. We set out what we believe to be the undisputed facts so as to show why and how we have tried to sort it out.

The respondent to this appeal, the nature of which we shall describe later, had accepted a guarantee from the appellant in respect of the debts of a company back in 1983. We shall refer to the respondent as the Bank. It commenced proceedings to recover the sum of $43,000 under the guarantee in 1986, and apparently did nothing further until it obtained judgment in that action on 27th November 1991. Under what circumstances that judgment was obtained we do not know, but we have been informed by counsel that it is under appeal.

At least as from 1st May 1991 the appellant had a savings bank account with the Bank. Until October 1992 he operated upon that account. As at 9th October 1992 he had a credit balance of $25,156.15 in that account. On that day he sought to withdraw $5,000. He was refused. No doubt being somewhat miffed by this conduct he commenced proceedings against the Bank to recover $25,156.15 (as amended), no doubt proceeding on the assumption that if the Bank would not pay him $5,000 it would not pay the total amount standing to his credit. On 23rd November 1992 he took out a summons for judgment relying on Order 14 of the High Court Rules, which provides so far as relevant:-

> *"1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."*

On 21st December 1992 the Bank filed a defence and counter-claim, claiming that it was entitled to the monies in the bank account of the plaintiff and to apply them as a set-off against the monies which the plaintiff owed the Bank.

On 4th February 1993 Saunders J gave what was termed a Decision upon the Order 14 summons of the plaintiff. In the absence of any appearance by the Bank he gave judgment against

the Bank for the amount claimed by the plaintiff - $25,156.15. The plaintiff promptly sought the issue of a writ of fi fa.

On 8th February 1993 the Bank issued a summons seeking a stay of execution of the writ of fi fa. That summons was heard ex parte. According to the Judge's notes (record p.75), he was asked to grant an interim injunction, which had not been sought in the summons, and he granted an interim injunction. The Bank promptly had the order passed and entered, and it came out as an order staying execution of the writ of fi fa (record p.67). The hearing of the Bank's application for a stay of execution was adjourned to 12th February 1993.

So, the state of play at that juncture was that there had been proceedings commenced by the plaintiff to recover $25,156.15, a summons issued for judgment in that action based on Order 14, a statement of defence and counter-claim based on a right of set-off filed by the Bank, an ex-parte hearing of the plaintiff's summons for judgment in which judgment was given in his favour, the issue of a writ of fi fa, and an interim stay by a summons made returnable on 12th February 1993.

Before this summons was due to come back before the Court, the Bank, on 10th February 1993, issued a summons to set aside the judgment which had been obtained by the plaintiff pursuant to Order 14 on 4th February 1993. Its application to set aside was based on Order 19 rule 9, "and the inherent jurisdiction of the Court" (record p.69). This summons was made returnable on 12th

February 1993, i.e. two days later, and the same day as that fixed for the hearing of the summons for a stay.

Both summons came before the Judge on 12th February 1993. There was no appearance for the appellant. It seems from the Judge's notes that he made a final order on the application for a stay (granting a stay) and that on the Bank's application to set aside the plaintiff's judgment, sought under O.19 r.9, he said "Decision on application to set aside and dismiss on notice" (record p.76). He had been asked by counsel for the Bank to grant an interim injunction, and he did so "until further order" (ibid). We have no idea as to what this related.

Now just pausing there we note that there is no evidence, and nothing before us, to show that any abridgment of time for the return of the Bank's summons to set aside the judgment was ever ordered -- it will recalled that it was made returnable two days after issue; there is no evidence, and nothing before us, to show that either the summons for a stay of execution, or more importantly the summons to set aside the appellant's judgment was ever served; the Bank's summons to set aside that judgment did not seek an order that the appellant's action be dismissed. The record simply does not disclose whether or not the appellant was ever given the opportunity to be heard on the summons to set aside -- he was certainly not at the hearing.

The Bank very promptly caused the order staying execution on the writ of fi fa to be passed and entered - 15th February 1993 (record p.71).

Judgment (called a Ruling) on the Bank's application to set aside the judgment of the appellant was given on 19th February 1993. The Judge ordered that "the judgment is set aside and the cause of action is dismissed." (record p.80). Counsel representing the appellant appears to have been present, but what, if anything, was said by him is not known. The Bank very promptly caused this order to be passed and entered - 23rd February 1993 (record p.81).

By notice of appeal dated 24th February 1993 the appellant appealed. The grounds of appeal are:

> *"1. THAT the Learned Judge erred in law in entertaining an application by the Defendant under Order 19 Rule 9 of the High Court Rules (1983), the said application being dated 10th day of February, 1993.*
>
> *2. THAT the Learned Judge erred in law in entertaining an application by the Defendant under Order 19 Rule 9 of the High Court Rules (1988), the said application being dated 10th day of February, 1993 in the absence of an Order abridging the time for service of the said application.*
>
> *3. THAT Learned Judge erred in law in setting aside the Judgment entered against the Defendant on the 4th day of February, 1993.*
>
> *4. THAT Learned Judge erred in law in dismissing the Plaintiff's whole action in Civil Action No. 312 of 1992."*

Were it not that we are so appalled at what apparently went on we would have made some ferse comments about the grounds of appeal. Ground 2 is the only one that could be said to qualify as such. The others are not ground of appeal, they are mere assertions that the Judge was wrong. If whoever was responsible for drafting them intended that they should be relied upon, then that person is in breach of his duty to his client and his duty to the Court. Had circumstances been different we would certainly have ordered fresh grounds of appeal to be filed and served and the case adjourned, with all costs ordered to be paid personally by the legal representative. However, if ground 2 correctly states the factual situation, then we feel that that alone would entitle the appellant to some remedial action.

In other circumstances we would have felt disposed to enquire of the legal representative of the Bank why he did not inform the appellants' legal representative of the deficiencies, give him an opportunity to file amended ones, and threaten to have them struck out on application if he did not take it.

Unfortunately the situation is symptomatic of so much of the work coming to this Court. In far too many cases there is a demonstration of lack of attention by practitioners to what is required to perform their duties and a failure to do so. Unfortunately the remedial action required to correct the imperfections in this case would cause added delay with unknown consequences to the litigants, even if the Court is able to ensure that the total costs are paid by the offending

practitioners. Even if it is apparent that a litigant has a good cause of action against his legal representative, this is not always the way in which justice can be done.

The first thing that can be said is that there was no power in the Judge pursuant to Order 19 of the High Court Rules to make the order which he did on 19th February, 1993 purporting to set aside the judgment which had been obtained by the appellant on 4th February, 1993. That was the judgment obtained in pursuance of Order 14 on the basis that the Bank had no defence to the claim made in the writ by the appellant. By the time the ruling was given by the Judge in that matter, the Bank had filed a statement of defence and counter-claim. Whether Order 14 applies in such circumstances we need not pause to consider; the appellant obtained judgment against the Bank. The order sought by the Bank by its summons dated 10th February, 1993 to set that judgment aside was quite misconceived; so was the Judge's order. It sought that setting aside pursuant to Order 19 rule 9 "and under the inherent jurisdiction of the Court" (record p.69). There was no power to do this under Order 19 rule 9. The judgment sought and obtained by the appellant had been on the basis that the Bank had no defence to his claim, not on the basis that the Bank had made default in pleading (Order 19). The Judge expressly said in his decision on the Order 14 summons that he was not giving judgment on the basis that there was no defence (record p.52), the only basis upon which his decision had been sought. The appellant's summons did not seek an order on any other basis (record p.26), yet the Judge made one in his favour.

We find it very difficult to know on what basis he purported to do so (record pp. 52-3), but whatever it was it was not one that was open to be set aside pursuant to Order 19 rule 9. So under that part of the application he had no power to entertain the Bank's summons or make any order.

However, the Bank's summons also sought the setting aside of the order of 4th February 1993 "under the inherent jurisdiction of the Court". The Judge seems to have made his order on the basis that "the plaintiff's (appellant's) statement of claim reveals no cause of action" (record p.30). One might be justified in thinking that his power to make the order that he did arose under Order 14, which he was not asked to invoke, rather than by the exercise of any inherent jurisdiction. Further, the order, when it was entered, only referred to Order 19, which gave him no power, and not to any inherent jurisdiction. It will also be noted that the order is said to be made ex parte. On what basis he invoked "inherent jurisdiction", if he did, he did not explain.

That order, however made, was passed and entered. So the correct procedure for the appellant to follow was to appeal. This he did. Even with only one legitimate ground of appeal we have no hesitation at all in upholding the appeal, and we will set aside the order of the Judge.

By doing so, that seems to leave the parties in this position.

The proceedings were commenced by statement of claim, subsequently amended. There was a statement of defence and counter-claim. There was a summons by the appellant seeking to rely on Order 14, and an ex parte order giving judgment against the Bank for the amount claimed by the appellant, $25,156.15. That judgment has not been passed and entered, and we believe that it is in the interests of justice in all the circumstances if we direct that that judgment not be passed and entered, and we will do so. The writ of fi fa is not causing any problem at the moment, because there is an indefinite stay, the Sheriff has been ordered to withdraw, and those two orders have been embodied in an order that has been drawn up and entered (record p.71). That need not cause any concern. It is noted that in the application which resulted in the order from which this appeal is brought his Lordship made no order as to costs.

If the parties want to continue their struggle, and are not inclined to take a sensible course, then the only obstacle to their doing so is the judgment in favour of the appellant of 4th February, 1993. Action can, if necessary, be taken by the Bank to get it out of the way without the necessity for an appeal. Indeed if the parties want to fight and can muster enough sense to work out the exact issues necessary to decide the outcome of their fight on the merits, then it may be proper to have the whole matter decided on some kind of application to set aside the extant judgment in favour of the appellant. That may be preferable to proceeding by means of the skirmishes that so far have achieved nothing except benefit for the lawyers. Certainly

the trial on the merits cannot proceed further until that judgment is got out of the way, by some means or other.

The formal orders will be:

Appeal allowed and order of Saunders J made on 19th February 1993 and entered on 23rd February 1993 set aside.

Order the respondent to pay the appellant's costs of the appeal.

Direct the Registrar to take no steps to cause the judgment of Saunders J given on 4th February 1993 to be passed and entered until any further proceedings in relation to that judgment have been determined.

Mr. Justice Michael H. Helsham
President Fiji Court of Appeal

Sir Moti Tikaram
Resident Justice of Appeal

Sir Edward Williams
Justice of Appeal