IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL N0. 31 OF 1992.
(High Court Civil Appeal N0 6 of 1991)

BETWEEN:

SURENDRA PRASAD

APPELLANT

and

ANAND VIKASH and ARUNESHWAR VIKASH

RESPONDENTS

Mr. V. Kapadia for the Appellant.

Mr. N. Arjun with Mr. R. Gopal for the Respondents.

Date of Hearing : 10 May 1994

Date of Delivery of Judgement : 29 September 1994

JUDGMENT OF THE COURT.

On 13 September 1989 the respondents/plaintiffs filed a summons in the Suva Magistrates Court (action no. 1731 of 1989) in which they claimed possession of a dwelling house and land, an injunction to restrain the appellant defendant from using the dwelling house and the land and general damages. Essentially the

plaintiffs were asserting that the defendant was a trespasser. On 17 October 1989 the defendant filed a defence in which he sought that the plaintiffs' claim be dismissed with costs and counter-claimed for a declaration that he was the beneficial owner of the premises or alternatively for damages of $25,000.

The hearing of the matter commenced before Magistrate Mr. De Silva on 28 June 1990. However, the Magistrate was unable to continue with the hearing and the matter was adjourned part-heard to 1 August 1990. On 1 August 1990, by consent of the parties, the case was further adjourned to 13 August 1990.

On 13 August 1990, Mr. Maharaj, counsel for the defendant, advised the Court that the defendant was sick and requested a further adjournment of the matter. The Court granted the application and the matter was adjourned to 3 September 1990 for hearing. The Court required the defendant to file a copy of a medical certificate as to his unfitness to attend court.

On 3 September 1990 the defendant did not appear. Mr. Maharaj indicated to the Court that he had advised his client of the date of the hearing. Counsel, unable to explain the absence of his client (the defendant), sought leave to withdraw from the case. The Court granted leave to withdraw. The medical certificate that was required by the Magistrate had not been filed by 3 September 1990.

The plaintiffs then proceeded and called two witnesses for formal proof of their case. The Magistrate gave his judgment on 7 September 1990 and awarded possession of the land to the plaintiffs and dismissed the counter-claim by the defendant. He did not award damages.

On 21 September 1990 an application was made by the defendant to set aside the judgement and for stay of execution of the order. This application was made in accordance with Order XXX rule 5 of the Magistrates Courts Rules (Cap. 14). Although the defendant made reference to a statement of defence in paragraph 3 of his affidavit, the application was based solely on one ground, namely, that the defendant was not aware that the case had been adjourned to 3 September 1990 for hearing and that his lawyer Mr. Maharaj had not informed him of the hearing date. The defendant filed a medical certificate with his affidavit in support of the application. The application was heard on 5 December 1990. The learned Magistrate dismissed the application on 24 December 1990. In his reasons for the order, he stated the issue before him in the following terms:

> *"I have examined the affidavits of the Defendant and Plaintiff and given the submissions made my most anxious consideration. The matter in issue is whether the reasons given by the Defendant in his affidavit for his non-appearance on 3/9/90 on which date the Plaintiff led evidence in his absence are good and sufficient grounds to vacate the judgement."*

The learned Magistrate then concluded:

> *"It is pertinent to note that when Defendant's Counsel moved for an adjournment on 13/8/90 on the ground that the Defendant was ill, he stated to Court that the Medical Certificate would be filed; but when the case came up on 3/9/90, the Medical Certificate had still not been tendered. The said Medical Certificate is only tendered with the Defendant's affidavit dated 20th September 1990. Apart from the fact that Defendant had ample time to submit the Medical Certificate to Court, and tenders it only with his affidavit, the very Medical Certificate is suspect and cannot be accepted for the reason that it does not state that he was unfit to attend the Court. This is a fatal irregularity. The Defendant has stated in his affidavit that the allegation that on 13/8/90 he was seen driving a truck is true and that he went to the Hospital to get the Medical Certificate. In the absence of a statement in the Medical Certificate that he is not fit to attend Court, the question is whether if he is fit enough to drive a truck whether he was fit to attend Court on the said date. The failure on the part of the Defendant to tender the Medical Certificate as soon as possible to Court after the 13 August reveal [sic] his indifferent attitude towards his own case. The same attitude has been displayed by him when according to his own affidavit he failed to take any positive steps between the 13th August and 3rd September to ascertain from his Counsel the relevant date. But Mr. Maharaj his Counsel has informed the Court that the Defendant was informed of the next date of hearing. The Defendant has denied this. I see no reason to disbelieve learned Counsel's statement in Court that he informed the Defendant of the next hearing date. Even Defendant's statement in his affidavit that he came late on 3rd September and could not locate his Counsel does not bear scrutiny. He gives no*

reason why he waited till 7th September to meet his Counsel. His conduct reveals in ample measure his lethargic attitude towards his own case. Having displayed his lack of interest in his cause he cannot now ask for an opportunity to defend his case. He had every opportunity to do so from the very first date of hearing.

The delay in tendering the Medical Certificate, the fatal irregularity in the said Medical Certificate, the indifferent attitude and lack of interest of the Defendant between 13/8/90 and 3/9/90 in not ascertaining the next date of hearing from his Counsel, if in fact he was not so informed, has been taken into consideration in coming to a finding whether sufficient cause has been shown to have the Judgement entered on 3/9/90 vacated.

I am of the opinion that the Defendant has not shown sufficient cause and I accordingly dismiss the application with costs."

The defendant then appealed to the High Court against the decision of the Magistrate. His grounds of appeal were:

"1. That the learned trial Magistrate erred in law and in fact in entering judgment against the Appellant.
2. That the learned Magistrate erred in law and in fact in not setting aside the default judgment against the Appellant."

These two grounds of appeal were expressed in very general terms and they did not specify the errors in law or in fact. However, Counsel for the defendant made two submissions in the High Court. First, that the defendant suffered injustice when the learned Magistrate granted leave for Mr Maharaj to withdraw from the case. He submitted that the Court should not have allowed counsel to withdraw when no notice of his intention to withdraw had been served on the defendant. He submitted that the learned Magistrate should have adjourned the case to another date and only if the defendant had then failed to appear at the adjourned date would it have been fair to proceed in his absence.

The second submission made was that the learned Magistrate had before him affidavits filed by the defendant in which he stated, contrary to the statement made by Mr. Maharaj on 3 September 1990, that he did not know that the proceedings

had been adjourned to 3 September for further hearing and that he had not been advised of the date of the hearing by Mr. Maharaj.

The High Court concluded in the following terms:

> *"It clearly emerges from the contents of the Magistrate's Order dated 24 December 1990 that the decision to proceed in the absence of the Appellant on 3 September was not taken lightly. The Magistrate reviewed not only the chronology of events but also the affidavit evidence. Most importantly he accepted that Mr Maharaj had indeed told his client that the case would proceed on 3 September. The Magistrate disbelieved the Appellant. In my opinion he had every reason to do so. In particular the contents of paragraph 8 of the Appellants affidavit of 3 December 1990 seem to me to be quite unbelievable especially taken together with the Appellants extraordinary ability to drive his lorry on the day when he was too sick to attend Court.*
>
> *The decision whether to proceed in the absence of the Appellant on 3 September 1990 and the decision whether or not to set the Judgement aside where both decisions made by the Resident Magistrate in the exercise of his discretion. Nothing has been said to persuade me that in the exercise of that discretion the Magistrate erred. Even if I accepted, which I do not, that in withdrawing from representing his client without giving his client notice Mr Maharaj had failed to discharge his professional duty then I do not see how such a failure could avail the Appellants against the Respondents. The appeal is dismissed."*

The defendant has appealed to this Court from this decision. There were 6 grounds of appeal:

> *"1. The Learned Judge erred in law and in fact in holding that the Learned Magistrate was correct in this believing (sic) the Appellant when the Appellant had not even given evidence at the trial.*
>
> *2. The Learned Judge erred in law and in fact in deciding the Appeal on the issue of credibility when such issue was not before the Court.*
>
> *3. The Learned Judge erred in law and in fact in not holding that the Learned Magistrate erred in law in entering judgement against the Appellant.*
>
> *4. The Learned Judge erred in law and in fact in not holding that the Appellant was a victim of breach of the rules of natural justice.*
>
> *5. The Learned Judge erred in law and in fact in not holding that the Appellant was not given sufficient opportunity to present his defence at the trial.*
>
> *6. The Learned Judge erred in law and in fact in not holding that Mr. Maharaj had failed to discharge his professional duty as Counsel."*

Grounds 1 and 2 can be considered together. The point raised by these two grounds is a narrow one: that the defendant did not give oral evidence at the trial and therefore the learned Magistrate was wrong in determining the issue of credibility of witnesses.

In our view, an application to set aside judgement under Order XXX rule 5 of the Magistrate's Courts Rules (Cap. 14) places the onus on an applicant to show cause. In this particular case, the onus was on the defendant to give a satisfactory explanation to the Court for his failure to appear on 3 September 1990. The explanation of the defendant in this regard did not go unchallenged. For example the defendant's assertion that he was sick on 13 August 1990 (record pp. 51-2) was challenged by Anand Vikash (record p.56) and Henry Brij Raj (record p. 59). The defendant put in issue matters of fact in his affidavit in reply (record pp.65-69).

It is clear to us that the credibility of all deponents of affidavits was made an issue in the application to set aside judgment before the Magistrate.

We note that Mr. Maharaj did not file an affidavit nor was he called to give evidence on the application to set aside judgment. It may be suggested that the learned Magistrate erred in taking into account the statement of Mr. Maharaj that was made on 3 September 1990 in a separate proceeding. This statement was not before him as a matter of evidence on the application to set aside judgment. However, we do not wish to express any concluded opinion on this point as the matter has not been raised specifically on appeal before us. As we have stated before, grounds 1 and 2 raise a very narrow point. We dismiss these grounds of appeal.

Grounds 3, 4 and 5 can be considered together. Counsel has submitted that the defendant has been denied an opportunity to present his defence and this has resulted in breach of the principles of natural justice.

Counsel for defendant submitted that, when the learned Magistrate granted leave for Mr. Maharaj to withdraw from the case and proceeded with the trial without informing the defendant, he fell into error. Withdrawal of counsel, it was submitted, is governed by Order 67 rule 6 of the High Court Rules 1988 which requires that notice of intention to withdraw must be served on a client before a barrister or a solicitor is allowed to withdraw. Counsel for the defendant argued that there is no rule of practice in the Magistrates Courts Rules (Cap. 14) which governs a situation where a barrister or a solicitor wishes to withdraw from a case. Counsel for the defendant submitted that by virtue of Order III rule 8 of the Magistrates Courts Rules (Cap. 14), the High Court Rules are applicable.

Counsel for the plaintiffs in reply submitted that withdrawal of counsel in this case is governed by Order IV rule 1 of the Magistrates Courts Rules (Cap. 14) which is in the following terms:

> *"A party suing or defending by a barrister and solicitor in any cause or matter shall be at liberty to change his barrister and solicitor in such cause or matter, without an order for that purpose, upon notice of such change being filed in the office of the clerk of the court in which such cause or matter may be proceeding. But, until such notice is filed and a copy served, the former barrister and solicitor shall be considered the barrister and solicitor of the party until final judgment, unless allowed by the court, for any special reason, to cease from acting therein, but such barrister and solicitor shall not be bound, except under express agreement or unless re-engaged, to take any appeal from such judgment."*

Counsel for the defendant replied that this rule applies only in circumstances in which a client purports to change barrister or solicitor and has filed notice of

change and it is not applicable to circumstances where a barrister or solicitor wishes to withdraw from representation of a client.

We have not been referred to any authority on the proper application of this rule. We have reached the conclusion that Order IV rule 1 is applicable and the words ..."unless allowed by the court, for any special reason, to cease from acting therein;..." gives the court power to grant leave to a barrister or a solicitor who wishes to cease acting for a client for any special reason to do so. We find that the learned Magistrate acted within this power in granting leave for Mr. Maharaj to withdraw.

The question then arises; for what special reason did the learned Magistrate grant the leave? We are unable to find any recorded "special reason" upon which the Magistrate granted leave. In any case we do not consider that we should concern ourselves with this issue. Whether, or not, the learned Magistrate had any special reason, the end result of his ruling was that the trial proceeded in the absence of the defendant.

We believe the proper remedy for the defendant in the circumstances was to apply to set aside judgement under Order XXX rule 5 of the Magistrates Courts Rules (Cap. 14). In fact he made such an application. The onus was on the defendant to show two matters:

1. That he had a reasonable explanation for his absence at the trial.

2. That he had a defence on the merits.

On an application to set aside a judgment, the principal matter that must be shown by the applicant is that he has a defence on the merits. It has been said that it is an "almost inflexible rule" that the court will not accede to the application unless the applicant does show such a defence. On any such application, a Court will be bound to consider "whether any useful purpose is served by acceding to the application. Plainly no useful purpose is served if it appears that if the judgment were set aside and the action allowed to go to trial, there would be no possible defence" see Gamble v Killingsworth [1970] V.R. 161 at 168; see also Sholl J. in Bayview Quarries Pty Ltd. v Castley Development Pty Ltd [1963] V.R. 445 at 446. The position in England is the same. See Farden v Richter 23 QBD 124 at 129 and Evans v Bartlam (1937) AC 473 at 482.

On the first matter, the learned Magistrate did not find the defendant credible and consequently rejected his explanation. The High Court confirmed this finding. The defendant has not appealed against this finding before us.

As to the second matter, the defendant failed to lead evidence of any defence. This was fatal to the application to set aside judgment. Before us Counsel for the defendant in desperation argued that there would be a defence in law, namely, that the plaintiffs were not the registered proprietors of the land in question. However, we note that the defence filed by the defendant does not raise any facts which may give rise to such a defence in law. Similarly, the defendant failed to raise any facts in the application to set aside judgment that would support such a defence.

We fail to find any error in the decision of the High Court in upholding the decision of the learned Magistrate. We dismiss the appeal with costs.

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Sir Mari Kapi CBE
Judge of Appeal

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Mr Justice Gordon Ward
Judge of Appeal

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Mr Justice I. Thompson
Judge of Appeal