

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No.: HRA 18 of 2017

BETWEEN : **NARENDRA PILLAY t/a PILLAY GARMENTS** **1ST APPELLANT**

JAMES NILESH RAM Digicel Employee, Pilling Road, Nasinu

2ND APPELLANT

AND : **SAIRA BANO** of 144 Kelland Street, Narere, Nasinu **RESPONDENT**

Counsel : **Mr. Bukarau T. for the 1st and 2nd Appellants**
Mr. Raikanikoda S. for the Respondent
Date of Hearing : **27th November, 2017**
Date of Judgment : **11 December, 2017**

JUDGMENT

INTRODUCTION

1. The Respondent-Plaintiff (the Plaintiff) filed action against the Appellant-Defendants (the Defendants) and when the matter was mentioned to fix a hearing date counsel for the Defendants was absent. He stated that he had indicated his unavailability due to a personal ground. Further it is evidenced that a Default Judgment was entered on the same day in the absence of Defendants and or their lawyers, without adducing evidence. An application was filed in court below to set aside Default Judgment and this was dismissed, and Learned Magistrate considered it as an application for reinstatement. This is an Appeal against that dismissal of the application for setting aside the Default Judgment entered on 9th December, 2015.

FACTS

2. This is an appeal filed against Ruling of Resident Magistrate (RM) delivered on 19th September, 2016, dismissing an application for setting aside of Default Judgment.
3. Learned RM in his Ruling stated that
'it can be gleaned that the application is for re-instatement'.
4. The law relating reinstatement was discussed in the said Ruling.
5. No issue of reinstatement arose in this matter, as the Plaintiff had appeared on 9th December, 2015 which was a date fixed for mention to list it for hearing.
6. In the absence of Defendants' counsel RM had entered Default Judgment against the Defendants. Subsequently a Judgment Debtor Summons was also filed on 10th March, 2016. The application for setting aside of Default Judgment was made on 6th April, 2016, and the Ruling regarding the said application for setting aside of default judgment was delivered on 19.9.2016.

ANALYSIS

7. This is an Appeal against Ruling delivered on 19.9.2016.
8. The Notice of Intention to Appeal was undated but the stamp on that indicates that filing fees were paid on 7.10.2016. This is outside the time period set in Order XXXVII rule 1 of the Magistrates' Court Rules. This provision allows. Notice of Intension to Appeal to be filed within 7 days from the date the decision appealed against was delivered and the exception found in the proviso to the said Rule also allows verbal notice immediately after the decision was pronounced, which had not happened in this case.
9. The Grounds of Appeal was filed on 7th November, 2017. This is again outside the time stipulated in Order XXXVII rule 3 where it had stipulated a time period of one month.
10. So, without considering the merits of the Appeal it can be dismissed *in limine* for non-compliance with the orders sought as there is non-compliance of Magistrates' Court Rules.

11. The Order XXXVII rule 4 of the Magistrates' Court Rules states as follows

'On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.'

12. So the Grounds of Appeal needs to be filed within one month and if not it is deemed to have abandoned, unless court below had extended the time. Order XXXVII rule 4 creates a legal fiction by using words 'deemed'. So, unless the time was extended the appeal is abandoned.
13. There was no evidence of any leave being obtained by the Defendants. In any event this non compliance was not raised as an objection by the learned counsel for the Plaintiff at the hearing. It should also be noted that in terms of Order II rule 2 and Order III rule 9 of the Magistrates' Court Rules also allows extension of time. In terms of the earlier provision *'Parties may, by consent, enlarge or abridge any of the times fixed for taking any step'*.
14. The decision appealed was delivered on **19.9.2016**. Even if Notice of Intension to Appeal was filed within the stipulated time, this appeal is deemed abandoned as the no Grounds of Appeal was filed within one month time period.
15. The Appeal powers of a court needs to be determined by statute and or any rules made out in terms of such statute that confer power to make rules regarding such Appeals. Perusal of statutory law (Magistrates' Court Act) and also rules made under that indicate that power granted to the High Court in relation to Appeals from the court below are extremely wide, and can be utilized in fit and proper instances even if there are technical defects in such Appeal.
16. Sections 36, 37, 38, and 39 of the Magistrates' Court Act deals with the civil appeals and states as follows.

Civil Appeals

- "36. (1) Subject to the provisions of this Act, an appeal shall lie to the Supreme Court from a resident magistrate in the following cases:-
(a) from all final judgments and decisions: and*

(b) from all interlocutory orders and decisions made in the course of any suit or matter before a magistrates' court.

(2) An appeal shall lie to the Supreme Court from all judgments, decisions or orders of a resident magistrate sitting in its appellate jurisdiction under section 40.

Power to reserve question of law for the opinion of the Supreme Court

37. *In addition to and without prejudice to the right of appeal conferred by this Act, a magistrate may reserve for consideration by the Supreme Court, on a case to be stated by him, any question of law which may arise on the trial of any suit or matter, and may give any judgment or decision subject to the opinion of the Supreme Court, and the Supreme Court shall have power to determine, with or without hearing argument, every such question.*

Conditions precedent to appeal

38. *Subject to the provisions of section 39, the Supreme Court shall not entertain any appeal unless the appellant has Court, as prescribed by rules of court*

Discretionary power of Supreme Court

39. *Notwithstanding anything hereinbefore contained, the Supreme Court may entertain any appeal from a magistrates' court, on any terms which it thinks just." (emphasis added)*

17. Even though I am inclined to dismiss the Appeal for non-compliance of mandatory provisions by the application of 'legal fiction', as the Grounds of Appeal were filed outside the one month period without seeking leave, I will not do so considering the overall justice of the matter.

18. Order XXXVII rule 18 and 19 grants a wide discretion to the High Court in relation to Appeals and state as follows

General Powers of appellate court

18. *The appellate court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the appellate court thinks fit to determine before final judgment in the appeal, and generally, shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the appellate court as a court of first instance, and may rehear the whole*

case, or may remit it to the court below to be reheard, or to be otherwise dealt with as the appellate court directs.

Power of appellate court to give any decision or make any order

19. The appellate court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other orders as the case may require, including any order as to costs. These powers may be exercised by the appellate court, notwithstanding that the appellate may have asked that part of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.' (emphasis added)

19. In terms of Section 39 of Magistrates' Court Act, which was quoted before, the High Court may entertain any appeal from Magistrates' Court on any terms which it thinks just.
20. Order XXXVII rule 18 grants a wide discretion to the High Court notwithstanding any errors or defects in the record of the appeal. These provisions are not made to encourage negligent parties or their counsel, or to disregard the procedure, but to allow an appellate court widest possible discretion, to deal with the real question or dispute, when it is just to do so. When the decision appealed had misapplied a law and it had an effect of irreparable damage to a party, High Court can deal with such Ruling of court below, notwithstanding any error on the record. The overall justice should be in favour of such application.
21. So, even where there is failure on the part of the appellants regarding the non compliance of the time periods, if it is just, High Court can deal with the Appeal notwithstanding such failure of the appellants.
22. The Ruling delivered by RM on 19th September, 2016 needs to be set aside as there is a patent error on the face of it, which had gravely prejudiced the Defendants, and they are precluded from hearing in court below.
23. The Learned Resident Magistrate had considered the application of the Defendants, for setting aside of the default judgment as an application made under Order XXX rule 6.

24. Order XXX rule 6 of the Magistrates' Court Rules state as follows ;

Relisting of cause struck out

'Any civil cause struck out may, by leave of the court, be replaced on the cause list, on such terms as to the court may seem fit.'

25. The Plaintiff's claim cannot be struck out on the absence of Defendants and it was never done, in the court below. So there was no issue of relisting a cause and there was never such application before RM.

26. The Learned Resident Magistrate had entered Default Judgment in the absence of Defendants on 9th December, 2015.

27. The Defendants had applied to the court below to set aside the 'Default Judgment' entered on 9th December, 2015. The matter was fixed for mention on that day to fix hearing.

28. When there was no appearance for the Defendants on a mention date the court below had no power to enter Default Judgment.

29. In terms of Order XXX rule 3 of Magistrate's Court Rule when the *matter is fixed for hearing and at the hearing Defendant does not appear* there is discretion granted either to postpone the hearing and give fresh notice or to give judgment on evidence adduced by the Plaintiff. The said provision states as follows

'If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.'

30. If the Magistrate had entered judgment on the evidence adduced by the Plaintiff in terms of the abovementioned rule, it can be set aside in terms of Order XXX rule 5 of the Magistrates' Court Rules; but Default Judgment is allowed when the matter is fixed for hearing. This matter was never fixed for hearing by RM but 'Default Judgment' was entered.

31. So, when neither Defendants nor their lawyers appeared in court on 9th December, 2015 there was no power vested with the Magistrate to enter Default Judgment.
32. Even if it was a date fixed for hearing, the Magistrate was obliged to hear the evidence of the Plaintiff before entering any judgment in favour of the Plaintiff and no Judgment on Default could be entered without adducing evidence. Since it was a date fixed for mention, no issue of Default Judgment had arisen, and even on a date fixed for hearing default judgment can be entered only after adducing evidence. So Default Judgment ordered on 9.12.2015 was an error.
33. Any Default Judgment can be set aside in terms of Order XXXII rule 11 of the Magistrates' Court Rules and it states as follows
- 'Any judgment by default may be set aside by the court or magistrate upon such terms as to costs or otherwise as the court or magistrate may think fit'*
34. The Default Judgment entered on 9.12.2015 by the court below was an error, but when it was entered Defendants had sought to set it aside in terms of Order XXXII rule 11 of Magistrates' Court Rules, but learned RM had failed to consider this provision in the Ruling.
35. The above mention provision was not considered in the Ruling of the court below delivered on 19.9.2016. What was considered was provision relating reinstatement of strike out contained in Order XXX rule 6.
36. This is misapplication of correct law and normally the matter should be remitted to court below to be considered a fresh, by application of correct law in terms of Order XXXII rule 11 but considering the long delay in this matter that is not justified. It should also be noted that such a decision can also be appealed as of right to the High Court, which may incur further delay.

37. The Default Judgment needs to be set aside for following grounds
- a. There was no power vested with the Magistrate to enter Default Judgment on a day fixed for mention to fix hearing on 9.12.2015.
 - b. There was no power to enter default judgment for the Plaintiff without adducing evidence in court.
 - c. The Ruling delivered on 19.9.2016 did not consider Order XXXII rule 11 of Magistrates' Court Rules for setting aside the Default Judgment, but only considered Order XXX rule 6 of Magistrates' Court Rules regarding reinstatement.

CONCLUSION

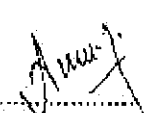
38. Notwithstanding the defects in the appeal, it is just to set aside the Ruling delivered by Resident Magistrate and also order made to enter Default Judgment. Magistrates' Court Act Section 39 and Magistrates' Court Rules allow such wide discretion in a fit and proper instance and in my judgment this is such an occasion. The Ruling delivered on 19.9.2016 and the order made on 9th December, 2015 to enter Default Judgment are set aside. The matter is remitted to court below to have an expedited hearing of the matter after notification of the parties. Considering the circumstances of the case no costs awarded.

FINAL ORDERS

- a. The Ruling delivered on 19.9.2016 and the order made on 9th December, 2015 to enter Default Judgment are set aside.
- b. No costs.
- c. A direction to the Magistrate to give priority to the matter as there was delay in this matter.

Dated at Suva this 11th day of December, 2017.




Justice Deepthi Amaratunga
High Court, Suva