THE FIJI SUGAR CORPORATION LIMITED

A

v.

MOHAMMED ISMAIL

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[COURT OF APPEAL, Tuivaga, P. Kermode, J.A., Tikaram, J.A.]

Civil Jurisdiction

Hearing: 28 June, 1988.
Judgment: 8 July, 1988.

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(Practice and Procedure—Judgment signed by default—application to set aside—reason for failure of file defence in time accepted—various triable issues raised by defendant's affidavit—plaintiff invited thereto, did not reply—order of trial Judge refusing to set aside judgment—a wrongful exercise of discretion).

J. G. Singh for the Appellant.
V. Parmanandam for the Respondent.

D

Appeal by The Fiji Sugar Corporation Limited (defendant) against a decision of Govind J. of 27 March, 1987 whereby the Judge varied a default judgment of $89,867.88 entered by Mohammed Ismail (plaintiff) on 15 October, 1986 by setting it aside to the extent of $4,352.28 leaving a balance intact viz. $85,509.40. At the outset, the Judge expressed himself as satisfied with the explanation by the defendant as to failing to file the defence on time. The ground of appeal was that the trial Judge erred in not setting aside the judgment when there "triable" issues and the (defendant) had a proper defence, including falsification of account, fraud and fundamental breach of agreement, including a counterclaim.

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On 28 August, 1986 the writ was issued. The defendant failed owing to a staff error to file a defence in time. The plaintiff signed judgment by default. The defendant's solicitors without undue delay applied under Order 13 r.10 to set aside the judgment. The affidavit in support, apart from explaining the delay also referred to the existence of a defence of irregular and double charges for work not carried out, and alleged fundamental breach of contract all more particularly set out in a draft defence annexed. In reply defendant filed an affidavit which did not specifically answer the allegation in paragraph 10 of the affidavit on behalf of the defendant.

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The trial Judge ordered further affidavits by each party setting out further particulars. The defendant's affidavit set out 16 of the alleged detailed particulars of overcharge (i.e. out of a total of 116) which totalled in terms of alleged overpayments, $4,352.28. The affidavit made further charges of falsification of accounts and fraudulent claims, which claims were not the subject of reply, although opportunity therefor was given.

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The learned Judge expressing himself to be not persuaded the defendant had a genuine defence, or that there were triable issues on the bulk of the plaintiff's claim. He dismissed the application except to the extent that he varied the judgment i.e. by reduction of the $4,352.28.

The Court of Appeal referred to Order 18. r.12(1) of the High Court rules—

"12(1) Subject to paragraph (4), any allegation of facts made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 13 operates as a denial of it."

They referred to statements in the affidavit filed on behalf of the defendant as being "highly significant". These statements were like others not the subject of reply.

No "clear unchallenged evidence of (alleged) gross irregularity and dishonest or fraudulent conduct" could have been presented to the Court by the affidavit presented on behalf of the defendant.

Whilst entertaining the possibility as the trial Judge said he did justice demanded that the issue of indebtedness be determined in a Court.

Held: The learned Judge had a discretion to exercise in deciding to set aside or refuse the application. See e.g. *Evans v. Bartlam* (1937) 2 All E.R. p. 646 from which it noted that on such an application as this, the affidavit of merits need show only that he has a prima facie defence whereas the effect of what the trial Judge had required was that defendant should establish a defence. The defendant raised triable issues and a prima facie defence. The conclusion therefore was that there had been a wrongful exercise of discretion.

Appealed allowed.

Judgment set aside

The leave to the appellant to defend and present or pursue a counterclaim, confirmed.

Appellant to have costs of the appeal.

Cases referred to:

Evans v. Bartlam (1937) 2 All E.R. 646

Judgment of the Court

The appellant, the defendant in this action, seeks to set aside part of the judgment of Govind, J. dated the 27th day of March, 1987 whereunder the learned Judge varied the default judgment of $89,867.68 entered by the respondent/plaintiff on the 15th day of October, 1986 by setting it aside to the extent of $4,352.28 leaving a balance of $85,509.40 intact under the judgment.

There is only one ground of appeal which is as follows:—

"THAT the learned trial judge erred in fact and in law in not setting aside the judgment in default entered against the Appellant when there were triable issues before this Honourable Court and the Appellant had a proper and arguable defence to the claim by the Respondent and a substantial Counterclaim against the Respondent as can be ascertained from the intended Defence and the Affidavits which have been filed herein for the Appellant and which Defence and Affidavits allege gross falsification of accounts and fraud and fundamental breach of the Agreement between the Appellant and the Respondent on the part of the Respondent details of which are more particularly referred to in the Pleading herein."

The writ was issued on the 28th August, 1986 and appearance was duly entered. The appellant's solicitors due to an oversight failed to file a defence in time and the respondent then entered up judgment by default. Mr Sweetman believed his firm's Labasa agents had acted on his instructions to file a defence. The position, however, was that the instructions with the defence were temporarily mislaid by Mr Sweetman's secretary and were not forwarded to the Labasa agents in time.

The learned Judge stated:—

"The affidavit of Mr Sweetman filed herein, states the reason for non-filing of defence and I at once say I accept the reasons advanced, for such failure discloses no dilatoriness or negligence on the part of solicitors for the defence."

The appellant's solicitors without undue delay then applied under Order 13 rule 10 to set aside the judgment. This application was supported by an affidavit sworn by Mr Sweetman. In addition to explaining the failure to file a defence this affidavit contained the following statement:

"I am informed and verily believe that the Defendant has a good Defence to this action based on the fact that the amount claimed includes irregular and double charges made by the Plaintiff for work not carried out by the Plaintiff as pleaded in Paragraph 5 of the Defence annexed as Exhibit 'A' and on the grounds of fundamental breach of contract as alleged in Paragraph 6 of the said Defence."

A draft Defence was annexed to the affidavit. Paragraph 5 of the draft alleged breach of a contract entered into by the appellant and the respondent on the 16th May, 1980 and alleged that the respondent had submitted accounts to the appellant for alleged services under the said agreement and which accounts the appellant contended were irregular. The Defence also alleged there were instances of double charging for work not carried out by the respondent. The appellant in its defence denied any indebtedness to the respondent.

The respondent filed an affidavit in reply which did not specifically answer the main allegations in paragraph 10 of Mr Sweetman's affidavit.

He did not deny that he had double charged for work not performed by him, an allegation which appears to be an accusation of dishonesty. The respondent stated in paragraph 3 of his affidavit:—

"THAT by paragraph 5 of the Defence the Defendant alleges "irregular (services) and instances of double charging" without giving particulars of such

A allegations bearing in mind the particulars supplied by me and I further say that if judgment is to be set aside the Defendant should at least pay your deponent the amounts on a "single" charge basis pending trial on the allegations of "double charges" so that judgment is set aside only partially."

Both in Mr Sweetman's affidavit and draft defence annexed thereto there was an allegation that there had been a fundamental breach by the respondent of the relevant agreement. The respondent's answer to this was:—

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"That the Defence as filed is in effect a bare denial and I take issue with the allegation of fundamental breach".

After hearing the solicitors for the parties the learned Judge made an interim ruling. Having stated the appellant's failure to file a defence was excusable he went on to state that in his opinion it must be shown that the defendant (appellant) has a C defence or (sic) merits. He referred to two cases, which we do not need to refer to, setting out the purpose or functions of pleadings. He then discusses the statement of claim and the proposed defence in the course of which he makes the following significant statement:—

"While it is possible that the plaintiff has obtained judgment for more than he is entitled I am not in a position to say so."

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The learned Judge then made a specific order. He stated:—

"I am, therefore, not prepared to rule in favour of the defendant unless it sets out with certainty, the breach complained of and how it affects the defendants liability and further it must detail the charges with which it disagrees.

E I further order that the defendant file a further affidavit setting out precisely the breach and its relevance. It must also set out the charges which it claims are double. Surely after 6 years it must know which charges it agrees with and which charges it disagrees with."

Pursuant to this order Mr Ram Das Moosad, the General Manager Finance of the appellant corporation, made a lengthy affidavit to which was annexed detailed F particulars of 16 of the alleged 116 instances indicated that the duplications detailed resulted in overpayments to a total of $4,352.28.

Mr Moosad's affidavit alleged gross falsification of accounts and fraudulent claims for services which were not rendered.

When making his order the learned Judge granted the respondent liberty to reply to Mr Moosad's affidavit but he chose not to reply. Mr Moosad's statements G stood unchallenged. The learned Judge after considering the affidavit stated:—

"On the basis of the affidavits and annexures filed herein I am not persuaded that the defendants have a genuine defence nor that there are triable issues on the bulk of the plaintiff's claim."

He then made the following order:—

H "I, therefore, set aside the judgment entered herein to the extent of $4,352.28 leaving the judgment in the sum of $85,509.40 intact."

From this order the appellant now appeals seeking in effect the setting aside of the whole of the default judgment but retaining the orders granting leave to defend and present a counterclaim and costs.

We turn now to consider the evidence before the learned Judge and commence with the contents of the affidavits.

We have referred to the failure by the respondent to deny or contradict allegations made by Mr Sweetman and Mr Moosad.

The rule as the pleadings contained in Order 18 r. 12(1) of the High Court Rules is quite clear. It provides:—

> "12.—(1) Subject to paragraph (4), any allegation of facts made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 13 operates as a denial of it."

Paragraph (4) refers to allegations that a party has suffered damage and amount of damages claimed. Traverse of such allegations is not required.

Rule 13 deals with denial by joinder of issue. The affidavits filed in support of the application were in the nature of pleadings but they went further than pleadings. They were on oath and they contained the evidence which the learned Judge was required to consider. Relevant statements made on oath by Mr Sweetman and Mr Moosad, which the respondent ignored, could not be ignored by the learned Judge.

Highly significant unchallenged statements by Mr Moosad are contained in paragraph 7 of his affidavit which is as follows:

> "The Defendant further says the Plaintiff fraudulently collected moneys from the Defendant in 1979 and 1980 without rendering services. Once again, false claims were made by charging for hire of the same trucks, for the same hours at different locations. The Defendant has identified 116 cases where claims for payment were duplicated, for the period 1st April 1979 to 7th August 1980. Attached herewith is the document prepared by the Defendant Company which gives some examples of such fraudulent claims. I further say the Defendant's record shows that the Defendant has a substantial counter claim against the Plaintiff."

These statements made the learned Judge's statement that he was not "persuaded that the defendants had a genuine defence nor that there are triable issues on the bulk of the plaintiff's claim" quite untenable on any reasonable view of the matter. No clearer unchallenged evidence of alleged gross irregularity and dishonest or fraudulent conduct could have been presented to the court.

It appears to this court that not only did the learned judge ignore such clear evidence but he appears to have misapprehended his functions on the application before him.

The orders he made directing the establishment with precision of alleged breaches and details of charges which the appellant did not accept were directions which might have had some validity if it had been a trial and the plaintiff, who had the burden of establishing his claim, was called on to provide further and better particulars of his claim.

The order however required the appellant to establish its defence. The learned Judge ruled in effect that as to the sum of $4,352.28 the appellant would be allowed in to defend and he varied the default judgment by reducing it by that amount.

We earlier referred to a significant statement made by the learned Judge namely the expression of his view that it was possible that the plaintiff had obtained judgment for more than he was entitled but he was not in a position to say to.

In our view, while entertaining such a possibility justice demanded that the issue of indebtedness be determined in court and the judgment should have been set aside.

Although the learned Judge stated he was not in a position to say whether judgment had been entered for too much he did in fact come to a decision on affidavit evidence and confirm that the sum and leaving the issue of a further sum of $4,352.28 claimed to be litigated.

The learned Judge had a discretion whether to set aside the judgment, and while we would not normally interfere with the proper exercise of that discretion except on grounds of law, this Court has the power and duty to remedy the effects of a decision that will result in injustice being done.

The principle on which a Court acts where it is sought to set aside a judgment resulting from a failure to comply with the rules was stated by Lord Atkin in the House of Lords case *Evans v. Bartlam* (1937) 2 All E.R. p. 646 at p.650. He said:—

> "I agree that both R.S.C. Ord. 13, r.10, and R.S.C., Ord. 27, r. 15, gives a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the application must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, to set it aside is one of the matters to which the court will have regard in excising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure."

We draw attention to that part of Lord Atkin's statement referring to the fact that a defendant only has to establish a prima facie defence. The learned Judge cannot have had the principles enunciated in *Bartlam's* case in mind when he ordered in effect that the appellant had to establish its defence. The statement also indicates that a draft defence is not necessary, what is required is the affidavit disclosing of prima facie defence.

The appellant raised a number of triable issues and a number of prima facie defences to the claim. In these circumstances we are bound to conclude that the learned Judge wrongly exercised his discretion in this matter.

The appeal is allowed.

The default judgment entered and dated the 15th day of October 1986 is wholly set aside. A

Those portions of the learned Judge's judgment dated the 27th March granting leave to the appellant to defend and present or pursue a counterclaim and order as to which there has been no appeal, are confirmed.

The appellant is to have the costs of this appeal. B

Appeal allowed; unconditional leave to defend.