

IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CIVIL APPEAL NO. 12 OF 1980

Between:

PARAS RAM s/o Krishna APPELLANT

- and -

RICKY LAL s/o Muni Lal RESPONDENT

Mr. H.M. Patel for the Appellant.
Mr. H. Lateef with Mr. Jamnadas for the Respondent.

J U D G M E N T

The appellant, who was the defendant in the Court below complains about the setting aside of the judgment he obtained on the 7th May, 1980.

It is convenient to refer in this judgment to the respondent as the plaintiff and the appellant as the defendant.

The plaintiff in the Court below claimed damages from the defendant for negligence arising out of an accident involving the vehicles owned by the respective parties. The defendant filed a defence and counterclaimed for damages for the alleged negligence of the driver of the plaintiff's vehicle.

Both parties were represented by solicitors who between the 14th November, 1979, and 12th March, 1980, appeared on 5 occasions for their clients. On the 12th March, 1980, when both solicitors were present, the

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action was adjourned to the 30th April, 1980, for hearing. On that date neither the plaintiff nor his solicitor appeared but the defendant and his solicitor did appear.

The Magistrate waited until 12.15p.m. when he then struck out the plaintiff's claim and proceeded to hear the counterclaim.

After hearing the defendant and two of his witnesses, the Magistrate on 7th May, 1980, found the defendant's claim established but held he was equally to blame for the accident. He gave the defendant judgment on his counterclaim for \$786.30.

It was not until the 26th August, 1980, that the plaintiff took out a summons seeking to set aside the judgment.

Mr. R.P. Singh, solicitor for the plaintiff, filed an affidavit in support of the summons. This discloses that "due to inadvertent oversight" he was not informed of the date of the adjourned hearing and was consequently not present at the hearing. He did not in his summons seek to have the plaintiff's claim reinstated.

A Mr. A. Singh appeared for Mr. R.P. Singh on 30th April, 1980, when the case was adjourned to 30th April, 1980.

The Magistrate who heard the counterclaim left Fiji before the summons to strike out the judgment was issued and it was heard by another Magistrate.

The Magistrate dealing with the application to set aside the judgment purported to act under Order XXX, rule 5 of the Magistrate Court Rules which provides :

" Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit."

The Magistrate considered whether 'sufficient cause' was shown. He said in his judgment :

" In my opinion 'sufficient cause' has been shown to set aside the said judgment. It is revealed in the affidavit of Mr. Singh that arising out of this accident there was a conviction of the defendant. Furthermore the learned magistrate also found 'fifty fifty blame'. Furthermore, in the interest of justice I do not consider that the plaintiff in those circumstances should be precluded from pursuing his claim in a court of law on merits."

The Magistrate set aside the judgment and restored the action to the list for hearing. The defendant has not appealed against the latter part of the Magistrate's order and only complains about the setting aside of the judgment.

As for the reasons given by the Magistrate for setting aside the judgment, the defendant's conviction was pleaded by the plaintiff and the Magistrate who tried the counterclaim refers to this fact in his judgment. He found the defendant negligent to the extent of 50%. The plaintiff was not precluded from pursuing his claim and this is now put beyond any doubt by the Magistrate's order restoring the plaintiff's claim.

The Magistrate did not consider whether in the circumstances this was a case where the defendant could be compensated by costs. The plaintiff was represented by counsel and it was his counsel's negligence or that of a solicitor briefed by him to appear for him that was the cause of the plaintiff's action being struck out.

Nor when referring to Odgers on Pleadings and Practice did the Magistrate appreciate that the Rules of the Supreme Court (O.35 r.2) give a judge a much wider discretion than has a Magistrate under Order XXX rule 5

where a Magistrate may set aside a judgment 'on sufficient cause shown'. If sufficient cause is shown he has a wide discretion in fixing terms. If sufficient cause is not shown he cannot set a judgment aside.

The Magistrate relied also on Hayman v. Rowlands (1957) 1 All E.R. 321 and quoted a passage from Lord Denning's judgment.

That case was one where a tenant by mistake did not appear at a trial and his landlord proved his case and judgment was given for the landlord. The tenant paid the rent due into court and applied for a new trial. The County Court judge refused a new trial. On appeal a new trial was ordered because it was held that the tenant had some defence (viz having paid all rent) and it was not reasonable to make an order for possession. In that case it was stated that where a party failed to appear by mistake a new trial should be ordered if it could be done without injustice, the other party being compensated in costs.

I do not consider the defendant can be compensated by an order for costs and it would be unjust to deprive him of his judgment. He has proved his claim which necessitated his calling witnesses. Court costs would not compensate him for solicitor/client costs. Had judgment been entered by default the position would be different. Also after nearly 2½ years since the accident happened he could be severely prejudiced in proving his counterclaim. There has been a trial of the counterclaim albeit the plaintiff was not present and the issue of negligence has been considered and determined.

While the Magistrate referred to Lord Denning's remarks he did not comment on Lord Denning's statement that a person seeking a new trial ought to show some defence on the merits.

Mr. Singh apart from giving a reason for his not attending the Court referred to the defendant's conviction indicating the defendant was negligent. The other Magistrate had found the parties equally negligent.

No other possible defence was disclosed by the plaintiff to justify setting aside the judgment after trial.

Nor did the Magistrate consider the plaintiff's delay. Judgment was given against him on the 7th May, 1980, but it was not until the 26th August, 1980, that he moved to set aside the judgment.

I do not consider the plaintiff showed 'sufficient cause' why the judgment should be set aside and had the Magistrate considered all factors I have mentioned, he should have come to that conclusion.

Justice however has been done by restoring the plaintiff's claim.

I allow the appeal and revoke the Magistrate's order so far as it relates to setting aside the judgment for the defendant on his counterclaim.

The judgment is restored but I order that execution thereon be stayed pending the trial on the plaintiff's claim with this proviso that such stay shall lapse if the plaintiff shall not have applied to the Magistrate's Court within one month from the date of this judgment for his action to be listed for hearing.

The defendant is to have his costs of this appeal.

R.G. Kermode
(R.G. KERMODE)

ACTING CHIEF JUSTICE

SUVA,

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