Fiji National Provident Fund Board v. Shri Datt

High Court
Fatiaki J.
22 July 1988

Civil procedure—judgment in default—Order 13 Rule 10—discretion to set aside. Evidence—estoppel—issue estoppel.

A judgment in default of appearance had been entered against the defendant. Three months later, in execution of its summary judgment, the plaintiff caused a bankruptcy notice to be served on the defendant. This was followed two months later by a bankruptcy petition. Just three days before the bankruptcy petition was listed to be heard, the defendant filed an affidavit opposing the petition. Two weeks subsequent to that, the defendant filed this application to set aside the default judgment on which the notice and petition were based.

The default judgment had been for arrears of contributions and surcharges under the provisions of the Fiji National Provident Fund Act, cap. 219. In this application, the defence raised by the defendant was that he was not an "employer" as defined in section 2 of the Fiji National Provident Fund Act.

There was affidavit evidence to the effect that, in at least six previous proceedings instituted by the plaintiff statutory body against the defendant and in which the defendant was successfully sued or convicted, the defendant had been described in identical terms to that in the instant writ of summons.

HELD:

(Declining the application.)

(1) Order 13, Rule 10 of the High Court rules confers on the Court a discretion to set aside or vary any default judgment on such terms as it thinks just:

The discretion is prescribed in wide terms limited only by the justice of the case and although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none have been or can be elevated to the status of a rule of law or condition precedent to the exercise of the court's unfettered discretion.

These judicially recognised "tests" may be conveniently listed as follows:

(a) whether the defendant has a substantial ground of defence to the action;
(b) whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
(c) whether the plaintiff will suffer irreparable harm if the judgment is set aside.

In this latter regard, it is proper for the court to consider any delay on the defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and

whether or not the same has been stayed.

(2) The defendant's application has not, on the facts, been brought with any expedition.

(3) The defence raises only one legal issue which has already been decided more than once against the defendant in previous proceedings between him and the plaintiff board. That gives rise to the issue estoppel. *R.* v. *Hogan* [1974] 1 Q.B. 399 at 401 per Lawson J. applied; statement of Denning M.R. in *Amalgamated Property Co.* v. *Texas Bank* [1982] 1 Q.B. 84 at 122 approved.

50 **Other cases referred to in judgment:**

Amalgamated Property Co. v. *Texas Bank* [1982] 1 Q.B. 84
R. v. *Hogan* [1974] 1 Q.B. 399

Legislation referred to in judgment:

Fiji National Provident Fund Act, cap. 219, sections 2, 13, and 56(2)
Registration of Business Names Act, cap. 249, sections 10 and 15(3)

Other sources referred to in judgment:

Fiji National Provident Regulations
Rules of the High Court

Counsel:

60 *C. Chandra* for the plaintiff
S. Parshotam for H. Sahr for the defendant

FATIAKI J.

Judgment:

The defendant by a motion dated 14 March 1988 seeks to set aside a judgment regularly entered in default of appearance by the plaintiff body.

The defendant's application is brought pursuant to Order 13 Rule 10 which confers on the Court a discretion to set aside or vary any default judgment on such terms as it thinks just.

The discretion is prescribed in wide terms limited only by the justice of the case 70 and, although various "rules" or "tests" have been formulated as prudent considerations in the determination of the justice of a case, none have been or can be elevated to the status of a rule of law or condition precedent to the exercise of the Court's unfettered discretion.

These judicially recognized "tests" may be conveniently listed as follows:

1. whether the defendant has a substantial ground of defence to the action;
2. whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
3. whether the plaintiff will suffer irreparable harm if the judgment is set aside.

In this latter regard in my view it is proper for the Court to consider any delay on the 80 defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed.

The plaintiff by its writ of summons dated 26 August 1987 and personally served on the defendant on 7 September 1987 claimed various liquidated amounts for

arrears of contributions and surcharges under the provisions of the Fiji National Provident Fund Act, cap. 219 (hereinafter referred to as the F.N.P.F. Act).

Sixteen days later, on 23 September 1987, judgment in default of appearance was entered against the defendant in the sum of $19,379.87 together with $65 costs.

Approximately, three months later, on 11 December 1987, in execution of its summary judgment the plaintiff caused a bankruptcy notice to be served on the defendant. This was followed (about two months later) by a bankruptcy petition served on 4 February 1988.

Then three days before the bankruptcy petition was listed to be heard, the defendant filed an undisclosed affidavit opposing the petition on 26 February 1988 and two more weeks were to pass before the defendant applied to set aside the default judgment on which the said notice and petition were based. The bankruptcy proceedings have since then been stayed by consent pending the outcome of this present application.

In my view the defendant's present application cannot be said to have been brought with any expedition; no less than six months have expired since the default judgment was entered, and no less than three months since the bankruptcy notice was admittedly served on him.

Nevertheless, the defendant has not approbated the judgment in any way and, although unverified by an affidavit from the solicitors concerned, he has deposed to instructing, presumably in time, a firm of solicitors to defend the action.

I note that the plaintiff's statement of claim itself lacks particularity as to the number and names of employees for whom non-payment of contributions are alleged, and the claim for arrears and surcharges for 1981 prima facie appears to have been brought outside the six years time-limit expressly laid down in section 56(2) of the Fiji National Provident Fund Act, cap. 219. Nor is the plaintiff's capacity anywhere averred or pleaded in the statement of claim which is itself based generally on the provisions of the Fiji National Provident Fund Act.

I move next to consider whether the defendant has a serious defence to the plaintiff's claim. In this regard the defendant has annexed a proposed "defence" in the following terms:

1. That defendant denies owing the plaintiff the sum claimed or any sums whatsoever.
2. The defendant denies that any demand has been made on him by the plaintiff.
3. The defendant further says that he has never traded as "Datts Furniture and Joinery" of Lautoka.

From this "defence" and affidavit in support, it is clear that the defendant denies liability for the amount claimed on the basis that he is neither a partner in or owner of *nor* has he traded as "Datts Furniture and Joinery". He is, however, on his own admission, employed as a manager of the firm.

The liability to pay contributions to the Fiji National Provident Fund established under the Fiji National Provident Fund Act is that of an "employer" as defined in section 2 of the Act, which reads, as far as relevant for present purposes:

Employer means—

(a) in respect of an employee (employed in Fiji under a contract of service or

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apprenticeship or learnership, whether written or oral or whether expressed or implied), the person with whom such employee has entered into a contract of service or apprenticeship or learnership; or

(b) in respect of an employee (being in Fiji is under a contract for the performance of manual labour entered into by him either as an individual or as one of a group of persons), the person with whom such employee has entered into a contract to perform manual labor;

(Inclusions in brackets taken from the relevant statutory definition of an employee.)

140 Clearly, an "employer" is the person with whom the employe has entered into a contract of service or a contract to perform manual labour regardless of whether that person is or is not registered under a business name or is described as a manager or partner of a firm.

The sworn assertion by the defendant that he is "only employed as a manager" of the defendant firm is only one inconclusive evidential factor to be considered whether in law he is an "employer" liable to make contributions under Section 13 of the Fiji National Provident Fund Act.

In my view a "certificate of registration" issued pursuant to the Registration of Business Names Act, cap. 249 is *per se* of little or no assistance at all in the resolution

150 of the primary question raised in the defendant's defence and with which this Court is concerned, namely, whether the defendant is an "employer" liable to make contributions under the Fiji National Provident Fund Act.

I note that by section 10 of the Registration of Business Names Act, cap. 249, the failure by an individual to register a business name does not preclude the institution of civil proceedings against such individual in the name under which he is carrying on business, and such unregistered business name shall be a sufficient designation of such individual in a writ.

In this case the defendant is described in the plaintiff's writ of summons as follows: "Shiri Datt (f/n Indar Datt) T/A 'Datts Furniture & Joinery' of Lautoka".

160 The evidence in support of this designation of the defendant is allegedly to be found in the text of a registration of employer form which is required to be completed and submitted by every "employer" pursuant to Regulation 4(1) of the Fiji National Provident Registrations under threat of penalty for failure to do so (see: Regulation 79(1)(a)).

The form in question purports to register "Datts' Furniture & Joinery" of P.O. Box 655, Lautoka as an "employer" of three employees. In it, it is described as a partnership operating out of business premises at Natabua, Lautoka, with a showroom in Yasawa Street, Lautoka, and dealing in furniture and joinery.

It is dated 30 January 1976 and ends with the following signature caption:

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Full name and address of Employer/Owner of Business or Principal Partner; Secretary; Managing Director; signing the form on behalf of the employer:
Name (Print) Shri Datt s/o Indar Datt
Home Address—Natabua, Lautoka
I hereby certify the above to be true and correct:
Signature (Sgd,)......... Designation......... Partner
Date: 30/1/1976.

The defendant, in an affidavit dated 12 May 1988 in "answer" to the above-mentioned form deposed to in paragraph three of the affidavit of the plaintiff's enforcement officer dated 31 March 1988, merely states:

> 2. That I deny the contents of paragraph 3 of the said Affidavit and further say that at all material times I was not a partner in the firm of Datts Furniture & Joinery.
> 3. That at all material times my father Indar Datt was the sole owner of Datts Furniture & Joinery.

There is also annexed to the defendant's above-mentioned affidavit a certificate of registration under the Registration of Business Names Act, cap. 218, purporting to register "Datts Furniture Shop of Natabua, Lautoka, Box 328 Lautoka" on the eighth day of August, 1972 as a business name.

The certificate is by the terms of section 15(3) of the Registration of Business Names Act only "prima facie evidence of the fact and date of registration and any other particulars therein contained" such as the existence of a statement applying for registration, and the business name and address.

As such, it is *ex facie* unrelated to the "employer": "Datts Furniture & Joinery of P.O. Box 655, Lautoka" referred to in the earlier mentioned registration of employer form, albeit that "Datts Furniture" and "Natabua, Lautoka" appear to be common elements.

In my view the annexure cannot be said to refer to the business name "Datts Furniture & Joinery" under which the plaintiff issued its writ against the defendant, nor, considering my earlier expressed view about such certificates, does it preclude the defendant from being an "employer" under the Fiji National Provident Fund Act.

It is noteworthy that in the defendant's bare denial of the form he does not deny his signature on it, *nor* does he deny completing it in his own handwriting *nor* has he attempted any explanation of how he is designated as a "partner" in the partnership business when there are other non-proprietory titles or designations suggested within the form itself such as "secretary" and "managing director".

If it were a simple matter of preferring one annexure to another I would have little hesitation in preferring that of the plaintiff statutory body's registration of employer form, but the plaintiff body has also raised "estoppel" in its affidavit evidence.

This is evidenced by previous proceedings instituted by the plaintiff statutory body against the defendant and in which he was successfully sued or convicted, and in all of which he is described in identical terms to that in the present writ of summons, earlier set out, these were (by date):

(a) On the 26th of June, 1979 in Lautoka Magistrate's Court Criminal Case No. 646/79 for failure to pay contributions for the month of January, 1979;
(b) On the 9th of April, 1980 in Lautoka Magistrate's Court Case No. 303/80 for failure to pay contributions for the month of January, 1980 and surcharges;
(c) On the 9th of December, 1980 in Lautoka Magistrate's Court Case No. 1095/80 for failure to pay contributions for the month of July, 1980;
(d) On the 27th of February, 1984 in Suva Supreme Court Action No. 201 of 1984 and in subsequent enforcement proceedings taken by way of Bankruptcy Nos. 76 of 1984; 334 of 1984;

(e) On the 1st of May, 1984 in Lautoka Magistrate's Court Criminal Case No. 388/84 for failing to produce documents for the years 1981 to 1983 (inclusive);

(f) On the 23rd of July, 1984 in Lautoka Magistrate's Court Criminal Case No. 754/84 for failing to produce documents for the years 1981 to 1983 (inclusive); and

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(g) Further Bankruptcy Action nos. 619 of 1986 and 625 of 1986 taken in respect of the final judgment earlier obtained by the plaintiff in Civil Action No. 201 of 1984 (d) above.

Faced with this seemingly overwhelming array of previous proceedings, the defendant merely denies being a partner and asserts he was wrongfully sued. There is no suggestion that he has appealed against any or all of the above-mentioned convictions or judgments, the time for the doing of which has long now expired.

Counsel for the defendant at the hearing of the application, however, submitted that "estoppel" was not a cause of action, and to use the oft-quoted expression, was
240 a "shield and not a sword" and ought not to be used so as to deprive the defendant of the opportunity to fully argue his defence.

But Lord Denning M.R. in *Amalgamated Property Co.* v. *Texas Bank* (1982) 1 Q.B. 84 at page 122 had this to say about estoppel:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only
> 250 a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

So, too, in this case it is clear that since the submission of the employer registration
260 form in 1976 and right throughout the court proceedings from 1979 to 1986 the plaintiff Board and the defendant have proceeded on the underlying legal assumption that the defendant was an "employer" for the purposes of the Fiji National Provident Fund Act, cap. 219.

As such, in the absence of clear, fresh, and uncontravertible evidence or new argument or legal authority to the contrary, it would, in my view, be unfair to allow the defendant to go back on that assumption which has held sway between them for the past twelve years.

Furthermore, such a submission overlooks the fact that on more than one occasion and certainly in respect of all the occasions when the defendant was
270 convicted of the offence of failing to pay contributions to the plaintiff Board, it was a

fundamental issue and ingredient that had to be established beyond reasonable doubt by the plaintiff Board that the defendant was an "employer" liable to make such contributions as were alleged in the charges.

This is the very issue which the defendant's proposed defence seeks to now challenge and I am more than satisfied that there is no merit at all in it, and furthermore the defence as proposed raises only one legal issue which has already been decided more than once against the defendant in previous proceedings between him and the plaintiff Board.

Lawson, J. in *R.* v. *Hogan* (1974) 1 Q.B. 399, in holding that issue estoppel applied in criminal proceedings, described the doctrine as follows at page 401 D:

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> Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties.

In the circumstances, to permit the defendant to now impeach, by an exercise of the Court's discretion, that which he has neglected and can no longer lawfully impeach, would be to overlook the applicability of issue estoppel to the present case and undermine the need for some finality in litigation.

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In my view it would be an unfair and unjust exercise of the Court's discretion to set aside the default judgment regularly entered by the plaintiff on the basis of the defendant's proposed unmeritorious defence and I therefore refuse the defendant's application with costs to the plaintiff Board.