IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 24 of 1980

Between:

RAM PRASAD SHARMA
s/o Nageshwar Maharaj

Appellant

and

1. BURNS PHILP (SOUTH SEAS) COMPANY SLIMITED
2. METAL TRADERS INCORPORATION

Respondents

Mr. G.P. Shankar for the Appellant
Mr. J.R. Reddy for the First Respondent
Mr. A. Tikaram for the Second Respondent

Date of Hearing: 8 September 1980
Delivery of Judgment: 30 September 1980

JUDGMENT OF THE COURT

Henry J.A.

This is an appeal against the refusal of the Supreme Court to strike out the defences filed by respondents and to enter judgment for appellant with costs. Appellant claimed the sum of £10,276 from both respondents based on events which took place at the latest in January 1958. The Writ of Summons was issued on February 21, 1961. First respondent filed its defence on June 24, 1961 and second respondent filed its defence and a counterclaim on July 5, 1961. Appellant's reply to the defences of respondents and its defence to the counterclaim

were not filed until March 17, 1962. The pleadings were thus completed so the delay from July 1961 until March 1962 appears to be that of appellant. Notices by appellant of his intention to proceed were given successively on January 12, 1965 and June 13, 1967.

On July 26, 1968 first respondent took out a summons seeking an order dismissing the action for want of prosecution. This was heard on August 9, 1968 before Hammet C.J. Mr. Stuart, counsel for first respondent, in the presence of counsel for appellant, advised the Court that second respondent's attitude was that it had settled with appellant and that he had agreed to an adjournment of his summons to strike out to enable counsel for appellant to take further instructions. The adjournment was granted. Mr. Parmanandam represented Mr. Ramrakha at this hearing. The summons came before Knox-Mawer J. on September 6, 1968 Mr. Ramrakha and Mr. Stuart appeared and again there was no appearance of second respondent. The record of Knox- Mawer J. is as follows:

"Stuart: Mr. Ramrakha has undertaken to file a notice of discontinuance against 1st Dt. So by consent this application may be withdrawn.

Court: Application withdrawn. No order for costs.

Knox-Mawer, J.
6.9.68 "

The notice of discontinuance has never been filed.

The matter remained dormant until April 25, 1978 - some twenty years after the alleged cause of action arose - eighteen years after the issue of the writ, and thirteen and eleven years respectively after two successive notices of intention to proceed had been

given by appellant. It will be noted that the second notice of intention to proceed was given on June 13, 1967. This was followed by the summons to strike out which was issued by first respondent on July 26, 1968 apparently because appellant had taken no steps to get the action heard. The issue of this summons was followed by the announcement of the settlement before Hammett C.J. and the further announcement of the undertaking to discontnue before Knox-Mawer J. and the consequent withdrawal of the summons without costs.

Appellant changed his solicitor in 1979 and gave a third notice of intention to proceed on April 25, 1979. This was followed by a summons for directions served on June 9, 1979 almost seventeen years after such a summons ought to have been taken out. This was the third attempt to bring the case on for trial after two previous attempts which ended in the announcement of a settlement and an intention to discontinue the action. The delay was approximately eleven years. To say the least the delay was inordinate. No satisfactory explanation has been forthcoming. Indeed, practically the whole of the grounds of appeal are an attempt to attack the authority of Mr. Ramrakha to make the statements made to the Chief Justice and Knox-Mawer J. However, the Deputy Registrar made orders for discovery by both respondents at a hearing before him on June 6, 1979. The learned judge has justly criticised the making of these orders but it is not a matter which further requires out attention. As earlier stated neither respondent had at this stage complied with the order so the summons to strike out the defences and to enter judgment was issued. It was heard on February 12, 1980 and judgment dismissing it was delivered on March 4, 1980. This appeal is against that judgment.

In the meantime on November 13, 1979 first respondent had filed its list of documents. Nevertheless the notice of appeal asks for the dismissal in the Court below to be set aside and for judgment to be entered for appellant or for his application to enter judgment be heard. This appears to be seeking a judgment against both respondents. Much of the argument turned on the effect of Mr. Ramrakha's undertaking. It is conceded now that the appeal ought not to succeed against first respondent since it has now complied with the order for discovery. The case can now go for trial when if second respondent so desires, the issue of the purported settlement can be determined. It was no part of the duty of this Court, as counsel for appellant appeared to argue, to determine the legal effect of the matters referred to in, and arising out of, the appearances before Hammett C.J. and Knox-Mawer J.

Thus the sole question now is whether or not judgment by default should be entered at once against second respondent. The firm of Cromptons acted as solicitors for second respondent. When the matter became dormant after the appearance before Knox-Mawer J. in 1968 they took no further interest in the action and have not been in touch with second respondent which appears to be foreign concern domiciled in New York in the United States of America. Their file has been lost. They have made no attempt to advise their principals about the order for discovery or to comply with it or to take any other steps except to oppose the long delayed attempt of appellant to revive a very stale action which had earlier apparently come to an end after the appearance before Knox-Mawer J. in 1968.

Cromptons' actions in remaining as solicitors on the record and accepting service of proceedings reviving the action without taking some steps to meet that situation is difficult to condone. Nevertheless

the proceedings before Hammett C.J. and Knox-Mawer J. raised issues which the learned judge rightly considered, together with the inordinate delay and the general history of the litigation, as proper grounds for refusing appellant's application for judgment by default.

The remedy sought is one of discretion: Order 24 rule 16. The priciples applicable to appeals against the exercise of a discretion are well settled: Evans v. Bartlam [1937] A.C. 473; Charles Ossento & Co. v. Johnston [1942] A.C. 130 and Ward v. James [1966] 1 Q.B. 293. The learned judge has correctly applied the law and has properly weighed all relevant factors. Appellant's counsel has misconceived the issue which has been raised as a result of the purported settlement and proposed discontinuance of the case in 1968, both made in the presence of counsel for appellant. The case must be allowed to take its course against both respondents.

The appeal is dismissed. Appellant will pay the costs of first respondent but no order for costs is made in favour of second respondent

(SGD.) T. Gould
VICE PRESIDENT

(SGD.) T. Henry
JUDGE OF APPEAL

(SGD.) B.C. Spring
JUDGE OF APPEAL