IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0060 OF 1998S
(High Court Civil Appeal No.HBC404 of 1990))

BETWEEN:

ABDUL KADEER KUDDUS HUSSEIN

Appellant

AND:

CHECKABOARD FURNISHINGS

1st Respondent

PACIFIC FORUM LINE LIMITED

2nd Respondent

PANPACIFIC INSURANCE COMPANY LIMITED

3rd Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Mr. Justice Savage, Justice of Appeal

Hearing: Monday, 22 November 1999

Counsel: Mr R. R. Gordon for the Appellant
Mr. S. Lateef and Miss B. Narain for the Second Respondent
No appearance for the First and Third Respondent

Date of Judgment: Friday, 26 November 1999

JUDGMENT OF THE COURT

This is an appeal from an interlocutory order of the High Court at Suva given on the 3rd September 1998 by Scott J. in which he dismissed an application for leave to appeal to this Court from an earlier interlocutory judgment of his refusing to set aside an Order made by Kepa J on the 28th October 1993. Subsequently on the 16th November 1998 the President, by consent, recorded that it was agreed that no leave to appeal or leave to appeal out of time was required. The appeal proceeded before us as if it were an appeal from the judgment of Scott J refusing to set aside the Order made by Kepa J.

The appellant had issued a writ on the 1st November 1990 claiming various

substantial sums of money from the three respondents, all of whom filed statements of defence. It is not necessary to catalogue all the steps that were taken by the parties thereafter but it will be sufficient to record those that are relevant for the purposes of this judgment.

1 November 1990	Issue of writ by appellant.
27 November 1990	Summons by third respondent, (Panpacific Insurance) to strike out the writ and statement of claim on the grounds that statement of claim disclosed no reasonable cause of action against it.
22 July 1991	Summons by the appellant for directions.
3 February 1993	Notice by second respondent, (Pacific Forum) of intention to proceed (19 months later).
7 May 1993	Notice by Appellant of intention to proceed.
12 October 1993	Summons by Pacific Forum for hearing on 22 October to strike out action against it for want of prosecution.
22 October 1993	Action struck out by Kepa J subject to filing of affidavit. Affidavit filed on 28 October 1993.
28 October 1993	Formal order made in terms of Kepa J's order.
3 February 1994	Appellant writes to Chief Registrar to the effect that he had just learnt that the action had been struck out and asking for copies of relevant documents.
30 April 1997	Notice by Appellant of intention to proceed (3 years later).
23 July 1997	Summons by the Appellant for an order that the action be reinstated, the application being made pursuant to Order 14 Rule 11.

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9 December 1997	Order made by Madraiwiwi J adjourning summons sine die there being no appearance of appellant but appearances by Pacific Forum and Panpacific Insurance.
5 May 1998	Order made by Scott J dismissing the summons for reinstatement of the action.
18 June 1998	Appellant applies for leave to appeal against the Order made by Scott J on 5 May. Scott J heard the parties on 1 September 1998 and gave a written decision of the 3rd September dismissing the application.

As noted earlier by consent and in terms of an order made by the President this matter has been heard by the Court.

In an admirably clear and concise judgment given on the 3rd September 1998 Scott J sets out how the matter proceeded before him and how he dealt with it. The application for reinstatement made on 23 July 1997 was based on two grounds; first that the appellant had not been served with the summons to have the action struck out and, secondly, that the order should not have been made before the Judge saw the affidavit of service. When this application finally came on before Scott J in May 1998 Mr Peter Howard appeared for the Appellant, Mr Lateef for the Pacific Forum and Mr Tuitoga for Panpacific Insurance. We deal with these two grounds. As to the first; both the original affidavit of service filed at the time Kepa J struck the action out on 28 October 1993, and an affidavit filed by Pacific Forum on the reinstatement summons, said that on 12 October 1993 the summons to strike out had been posted to the appellant at his residential address of Matanitobua Street, Suva. That ground does not appear to have been further pursued before Scott J. As to the second ground, not surprisingly, nothing

seems to have been said. When the learned judge pointed out to the appellant's counsel that Order 14, relied upon in the summons, could not have any application in the circumstances since it applied only to summary judgments, Mr Howard felt constrained not to disagree with the proposition that the only possible relevant rule was Order 32 rule 5(3), and that since the Order of Kepa J had been perfected 4 ½ years previously the Court had no jurisdiction to set it aside.

When the matter came before us Mr. Gordon for the appellant in his careful argument, proceeded on a somewhat different basis. He first submitted that the summons to strike out had not been served on the appellant in accordance with the High Court Rules. The rule applicable in these circumstances was O.65 r.5. That rule reads:

> ***"5. (1) Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally or a document to which Order 10, rule 1, applies, may be effected -***
>
> *(a)* *by leaving the document at the proper address of the person to be served, or*
> *(b)* *by registered post, or*
> *(c)* *in such other manner as the Court may direct.*
>
> *(2)* ....
> *(3)* ...."

The affidavit showed that the summons had been posted by ordinary post, not registered post and therefore did not comply with the rules. Pacific Forum accepted that the summons had been sent by ordinary post. Of prime importance in this case is that the appellant had made an affidavit in support of his application for reinstatement in which he deposed that "the alleged service is vehemently denied and that such service was never made on the plaintiff." The affidavit was not challenged or contradicted by evidence from Pacific Forum. It submitted that though service of the summons was by ordinary post it was never returned unclaimed and so was to be presumed

served. It further submitted that in terms of O.10 r. 1 and r.5 a writ of summons, or any originating summons, may be served by ordinary post, so long as the party to be served is within the jurisdiction, and therefore the service of this summons should also be effected in the same manner. We do not accept these two submissions. First, we do not think that because the summons was not returned unclaimed it can be presumed to have been served; common experience tells us that that is not so, because even if delivery at the address is made (and sometimes it may not be) the named addressee may not in fact receive it for any one of a number of reasons. Although it is the case that the Interpretation Act (Cap 7) in section 2 (5) provides that where any written law authorises or requires any document to be served by post then, unless a contrary intention appears, it shall be "deemed" to have been effected if done in the way set out in the subsection, it also expressly requires the posting to be by registered post. The plain fact is that the Act says "registered post" and O.65 r.5(1) says "registered post;" but what was done here was to send it by ordinary post. Second, as to the submission based on O.10 r.1 which uses the words "ordinary post", that rule applies only to a writ of summons or any originating summons, and as already noted it is O.65 r.5(1) that applies in this case and the clear words in that rule are "registered post". For completeness we record it would seem probable that s.2(5) of the Interpretation Act does not apply to O.10 r.1, for it could well be contended that a "contrary intention" appears. In passing we note that the reason for not requiring registered post in respect of writs and other originating summonses is referred to in the Supreme Court Practice 1991 (The White Book) at p.75 where O.10 r.1 is discussed. The English O.10 r.5 is in substantially the same terms as ours.

Mr Gordon's second and third submissions were to the effect that the summons to strike out not having been properly served resulted in the Order made upon it by Kepa J being

a nullity and should accordingly have been set aside by Scott J. He relied upon Craig v. Kanssen [1943] 1 KB 256 and in particular upon the judgment of Lord Greene M.R. with whom Goddard L J agreed. In that case an order had been obtained by the plaintiff granting him leave under the Courts (Emergency Powers) Act 1939 to enforce a judgment. The Order was obtained on an affidavit of service which stated service of the summons asking for the order had been made by posting a copy to the defendant. The address given was not the address for service of the defendant and did not satisfy the appropriate Rules of the High Court. The rule in question provided that in a case where personal service is not requisite, service would be sufficient if the document was left at the address for service or if it was posted addressed to the person at that address. Lord Greene said:-

> ***"In the present case, as appears from the affidavit of service, the summons was not sent to the address for service of the defendant, so the rule was not complied with and the alleged service mentioned in the affidavit was no service at all. It was clearly a mistake and there can be no suggestion of bad faith, but there was no warrant or justification in the Rules of Court for obtaining the order in such circumstances. That order was a nullity and it must be set aside."***

Thus in Craig v Kanssen in circumstances somewhat similar to those here the Court said plainly that the order was a nullity and must be set aside. In passing we note a passage cited by Lord Greene from Fry v Moon 23 QBD 395 where Lindley C. J. said:

> ***"But then arises the question whether the order for substituted service was a nullity rendering all that was there afterwards void, or whether it was only an irregularity. If it was the latter it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls......"***

In our view what happened here cannot be described as an irregularity. As noted earlier there was uncontradicted evidence that the appellant had not received the summons. It

was, to adopt the words of Lord Greene, no service at all and the order must therefore be set aside. We are also satisfied that the High Court itself had this power to set aside the Order made by Kepa J in the exercise of its inherent jurisdiction. See Lord Greene in Craig v. Kanssen (supra) at P.262. Accordingly the appeal is allowed and the Order made by Kepa J on the 28 October 1993 is set aside.

There are, however, two further matters to which we wish to refer. First, the consequences of this Court's allowing the appeal. Kepa J's judgment dismissing the action for want of prosecution being set aside there is before the High Court an undisposed of application to dismiss. That should be brought on promptly. The applicant, Pacific Forum should file an affidavit in support dealing with the question of delay and prejudice to it by reason of the delay. We direct, subject to any later order of the High Court, that such affidavit should be filed within three weeks of the date of this judgment and that the plaintiff, the appellant in this Court, have two weeks from the filing of Pacific Forum's affidavit to file an affidavit in reply. A hearing date should be fixed promptly thereafter.

The second matter relates to a submission made by the second respondent on the substantive issue. It was urged that the appellant should be denied any relief in view of his long and unreasonable delay in making his application for reinstatement. Since in our view the order made by Kepa J was a nullity delay on the appellant's part cannot affect the invalidity of that order. Had it been a relevant factor there would, in our view, have been much merit in the submission. It is also to be noted that between the 7 May 1993, when he filed a Notice of his intention to proceed with his action, and the 30 April 1997 when he filed another Notice of his

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intention to proceed he did nothing; and this notwithstanding that by the 3 February 1994, as he states in a letter to the Chief Registrar attached to his affidavit of the 24 June 1997, he was aware of the Order made by Kepa J.

In these circumstances there will be no order for costs.

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Sir Moti Tikaram
President

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Sir Maurice Casey
Justice of Appeal

....
Mr Justice Savage
Justice of Appeal

Solicitors:

Appellant in Person
Messrs. Lateef and Lateef, Suva for the 2nd Respondent

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