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

CIVIL APPEAL NO. ABU0100 OF 2005S
(High Court Civil Action No. HBC 0223 of 2005L)

BETWEEN: 1. BAL RAM SINGH
2. DHARAMPAL SINGH
Appellants

AND: SUMINTRA DEVI
Respondent

Coram: Barker, JA
Ellis, JA
Scott, JA

Hearing: Monday, 5th March 2007, Suva

Counsel: R. Prakash] for the Appellants
M. Muir]

M.N. Sahu Khan] for the Respondent

Date of Judgment: Friday, 9th March 2007, Suva

JUDGMENT OF THE COURT

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[1] It would be hard to find a stronger case than this present appeal to exemplify the unfortunate consequences of justice delayed.

[2] Ram Shankar Singh (Ram Shankar) died on 14 April 1968. He left his estate (which was principally a long-term sugar cane contract) to his widow and his six sons. Each of the sons was allocated a 5 acre portion of the plantation.

[3] One of these sons, Narendra Singh ('Narendra') died on 16 December 1990, leaving his widow (the respondent) and four children. The respondent is also administratrix of his estate. At the time of his death, Narendra and his son had been cultivating one 5 acre lot and receiving a proportionate share of net income from the sugarcane. They lived in a house on their lot which Narendra had built at his own expense..

[4] At the date of Narendra's death, the sole trustee of Ram Shankar's estate was another brother Sundar Singh. On 16 May 1992, he retired as trustee and appointed two other brothers, Bal Ram Singh (Bal Ram) and Dharampal Singh (Dharampal) as trustees.

[5] On 12 August 1994, the respondent issued proceedings in the High Court at Lautoka against Bal Ram and Dharampal alleging that since Narendra's death, they had not distributed Narendra's share of the income from the sugar plantation and that they had refused to allow the appellant to remove the house on Narendra's lot. Orders were sought that Ram Shankar's estate be distributed amongst the beneficiaries and that the defendants not interfere with the respondent's right to remove the house.

[6] Dharampal died on 28 August 1994. Despite his demise, his name still continued to appear as a party both in the High Court and in this Court. Nobody has ever applied to substitute his personal representatives as is required by 0.15 r 7(4) of the High Court Rules. In this judgment, we treat Bal Ram as the only appellant.

[7] On 23 November 1994, with no statement of defence having been filed, judgment by default was entered against both named defendants, despite the death of one of them.

[8] On 29 April 1995, Sadal J, by consent, recalled the judgment by default on the application of a solicitor then acting for the defendants (including the deceased). An

uninformative statement of defence which hardly complied with the Rules was allowed to be filed, along with an affidavit by Bal Ram that there had been delay in filing a defence because ***"certain papers had to be located and certain information obtained before it could be prepared."*** Details of these papers and this information were not supplied nor does the deficient statement of defence give any clue as to what they might have been.

[9] Sadal J should not have granted the appellant the indulgence of recalling the judgment by default before ascertaining with some precision exactly what the proposed defence was and without insisting upon the filing a statement of defence which complied with the Rules.

[10] On 11 August 1995, a Registrar made orders for discovery and inspection against both parties. The respondent filed a verified list of documents on 13 August 1996. The appellant did not comply with the order, despite a notice to produce at trial relevant documents which notice had been issued by the respondent's solicitor on 30 August 1996.

[11] The appellant requested a pre-trial conference on 1 October 1996. Nothing further seems to have happened until 29 February 2000 when the High Court sent out a pre-trial conference minute to the appellant whose solicitor gave notice of intention to proceed on 8 March 2000.

[12] Nothing more seems to have happened until Finnigan J was appointed to Lautoka some five years later. A notice of mention was issued on 7 April 2005, on which date, the Judge assigned a hearing date of 25 August 2005.

[13] On that day – 11 years after issuing her writ - the respondent got her day in Court at last. The hearing took only two hours. We are appalled at the delays in bringing to trial a simple case, such as we have recorded above.

[14] Finnigan J, to his huge credit, was one of the Judges who attempted to reduce the backlog of cases at Lautoka. He commenced his judgment thus:

> ***"The action was commenced in August 1994. By August 1996 the proceedings were ready for hearing. It is a matter of great regret that this action has lying about in the Registry since that time waiting for a hearing. Hearing the evidence took just over 2 hours. It was abundantly plain to me when the Defendant concluded his evidence that he had no defence to the Plaintiff's claim and so the delay is doubly significant. The Plaintiff has been deprived of her remedy for 9 years and her children have grown through important years of their lives without the benefits of their father's estate. By the same token the Defendant must now find a significantly greater sum in order to meet her just claims."***

[15] The Judge heard evidence from the respondent, the appellant and an officer of the Fiji Sugar Corporation. The appellant claimed that Narendra's 5 acres had been left uncultivated since 1993. He was disbelieved by the Judge who found that he had shown no sympathy with the needs of Narendra's widow and children nor had he appreciated their entitlement in Ram Shankar's estate. He noted that any reduction in the area being cultivated had to be notified to the Sugar Corporation. None had been notified. The Judge therefore did not accept the claim, unheralded in the statement of defence, that Narendra's 5 acres had not been farmed.

[16] Bal Ram produced no records to the Court despite the notice to produce. The Judge found that he had failed or refused to answer simple but vital questions. The appellant claimed that Dharampal had had been the operational trustee from May 1992 until his death in August 1994. No attempt has ever been made to claim indemnity or contribution from Dharampal's estate nor was this defence referred to in the statement of defence. The appellant also suggested some responsibility on the part of the former trustee Sundar Singh from the time of Narendra's death in December 1990 until May 1992 when he retired as a trustee. Again, no particulars were given in the statement of defence nor had there been any attempt to join Sundar as a party.

[17] Finnigan J found:

(a) Based on the evidence from the official from the Fiji Sugar Corporation, which was unchallenged, the damages due to the respondent for Narendra's estate's share of the return from the sugar plantation over 15 years was $52,500. The Judge noted that this figure was also unchallenged.

(b) The house on the property enhanced the market value of the land. The Judge noted the respondents self-value of $22,000 and that she had abandoned all claims to the house. Its value he said, would be reflected in her husband's share of the Ram Shankar estate.

(c) The appellant had breached his fiduciary duty to Narendra's estate and was personally liable for breach of trust.

(d) The estate was to be wound up and distributed and the appellant would thereby cease to be a trustee.

(e) The respondent was entitled to "substantial costs" which the Judge offered to fix at the next hearing which was fixed for 10 February 2006. These costs have never been fixed.

[18] On 11 November 2005, an appeal from Finnigan J's judgment was filed in this Court by the appellant. In summary, the grounds were:

(a) The Judge erred in assessing the value of the house at $22,000 without a proper valuation.

(b) The Judge should not have found liability against the appellant when Dharampal was equally accountable.

(c) The Judge did not apply correct principles in calculating damages against the appellant personally and failed to give him the protection afforded to a trustee.

(d) The Judge was incorrect in holding the appellant had prevented the removal of the house.

(e) The Judge should not have assumed a multiplier of 15 when calculating Nanendra's share of profits for the unpaid years.

(f) The Judge failed to take into account the appellant's right to remuneration as a trustee and the fact that he was not required to expend his personal moneys for the benefit of the trust.

[19] The appeal record was certified on 20 November 2006. Under the Practice Direction No.1 of 2004, issued by the President of this Court the appellant was required to file his written submissions within 21 days. None were filed.

[20] At a fixture call over on 22 January 2007, the appellant was again required to file his submissions within 21 days. Again, no submissions were filed.

[21] No submissions were filed by the appellant in the Court registry prior to the fixture on 5 March 2007. Senior counsel for the appellant said he had tried to file them on 2 March 2007. He sought to present them to the Court at the hearing.

[22] Counsel for the respondent stated from bar that he had received a faxed copy of the submissions at 3.45 pm on 2 March 2007 but had not received copies of the authorities relied upon by the appellant until the hearing in Court. Not surprisingly, in these circumstances, he was not prepared to argue the merits of the appeal, but sought an order striking-out the appeal on the grounds of non-prosecution.

[23] Counsel for the respondent submitted that the appellant had disregarded both the general Practice Direction and the particular call-over direction to file written submissions. He relied on the ruling of Ward, P in ***Attorney General and Anor v Naco*** (Civil Appeal ABU0004 of 2006 - ruling 27 February 2007). There, an appellant had disregarded two similar directions to file submissions. The learned President rejected the appellant's explanation for failure to file as inadequate and dismissed the appeal for want of prosecution.

[24] Counsel for the appellant's explanation for the delay was that the solicitors on the record were unsure whether the appellant wished to continue to instruct them . There had been the possibility of another solicitor being instructed. For this reason, the submissions were not prepared when they should have been. Counsel claimed that the appeal had merits.

[25] We find the explanation for the failure to file submissions unconvincing. An appeal in a case which had experienced massive delays in the past needed to be prosecuted with the utmost diligence. We therefore consider this is an appropriate case for striking-out for want of prosecution. There has been ample opportunity for the appellant to file submissions. This opportunity has been disregarded.

[26] In any event, it is hard to see how the grounds of appeal have much credibility. We comment seriatim on the grounds as enumerated in para. 18 above:

(a) The Judge's value of the house was not material to his decision which was to leave the house on the estate property. The appellant offered no evidence of the value.

(b) The appellant was personally liable for any breach of trust. Even if his late brother had attended to estate matters in the years 1990 to 1992, the appellant had never sought indemnity from his brother's estate and did

not even initiate a change of parties in the court proceedings after his co-trustee had died.

(c) The Judge made it clear, after seeing and hearing the appellant, that he was finding him personally liable for breach of trust. There can be no question of his being relieved from personal liability, unless the High Court were to make an order under section 71 of the Trustee Act (Cap.65). No such order has been made and such would seem an unlikely occurrence.

(d) The statement of defence said that the respondent could remove the building "provided it is acceptable to the beneficiaries involved." The Judge characterised the appellant's attitude in evidence that the appellant was always free to pay the rent and remove the house, "an abdication of his responsibilities." He noted the conflict between his evidence and his pleading. The Judge by these comments clearly preferred the evidence of the respondent that she had not been allowed to remove the house.

(e) The Judge noted that the method of calculation of the annual net income he employed and the multiplier of 15 were both unchallenged at trial by the appellant.

(f) Unless there is express authority for trustee's remuneration in the trust instrument, a trustee can only be remunerated after approval from the High Court under s.94 of the Act. The will says nothing about remuneration and it seems hardly likely that any application had been made to the Court.

[22] One of the concerns of this Court about making any order for dismissal on the grounds of non-prosecution is that there may have been some unresolved meritorious aspects of the appeal. This case has not revealed any.

[23] Accordingly, the appeal is dismissed for non prosecution. The appellant Bal Ram must pay the respondent $1,000 costs plus disbursements as fixed by the Registrar.

[24] The respondent is free to approach the High Court for an award of the costs which Finnigan J was minded to grant.

R. D. Barker.

Barker, JA

FIJI COURT OF APPEAL

Ellis, JA

Scott, JA

Solicitors:

Mishra Prakash and Associates, Suva for the Appellants
Haroon Ali Shah Solicitors, Lautoka for the Respondent

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