IN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Appeal No. HBA 10 of 2017

Civil Action No. 03 of 2016

BETWEEN

YOGESH CHAND of Sawani, Nausori, Handyman at Silverstone Limited.

PAINTIFF-APPELLANT

AND

SUBHAS CHANDRA of Sawani, Nausori, Carrier Driver.

DEFENDANT-RESPONDENT

Counsel	:	Mr. S. Kumar for the Plaintiff-Appellant Mr. K. Singh for the Defendant-Respondent
Date of Hearing	:	13th September, 2017
Date of Judgment	:	18th October, 2017

JUDGMENT

[1] This is an appeal from the ruling of the learned Magistrate striking out the claim of the plaintiff-appellant.

[2] The plaintiff-appellant instituted these proceedings in the Magistrate's Court of Nausori by writ of summons seeking to recover $7524.45 from the defendant-respondent.

[3] The plaintiff-appellant's case is that he entered into a sale and purchase agreement with the defendant-respondent to purchase a block of land which was completed on 31st December, 2001. The plaintiff thereafter, constructed a house and lived happily there for five years until the defendant started to shift the drive way by pulling out the culvert and barbwire. The plaintiff-appellant has spent $1200.00 to construct the drive way.

[4] On the instructions of the defendant-respondent the plaintiff-appellant had put up a new culvert which cost him $500.00 and to shift the electricity line the plaintiff-appellant had paid $580.00. The defendant-respondent thereafter had constructed another house and rented it out. The tenant of the new house had damaged the newly built culvert of the plaintiff-appellant. The action of the plaintiff-appellant is not based on the sale and purchase agreement.

[5] From the reading of the entire ruling of the learned Magistrate it appears that she has struck out the writ of summons on the ground that the cause of action was barred by the provisions of section 4(1) of the Limitation Act 1971.

[6] From these findings, as submitted by the learned counsel for the plaintiff-appellant, two important issues arise for consideration in appeal that is whether the learned Magistrate had the power to strike out the writ of summons *ex mere motu* without an objection taken by the defendant-respondent to that effect and whether the learned Magistrate had sufficient material on record to arrive at such a conclusion.

[7] In her ruling, at paragraphs 11 and 12 the learned Magistrate states as follows;

> 11. The sale and purchase dealing was completed in 2001.
>
> The plaintiff claims that after 05 years the Defendant started to shift the drive way which would be sometimes around 2006-2007.
>
> 12. There is no indication when the plaintiff had constructed the new drive way.

> Also there is no indication when Defendant's tenants had damaged the drive way and when the plaintiff again repaired it.

[8] As correctly observed by the learned Magistrate there is no indication in the writ of summons as to when the defendant-respondent's tenant damaged the culvert and the plaintiff-appellant repaired it. When there is no evidence as to the exact date on which the cause of action arose it has to be ascertained from the evidence adduced before the court it is especially so when there are no pleadings filed.

[9] A similar issue arose for determination before the Master in the case of **Nagan Engineering (Fiji) Ltd v Raj** [2010] FJHC 47; HBC 106.2009 (18 February 2010). The learned Master applied the principles laid down in **Johns v Johns and Holloway** [2004] NZCA 42 where it was held:

> As the case is one involving strike out, the facts upon which the Court must act are those alleged in the plaintiff's pleadings, which must for present purposes be taken as capable of proof. Causes of action or aspects thereof should only be struck out before trial on the basis that they are statute or otherwise barred, if the defendant can establish that proposition conclusively. If there is any real doubt about the matter, the case should be allowed to go to trial where all issues of fact and law can be fully explored. This is no more than the ordinary strike out principle applied in the context of a strike out application which is based on limitation grounds.

[10] Applying the above principle the learned Master made the following observations:

> The above passage clearly states that in considering a striking out application based on section 4, this court must assume that the facts in the statement of claim are established. It then puts the onus on the defendant ..... to establish conclusively that the cause of action based on facts is time barred. Hence, any doubt about whether the claim is statute barred should be reserved for the substantive trial.

[11] As the learned Magistrate observed, there is no indication in the statement of claim when the cause of action arose. By reading the ruling the court understands that the learned Magistrate proceeded to strike out the writ of summons on the assumption that the cause of action arose in or about 2007 which is not supported by any material found on record. The writ of summons has been filed on 18th January, 2016 and the ruling striking out the writ of summons has been made on 24th January, 2016. No statement of defence has been filed. In my view the learned Magistrate should not have summarily struck out

the writ of summons on the ground that it was barred by the section 4(1) of the Limitation Act 1971 without any evidence as to the date on which the cause of action arose.

[12] It was submitted by the learned counsel for the plaintiff-appellant that no objection was taken by the defendant-respondent to the maintainability of the action on the ground that it was barred by section 4(1) of the Limitation Act 1971. It does not appear from the ruling that there was an objection to the maintainability of this action. This position was not challenged by the learned counsel for the defendant-respondent at the hearing of the appeal. The failure on the part of the defendant to take up the objection amounts to a waiver. In my view the court cannot *ex mere motu* make an order declaring that a matter is time barred under section 4(1) of the Limitation Act 1971 without an objection taken by the other party.

[13] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The appeal of the plaintiff-appellant is allowed.
2. The ruling of the learned Magistrate dated 24th January, 2016 is set aside.
3. The matter is sent back to the Magistrate's Court for trial *de novo*, to be held before another Magistrate.
4. The defendant-respondent is ordered to pay $500.00 as costs (summarily assessed) of this appeal to the plaintiff-appellant within 30 days from the date of the judgment.

HIGH COURT OF FIJI
SUVA

Lyone Seneviratne

JUDGE

18th October, 2017