

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 426 of 2007

Between

Aubrey Low

Plaintiff

And

Spencer Ah Sam

First defendant

And

Russell Ah Sam

Second defendant

And

Malcolm Ah Sam

Third defendant

And

Hilda Ah Sam

Fourth defendant

And

Trade Publicity Limited

Fifth defendant

And

Labour Marine Shipping Services Limited

Sixth defendant

Counsel: Ms L. Prasad for the plaintiff
Ms E. Dauvere for all the defendants

Date of hearing: 1st May, 2016

Date of Judgment: 22nd June, 2018

Ruling

1. By summons filed on 26th February, 2018, the plaintiff seeks an extension of time to fulfill his obligations in the Terms of Settlement ordered on 24 October, 2016 and that the "*Parties be at liberty to re apply for further extension*", for the reasons stated in the affidavit in support filed by the Power of Attorney holder of the plaintiff.

2. The affidavit in support states that the plaintiff cannot proceed with the sale of the property, until it is granted further time to complete its obligation under the Consent Orders. The affidavit states that delay was caused in registering the Power of Attorney, obtaining two independent valuations for the property and by the defendants. The affidavit concludes that prejudice will be caused to the plaintiff, if extension of time is not granted and it will deprive him of his fair and reasonable value for his legitimate share in the sixth defendant company.
3. The defendants in their affidavit in opposition state that the delay in the sale of the property occurred, as the Attorney neglected and did not complete her duty on time as stipulated in the Consent Order. All the defendants have complied with the Consent Order and their respective obligations in the Terms of Settlement . The defendants move that the summons for extension of time be struck out with costs.

The determination

4. On 24 October 2016, the parties filed their Terms of Settlement in this case. The Terms of Settlement provides inter alia that the sixth defendant will sell its property within 6 months for the highest realizable value.
5. The plaintiff moves to vary the consent orders made by seeking an extension of time, to fulfill his obligations in the Consent Order.
6. The legal principles governing the varying and setting aside consent orders are laid down in the following judicial decisions.
7. In *Kinch v Walcott*, [1929] AC 482 Lord Blanesburgh at p.493 declared:
..an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal.

8. In *Mohammed Rasul v Hazra Singh*, 8 FLR 140 at p. 144 Hammett PJ said:

In my opinion once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct.

9. Gates J (as he then was) in *Kelly v Fiji Development Bank*, [2004] FJHC 526 cited *Spencer Bower, Turner and Handley, The Doctrine of Res Judicata*, (3rd Edit) at p.39 as follows:

Judgments, orders and awards, by consent are as efficacious and those pronounced after a contest in creating cause of action estoppels and effecting a merger of the causes of action sued on.

10. Basnayake JA in *Jai Dhir Singh v Jubilee Juice Distributors (Fiji) Ltd*, Civil Appeal No: ABU 0038 of 2012 said :

A court has no power to vary a consent judgment or order made previously in that court. Where it appears that the order embodies the conclusion of negotiations between the parties, the court will give effect to it where one party is in breach and will not vary it, for eg. by giving extra time to perform its terms...(emphasis added)

11. On appeal the Supreme Court in *Jubilee Juice Distributors v Jai Dhir Singh*, Civil Petition No. CBV 0006 of 2014 stated :

*A judgment by consent is just as effective by way of estoppel as a judgment whereby the Court exercises its mind in a contested case (vide: *Re South American & Mexican Co 1985 (1) Ch 37 at 50*).*

Upon a compromise being effected, the right of action upon the original claim is lost. Any action thereafter must be on the compromise and not upon the original claim.

12. The authorities I have cited clearly provide that a consent order validly obtained cannot be set aside or varied.

13. For the aforesaid reasons, the plaintiff's summons for extension of time fails .

14. **Orders**

- (a) The plaintiff's summons is declined.
- (b) The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 1000 within 15 days of this Ruling.



A.L.B. Brito-Mutunayagam
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Judge
22nd June, 2018