

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 206 OF 2016

BETWEEN : **SANT RAJ** formerly of Nalovo, Nadi but now of Auckland, New Zealand.

PLAINTIFF

A N D : **KRISHNA SAMI** of Nalovo, Nadi, Salesman.

DEFENDANT

Appearances : Ms S. Ravai for the plaintiff
Mr D. S. Naidu for the defendant

Date of Hearing : 1 November 2018

Date of Written

Submission : Plaintiff (11 February 2019), defendant (26 February 2019)

Date of Judgment: 27 February 2019

J U D G M E N T

Introduction

[01] On 4 October 2016, Mr Sant Raj, the plaintiff filed this action by way of writ of summons with statement of claim indorsed on it to have the consent judgment of 8 March 2005 entered in a previous civil action (No. HBC 210 of 1989) between the same parties set aside. The plaintiff alleges that he was not given any opportunity by the Court or his then counsel to ratify or comment on the consent Judgment and that consent judgment was irregular in that it was entered into without his knowledge and without any valid authority from him and the 1989 action was statute barred. The relief sought by the plaintiff is as follows:

- a) *A declaration that the purported judgment dated 8 March 2005, is vitiated by lack of the plaintiff's consent and/or knowledge.*
- b) *An order that the purported judgment dated 8 March 2005, be wholly set aside.*
- c) *An order that Civil Action No. HBC 210 of 1989L proceed to trial.*

- d) *An order that a stay of enforcement and/or execution be granted on the said judgment.*
- e) *An order that the sum of \$20,000.00 (Twenty Thousand Dollars) paid towards the purported consent judgment to the defendant's solicitors on 6 September 2016, be forthwith paid into Court and only to be released upon a further order of this Honourable Court.*
- f) *An order that sale of the plaintiff's property to enforce the said purported Judgment be set aside and/or revoked.*
- g) *Any other orders which in the opinion of this Honourable Court is just and expedient.*
- h) *Costs.*

[02] At the trial, both parties gave evidence and they tendered their respective written submissions. I was greatly assisted by the submission. I am grateful to both counsel and their team for their work.

Background

[03] The background facts, as gleaned from the pleading, are as follows.

[04] Mr Krishna Sami (the plaintiff in the earlier action (HBC 210 of 1989) (*the first action or 1989 action*)), the defendant in the current action brought a personal injury claim against Mr Sant Raj, the defendant in first action and the plaintiff in the current action.. The first action arose out of an accident that occurred on 12 July 1986.

[05] The first action went to trial. At the trial, Mr Krinshna Sami (then plaintiff) gave evidence and was cross examined by the defendant's counsel Dr Sahu Khan. However, on 8 March 2005, in the mid of the trial, the matter was settled between the parties for \$55,000.00. The plaintiff (then defendant) now alleges that:

"On or about 8 March 2005, during the course of an open court trial, the then plaintiff's counsel and the defendant's counsel without the plaintiff's knowledge, consent and/or authority compromised the plaintiff's case by entering into a consent Judgment with the defendant's counsel before His Lordship, Justice D.D. Finnigan in Chambers in the following terms:

- a) *Judgment for \$55,000.00 including all damages and costs.*
- b) *Execution of this Judgment is suspended for six month and it will become effective on 9 September 2005.*

- c) *The defendant has the right as between the parties to appeal if he so desires from the ruling of this Court on the issue of the application to the claim of the statute of limitations. Such appeal if any must be filed within fourteen days, i.e. by 4pm on 22 March 2005.*
- d) *The Ex Parte order as to passport etc. made in Chambers on 16 October 2003 by Byrne J. is hereby dissolved with no order as to costs.*

[06] The defendant, according to the plaintiff, has received the following sum from the plaintiff as a result of the consent judgment:

a) \$20,000 paid on 6 September 2016.

b) The sum of \$28,350.00 from the plaintiff's tenants from 24 June 2014 to 24 August 2016, by virtue of the defendant's solicitors demand on the plaintiff's tenants to pay all rental to the defendant's solicitors, Messrs Pillai Naidu & Associates, Solicitors, Nadi.

[07] The current action is brought to set aside the consent judgment entered in the 1989 action on the premises that the plaintiff has suffered loss and damages.

Defendant's case

[08] The defendant's case as stated in the statement of defence is as follows.

[09] Both parties' vehicle sustained damages from the collision as a result and consequences of the plaintiffs negligent, careless and dangerous driving the defendant, his wife (Premila Devi Swamy) and child (Ronesh Rahul Swamy) also sustained personal injuries and the plaintiff was sued in Civil Action Numbers 194 of 1989 and 195 of 1989 and the same was settled in favour of the claimants.

[10] The 1989 action was not beyond the limitation period and in any event the plaintiff had submitted to the Jurisdiction of the Lautoka High Court and failed to plead the same.

[11] When the consent judgment was announced both the plaintiff and defendant were present and were part of the settlement talks as the matter was for trial and the defendant had taken the witness stand and was in the process of giving evidence when the plaintiffs counsel's preliminary application that the claim was outside the limitation period was dismissed that the plaintiff and his counsel:

- a. *Entered into a consent judgment in favour of the defendant.*
- b. *As per clause 3 of the consent judgment the plaintiff was entitled to appeal the decision of Honourable Justice Finnigan who had ruled against the plaintiff on the question of the claim being outside the limitation period but that such appeal was to be filed within 14 days namely by 4pm on 22 March 2005, but the plaintiff failed/neglected to file any such appeal.*
- c. *Furthermore, the Judgment was stayed for six (6) months to become effective on 9 September 2005, as per clause 2 of the said consent judgment.*

[12] The plaintiff and the defendant were at all times parties to the consent/compromise talks but it appears that the plaintiff is using the absence of his then counsel who has been struck off the roll in Fiji to benefit from the same.

[13] The Court in Civil Action No. HBC 210 of 1989L held against the plaintiff and the plaintiff was provided with sufficient opportunity within the last twelve (12) years to challenge the ruling on the question of the statute of limitations but failed to do so but has instead adopted deceptive and conniving measures to avoid the payment of the judgment debt over the years.

[14] The defendant states that he had, as a result of the plaintiff's fraudulent, deceitful and dishonest conduct, suffered loss and damages due to the failure by the plaintiff to pay the defendant the sum of \$55,000.00 as per the consent judgment dated 8 March 2005.

[15] The defendant prays that the plaintiff's be dismissed and struck out with costs on solicitor/client indemnity basis.

Agreed facts

[16] The following facts were agreed between the parties at Pre-Trial Conference ('PTC'):

1. *The plaintiff was at all material times the driver of Motor Vehicle Registration No. BI086.*
2. *The defendant was at all material times the driver of Motor Vehicle Registration No. AW068.*

3. As a result of a collision between the aforesaid two vehicles the defendant sued the plaintiff in Civil Action No. HBC 210 of 1989L at the High Court at Lautoka.
4. On or about 8 March 2005, the respective counsel for the plaintiff and the defendant entered into a consent judgment in favour of the defendant in the sum of \$55,000.00.
5. The defendant and/or his counsel has to date received the sum of \$20,000.00 towards partial reduction of the Judgment amount.

The principles applicable in setting aside a consent judgment or order

[17] In *de Lasala v. de Lasala* [1980] AC 546, 561, the Privy Council held that:

“the setting aside of a consent order which is a final order on the grounds of fraud or mistake requires the bringing of a fresh action for this purpose”.

[18] In *Sharma v Caldwell* [1975] FJLawRp 12; [1975] 21 FLR 85 (25 July 1975), McMullin J.A. said:

*“A settlement or compromise in an action in which money or damages is or are claimed by or on behalf of an infant is invalid without the sanction of the court—Halsbury’s Laws of England, 3rd Edition, Volume 9, Page 234, Para. 536. Nor does it matter that the settlement or compromise has been made the subject of a judgment by consent. Such a judgment would appear to be no better than the source from which it springs, viz; the settlement or compromise made between the parties. A judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order — Halsbury’s Laws of England, 3rd Edition, Volume 22, Page 792, Para. 1672. In *Wilding v Sanderson* [1897] 2 Ch. 534 at 544 Bryan J. Said*

“And just as a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that such an order may be set aside if it can be clearly proved that there is no agreement, and consequently, no true consent to the order made”.

*Vaughan Williams J. made the point more forcibly in *Huddersfield Banking Company[sic] Ltd. v Henry Lister & Son* [1895] 2 Ch. 273 at 276 when he said:—*

“The real truth of the matter is that the Order is a mere creature of the agreement, and to say that the Court can set aside the agreement but that it cannot set aside an order which was the creature of that agreement seems to me to be giving the branch an existence which is independent of the tree”.

Whatever the inadequancies [sic] of the affidavit filed in support of the application to set aside the consent judgment, there can be no dispute that respondent is an infant and, as such, a person under disability. Order 80, Rule 10 of the Rules of the Supreme Court (The White Book 1967), as amended by the Fiji Supreme Court Rules 1968, provides:

"10. Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court".

The rule corresponding to Rule 10 and in force at the time the settlement was effected and judgment entered, viz; Order 22 Rule 14(1) was to the same effect. Clearly, subject to the setting aside of the judgment by consent, respondent is not bound by the settlement, the approval of the court not having been obtained.

Evidence

Plaintiff's evidence

[19] Sant Raj, the plaintiff ('PW1') gave evidence on his own behalf. His evidence was that:

- a) In action no. 210/89, his solicitor Dr. Sahu Khan entered a consent judgment against him in the sum of \$55,000.00 in Judge's Chambers after the plaintiff's evidence was complete, while he was standing outside. The Judge then pronounced the judgment in open court on the same day.*
- b) He said he was not explained the judgment and he was not given any form to sign and he was not asked if he understands the judgment.*
- c) He told the court that he did not give any authority to settle the case to his solicitor.*
- d) He said he was on the impression that the insurance company was going to pay the judgment sum as he had a valid third party insurance policy.*

[20] During the cross examination PW1 stated:

- a) He admitted that he retired as a Head Teacher and now he is a real estate agent in New Zealand.*
- b) He has been in and out of Fiji.*
- c) He said, recalling 8 March 2005, he was represented by Doctor Sahu Khan the earlier Action Number 210/1989 and Doctor and Doctor Sahu Khan told him that two claims had been settled by the insurance company.*

- d) *He said Ragni is his daughter. She was 23 in 2005 and is in New Zealand. She is still a student. She was totally relying on him for fund.*
- e) *He knew that the consent judgment in open court but did not know where to get a copy.*
- f) *He migrated in New Zealand in 2005.*
- g) *He admitted he mortgaged his property in July 2005 and placed a caveat. This all were done by Doctor Sahu Khan who is his family lawyer.*
- h) *He did not agree to the suggestion that the caveat was placed to defeat the consent judgment.*
- i) *He admitted that there was a stop departure order against him and he agreed to pay \$21,500.00 including costs.*
- j) *He said he (defendant) is collecting and he agreed to pay \$21,500.00 including costs.*
- k) *He said he (defendant) is collecting rental and three tenants did not pay.*

Defendant's evidence

[21] Krishna Sami, the defendant ('DW1') also gave evidence on his behalf. He in his evidence states:

- a) *The 1989 claim was for personal injury he sustained in a motor vehicle accident.*
- b) *The Trial was on 8 March 2005. He was present on that day. The defendant was also present. He gave evidence and he was asked questions by other solicitors and the matter was stood down. Both lawyers went to the chambers, he was waiting for 16 years for the trial to commence. His lawyer suggested a figure (\$55,000.00) for settlement. He agreed although he was not happy.*
- c) *He was asked if he can agree, he said yes. He (defendant) also agreed. He has paid only \$20,000.00 to his (DW1) solicitor.*

[22] Under cross examination DW 1 stated:

- a) *His solicitor came with the figure and he agreed. Judgment was pronounced in open Court. We were both asked to agree and both agreed.*
- b) *The Judgment was interpreted in Hindi. The Terms of Settlement were announced in Court in our presence.*

Discussion

[23] In this action, the plaintiff seeks to set aside the consent judgment entered by the Court and pronounced in the presence of the parties and their counsel in the 1989 action between the same parties. The consent judgment that was entered by Finnigan J on 8 March 2005 reads as follows:

"CONSENT JUDGMENT

During the hearing of the above matter Counsel came to see me in Chambers and asked me to record the following consent judgment.

Judgment is entered for the Plaintiff in the following terms:

- 1. Judgment for \$55,000.00 including all damages and costs.*
- 2. Execution of this judgment is suspended for six months and it will become effective on 9 September 2005.*
- 3. The Defendant has the right as between the parties to appeal if he so desires from the ruling of this Court on the issue of the application to the claim of the statute of limitations. Such appeal if any must be filed within fourteen days, i.e. by 4pm on 22 March 2005.*
- 4. The Ex Parte as to passport etc. made in Chambers on 16 October 2003 by Byrne J. is hereby dissolved with no order as to costs."*

[24] It will be noted that the setting aside of the consent judgment is being sought some 11 years after it was made and having acted upon the consent judgment by making payment of \$20,000.00 to the defendant (then plaintiff) on 6 September 2016, about a month before filing the current action.

[25] The plaintiff had a right of appeal the consent judgment within 14 days from the date on which it was entered (8 March 2005) on the issue of limitation. The plaintiff did not exercise this right. Moreover, the execution of the consent judgment was suspended for six months from the date on which it was entered. The plaintiff did not raise any objection during this period or thereafter until he filed this action on 4 October 2016.

- [26] The alleged ground for seeking an order setting aside the consent judgment is that his (plaintiff) solicitor in the 1989 action Dr. M. S. Sahu Khan had entered the consent judgment without his consent and it was not explained to him by the Court.
- [27] It is true that counsel agreed to settle the matter for \$55,000.00 for all damages and costs in favour of the plaintiff (now defendant) in Chambers in the 1989 action. However, the consent judgment was pronounced in open court in the presence of both parties and their counsel. In the course of the evidence, the plaintiff stated that both the plaintiff (him) and the defendant appeared in open court before with their counsel when Finnigan J. announced the consent judgment.
- [28] The plaintiff now says consent judgment was not explained to him. The plaintiff is a retired principal and he was ably represented by counsel. There is no legal requirement that a consent judgment must be explained to the parties, especially when the parties are represented by solicitors. In this particular case, the plaintiff was able to understand the meaning of the consent judgment as he is a well-educated litigant. In any event, the consent judgment, according to the defendant, was explained in Hindi, both parties were asked if they agree to the terms of settlement and it was agreed by both parties.
- [29] The plaintiff said in evidence that Dr. M. S. Sahu Khan, his solicitor in the 1989 action was his family lawyer, he is in good terms with him and executed a few documents through him even after the consent judgment was entered.
- [30] In fact, the plaintiff did not take any action against his solicitor for entering the consent judgment without his instruction or approval. Instead, he was dealing with the same solicitor for his other legal matters. In the circumstances, I find that there was "very strong possibility", if not probability that the plaintiff had given his consent or instruction to his then solicitor, Dr. Sahu Khan to settle the 1989 action, which was brought by the defendant (then plaintiff) claiming damages for personal injuries sustained by him, his wife and his son in an accident allegedly caused by the plaintiff's (then defendant) negligent driving.

- [31] A consent judgment or order entered by the Court should be simply set aside. A consent order which is a final order on the grounds of fraud or mistake requires the bringing of a fresh action for this purpose (see *de Lasala's* case (above)).
- [32] In *Sharma v Caldwell* (above), McMullin J.A. said that a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that such an order may be set aside if it can be clearly proved that there is no agreement, and consequently, no true consent to the order made.
- [33] A true consent order is based on a contract between the parties. As such, the contract is arrived at by bargaining between the parties, perhaps in correspondence, and the consent order is simply evidence of that contract (*Wentworth v Bullen* (1840) 9 B & C 840).
- [34] In *Siebe Gorman and Co. Ltd v Pneupac Ltd* [1982] 1 WLR 185, Lord Denning MR said at p. 189:

"It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous ... One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such case there no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties."

- [35] A consent order can act as an estoppel which can be raised if fresh proceedings are brought alleging matters encompassed by the compromise (*Keith v Walcott* [1929] AC 482).

Conclusion

- [36] A consent judgment or order may be set aside in a fresh proceeding on the grounds as a contract could be set aside, especially, on the ground of fraud or mistake.

- [37] On the evidence, I find that the consent judgment entered in the 1989 action was a real contract between the parties.
- [38] The plaintiff in this action seeks to set aside the consent judgment on the ground that his solicitor entered it without his consent and he was not explained the terms of the consent judgment. The plaintiff blames his former solicitor for entering the consent judgment without his consent after some 11 years at the execution stage.
- [39] It is of note that the plaintiff had transferred his property to his daughter and placed a caveat on the property through the same solicitor who represented him in the 1989 action, Dr. Sahu Khan after the consent judgment was entered.
- [40] I am not satisfied with the plaintiff's evidence that the consent judgment was entered by his counsel without his (plaintiff) consent and he was not explained the consent judgment. He was not coherent and consistent in his evidence. He answered the cross-examination question hesitantly. I would, therefore, place little reliance on his evidence. On the other hand, the plaintiff gave forthright evidence and his evidence was not shaken by the cross-examination. I accept the defendant's evidence.
- [41] On the evidence, I find that the consent judgment in the 1989 action was entered with the consent of the plaintiff (then defendant), it was pronounced in open court in the presence of both parties and their counsel, it was explained to both parties and the plaintiff agreed to the consent judgment having fully understood the terms of settlement. In the result, the consent order is valid and enforceable.
- [42] For the foregoing reasons, the plaintiff had failed to clearly prove that there is no agreement, and consequently, no true consent to the order made in the 1989 action. The consent judgment operates as an estoppel in this action. This follows that the plaintiff action should be dismissed with costs, which I summarily assess at \$4,500.00 and the defendant shall be free to enforce the consent judgment.
- [43] As for counterclaim, Mr Naidu of counsel for the defendant informed the court that the defendant does not wish to pursue his counterclaim. I would, therefore, dismiss the counterclaim.

The result

1. Plaintiff's action dismissed.
2. Defendant's counterclaim dismissed.
3. The consent order of 8 March 2005 made in HBC No. 210 of 1989 is valid and enforceable by the defendant.
4. Plaintiff shall pay summarily assessed costs of \$4,500.00 to the defendant.

M. H. Mohamed Ajmeer
..... 28/2/19

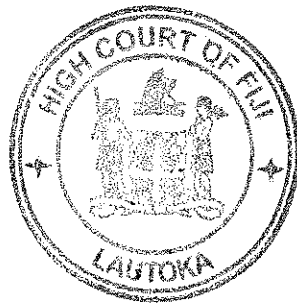
M. H. Mohamed Ajmeer

JUDGE

At Lautoka

28 February 2019

Solicitors:



For the plaintiff: M/s Fazilat Shah Legal, Barristers & Solicitors

For the defendant: M/s Pillai Naidu & Associates, Barristers & Solicitors