IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 252 of 2012

BETWEEN: **JAGAT KUMARAN REDDY** retired person and trustee of the Estate of Govind Reddy of Nadi, Fiji, but presently of New Zealand.

PLAINTIFF

A N D: **MUN SAMI REDDY** also known as **MUN REDDY** previously of Nadi, Fiji but presently residing at 9737 Toscano Drive, Elgrove, Sacramento, CAL 95757 in the United States, Trustee of the Estate of Parwatiammal.

DEFENDANT

Appearances : J. Sharma Lawyers for the Plaintiff
N. Khan & Associates for the Defendant
Date of Hearing : 7th May 2019
Date of Ruling : 17th May 2019

RULING

INTRODUCTION

1. Before me is a summons by the defendant dated 12 February 2019. The said summons is filed pursuant to Order 32 Rule 5(3) and (4) of the High Court Rules 1988. It seeks the following Orders:

   (i) That the Defendant's Defence which was struck out on 5th November, 2018 be restored to the list.

(ii) *That there be no orders as to costs or that the costs of the application be costs in the cause; That the Defendant will at the hearing of the application rely upon the grounds of the affidavit of Jai Reddy filed in support here with.*

2. Order 32 Rule 5(3) and (4) state as follows:

> 5-(3) *Where the Court hearing a summons proceeded in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may re-hear the summons.*
>
> (4) *Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the Court, if satisfied that it is just to do so, may allow the summons to be restored to the list.*

BACKGROUND

3. This is an estate matter. The plaintiff is the personal representative of the estate of his late father, namely Govind Reddy (**"Govind"**).

4. Govind was the brother of the defendant, Mun Sami Reddy (**"Mun Sami"**). There were three other brothers, namely Ram Reddy, Changa Reddy and Narayan Reddy.

5. All five Reddy brothers inherited in equal shares from the estate of their late mother, Parwatiammal (**"Parwati"**).

6. Included in the brothers' inheritance was some 22 acres of prime freehold real estate situated at Momi Bay.

7. This land was the subject of a Memorandum of Agreement dated 15 May 1973 between Parwati (as vendor) and three named US men (as purchasers).

8. At some point, the defendant caused a substantial part of the 22 acres to be transferred. As it turned out, the transferee would take that portion and amalgamate it with a neighboring plot to form an even larger holding which is

now all comprised in Certificate of Title 36938. CT 36938 would become the site of the five-star rated and internationally acclaimed Momi Bay Resort.

PLAINTIFF'S GRIEVANCE

9. The estate of Govind (Plaintiffs late father) holds 1/5 beneficial interest in the estate of Parwati (his grandmother). The plaintiff's grievance is that the estate of Parwati remains undistributed to this day.

10. The plaintiff filed this action in his capacity as the personal representative of the estate of Govind. The action is against the defendant as personal representative of the estate of Parwati.

11. Amongst the relief that the plaintiff seeks, is an Order that the defendant do give full and complete accounts of the estate of Parwati and do give written answers to queries and questions of the plaintiff within a reasonable time.

INTERIM RELIEF & DEVELOPMENTS

12. On 19 February 2015, I did grant an injunction to restrain the defendant from removing or disposing off or transferring assets of the estate of Parwati including State Lease No. 27523 without the prior leave of this Court

13. The Order 34 Summons was filed on 05 December 2016. Order in Terms was granted by the Master on 16 December 2016. The trial date was fixed for 03 and 04 August 2017. However, on 01 August 2017, Natasha Khan & Associates filed a Summons to Vacate Hearing Date due to ill-health of the defendant who, notably, was then 87 years of age, and receiving medical treatment in the US.

14. I observe from my file notes that on 03 August 2017, I dealt with the defendant's application first. I observe now from my file notes that Ms. Khan had been concerned that there were other beneficiaries of the estate who were not parties to the proceedings. Mr. Sharma had responded that if the defendant was so concerned about other beneficiaries interest, then he should take steps to join them. As it was, the defendant has failed to distribute the estate of Parwati.

15. I note also from my notes that on the same day, Ms. Khan argued that Pillai Naidu & Associates had handled the trust account. Ms. Khan said that her client has not been able to get the accounts from Pillai Naidu & Associates. My notes record Ms. Khan as having said the following:

> *"ideally, my client ought to have joined DS Naidu and Chen Bun Young and Registrar of Titles. By the time we came onboard, the statute of limitations had expired.*

16. Mr. Sharma is on record to have said:

> *It seems there is nothing left to distribute. Just damages and costs.*

17. Ms. Khan:

> *The defendant would like to be present to defend. We seek an adjournment.*

18. I ordered that the plaintiff be appointed co-trustee and executor of the estate of Parwati and that the plaintiff and the defendant do distribute the estate of Parwati. I then adjourned the matter to 05 September 2017 for mention to fix trial dates. Eventually, after some further adjournments, the trial dates were then fixed for 19 and 20 April 2018 and for review on 07 November 2017.

19. On 07 November 2017, Mr. Sharma highlighted in Court that the defendant was not co-operating with his client in the distribution of the estate. After hearing submissions from Mr. Sharma and Mr. Raratabu for Ms Khan, I ordered that the plaintiff be appointed sole executor/trustee of the estate of Parwati and to be responsible for the distribution of the balance of the estate i.e. Westpac Account No. 9802795915. The defendant however would still have to account for the period when he was sole executor/trustee of the estate of Parwati. The issue for damages and costs were to be reserved for trial.

CONSENT ORDERS

On 19 April 2018, the date of trial, both counsels were able to reach the following agreement which was presented to this court for endorsement as Consent Orders:

> *1) That the Defendant do within 60 days from 19th April, 2018 give full and complete accounts of the Estate of Parwatiammal alias Parvatiammal to the*

Plaintiff from the date he was appointed Trustee to 7th November, 2017 and the Defendant do give written answers to queries and questions of the Plaintiff.

2) *That the Defendant is to hand over all books and documents, assets and property of the said Estate to the Plaintiff within 60 days from 19th April, 2018 and he be restrained from interfering with the administration of the Estate in any way.*

3) *That the Defendant is to provide written response/answers to the Plaintiffs questions and queries on matters arising from Accounts of Estate of Parwatiammal within 21 days of the Plaintiff asking questions.*

4) *That if the Defendant does not comply with the above orders then the Defendant's Statement of Defence will be struck out and the Plaintiff will be at liberty to formally prove his claim for damages against the Defendant; unless the Defendant makes a prior and timely application to Court for variation of Order or for extension of time comply due to failure by a third Party withholding relevant information or document.*

5) *That in the event the Defendant applies to Court for variation of Order or extension of time pursuant to paragraph 4 above, such application must be made within 60 (sixty) days from 19th April, 2018 and the Defendant must comply with paragraph 1, 2 and 3 to the fullest extent that he is reasonably able to.*

6) *That the issue of damages is to be reserved for determination by Court later.*

7) *The matter is adjourned to 21st June, 2018 for Review.*

WHAT HAPPENED AFTER THE CONSENT ORDERS?

20. The first mention date after the consent order was 21 June 2018. On that occasion, it was highlighted in Court by counsel appearing on instructions for the plaintiff that the defendant had not complied with the Consent Order. Accordingly, counsel for the plaintiff sought an order that the statement of defence be struck out and that a formal proof date be set.

21. I then adjourned the case to 12 July 2018.

22. On 12 July 2018, counsel for the defendant advised Court that they had written to the defendant's previous solicitors, Pillay Naidu & Associates, who has sought time to respond. He then sought a further 28 days to comply. Counsel for the plaintiff however informed Court that they would be filing an application to

strike out the statement of defence on account of the defendant's failure to comply with the consent orders. The matter was then adjourned to 10 August 2018.

23. Meanwhile, on 19 July 2018, the plaintiff's solicitors filed a *Summons to Strike Out Statement of Defence and to Seek Formal Proof*. This was issued with the returnable of 10 August 2018.

24. On 10 August 2018, I granted 28 days to the defendant to file an affidavit in opposition and 14 days thereafter to the plaintiff to reply. I then adjourned the case to 05 November 2018 for hearing at 8.30 a.m. I also granted the defendant liberty to join third party.

25. On 05 November 2018, at 8.30 a.m., Mr. Janend Sharma appeared in Court ready for the hearing. There was no appearance by the defendant's counsel. However, fifteen minutes later, Ms. Devi appeared for the defendant's counsel and asked that the matter be stood down to 10.30 a.m. However, since I had a trial marked at 10.30 a.m., I refused to stand the matter down and allowed the plaintiff's counsel to proceed with their application.

PLAINTIFF'S SUBMISSIONS IN COURT

26. Mr. Sharma highlights that there has been no proper accounts provided to date. The affidavit of Jagat Reddy purportedly filed in that regard to provide accounts is not sufficient. All it contains is a Bill of Costs and the Westpac Banking Account statement. There is no accounting of what estate properties have been sold, what income for example was derived from that sale, what payments has the estate made etc. Mr. Sharma also highlighted that the affidavit was sworn by a law clerk and not by the defendant and this was most inappropriate when dealing with estate and trust account matters.

27. I agreed with Mr. Sharma's submissions and ordered that the statement of defence be struck out and then reserved costs as I adjourned the case to 12 February 2019 for hearing.

28. Of course, on 12 February 2019, the defendant filed the current application now before me.

12 FEBRUARY 2019

29. On the above date, Ms Khan said her client has been unable to settle her legal fees, hence the delay in filing affidavit of accounts. She also said that since the plaintiff has become sole executor-trustee of the estate of Parwati, the estate also has remained undistributed. She said her client accepts they have to pay costs.

30. Mr. Sharma said the defendant had not complied with the unless Orders made by consent and the accounts still have not been furnished by the defendant.

31. Ms Khan again raised the same old issues about the need to join D.S Naidu who had handled the estate accounts. She submitted that the defendant has provided all he possibly could by the affidavit of accounts filed. In response to a question as to why her client has yet to file 3rd party proceedings against DS Naidu, Ms Khan responded that her client could not afford the necessary legal fees.

32. I stood the matter down for some time to allow counsel to talk. After a while, both counsel appeared and by consent, the following orders were made:

(i) By consent the Formal Proof Hearing for today is vacated.
(ii) The Defendant to pay the Plaintiff's cost in the sum of $5,000 within 21 days.
(iii) The Registry is to issue the Summons filed by Messrs Natasha Khan & Associates.
(iv) The Defendants to serve summons within 14 days.
(v) If the costs are not settled in 21 days, the Defendant's Summons will be struck out with further costs.
(vi) The matter is adjourned to 8th March, 2019 for mention only to fix hearing date if need be.

08 MARCH 2019

33. On 08 March 2019, the matter was fixed for hearing to 07 May 2019 at 10.30 a.m.

07 MAY 2019

34. The question is whether or not to reinstate the defence. Ms. Khan, yet again, highlighted the need to join DS Naidu as he was the one who managed the estate accounts. She also reiterated, yet again, the need to have other beneficiaries

joined. She said that the plaintiff would not at all be prejudiced if the defence was reinstated.

35. Mr. Sharma reiterated the same arguments he has made in the past about the accounts furnished not being proper accounts and the affidavit having been sworn by a law clerk. He submitted that the defendant should first set aside the order striking out the defence before applying to reinstate the defence. The proper avenue by which to set aside the striking out order is to vide an appeal.

COMMENTS

36. It is obvious from the history of this case that the defendant has dragged his feet all along. One cannot help but get the impression that he hoped to frustrate and derail the plaintiff's case by doing so. It was open to him to join DS Naidu & Associates as a party to the proceedings, but he has not done so. The same excuse about the need to join the other beneficiaries has been raised time and time again for years – but to no avail.

37. The striking out Order was made pursuant to some consent orders.

38. I must point out at this time that a non-compliance with a consent order is treated very seriously by the courts.

39. In **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006), , the NLTB had failed persistently to comply with certain production and inspection orders which led to the striking out of its statement of defence. The orders in question were non-peremptory orders.

40. NLTB applied to set aside the striking out order. NLTB however appealed to the Fiji Court of Appeal.

41. Before the FCA, NLTB explained its failure to comply and argued that:

    i. It's conduct was not contumacious as it had not withheld the documents deliberately- and,

ii. the power to strike out a defence is exercisable only if there was evidence that it deliberately disobeyed discovery orders, or, if a fair trial would not be possible

42. The FCA sympathized with the plaintiff's interest in having his claim resolved quickly as well as the High Court's case- management obligations. It was also critical of the delaying tactics of the NLTB throughout the case.

43. However, the FCA took into account that there was a very substantial monetary claim against the NLTB. It also observed that the High Court had given no written ruling (let alone any written reasons) to explain why it had struck out the defence. Having observed all this, the FCA then warned, as it had done in **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), that," to deprive a defendant of the right to defend is a serious step to be taken only in the clearest of cases".

44. In the course of its reasoning, the FCA accepted the argument that what the High Court judge should have asked himself before striking out the defence was, whether NLTB's conduct "was sufficiently unsatisfactory to warrant it being denied its right to defend itself".

45. Then, upon a further review of the parties' conduct, the FCA took the view that NLTB's failures were not "sufficiently serious to warrant the order striking out the defence". In reaching this conclusion, the FCA took the following into account:

i. NLTB's default amounted to just twelve days and three days respectively in relation to the filing of list of documents and pre-trial conference. These were not "sufficiently serious to warrant the order striking out the defence".
ii. What is required is actual evidence of contumacious conduct or deliberate disobedience of the discovery orders on the part of NLTB. The court should actually have examined the evidence and make a finding of fact of contumacious conduct and/or deliberate disobedience of court orders. Such evidence would have been sufficient to warrant the striking out of its defence.
iii. Delay per se does not necessarily amount to contumacious conduct.
iv. But disobedience of an unless order or a peremptory order is sufficient to constitute contumacious conduct.

46. The FCA's reasoning in **Rapchand** may be construed rather narrowly as authority that a Court may strike out a defence on account of a defendant's failure to comply with a non-peremptory order, if there is evidence of contumacious conduct and/or deliberate disobedience of the non-peremptory orders. The onus lies with the plaintiff who is seeking to strike out the defence.

47. However, where the defendant disobeys a peremptory order or an unless order, that in itself is sufficient evidence of contumacious conduct, enough to justify striking the defence out.

48. The English Court of Appeal in **Star News Shops v Stafford Refrigeration Ltd** [1998] 4 All E.R. 408 at 415; [1998] 1 W.L.R. 536 at 545, CA:

> *I am reinforced in this conclusion by considering the approach of the court in cases of failure by a party to comply with the terms of an 'unless' order. In* ***Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd*** *[1974] 2 Lloyd's Rep 32 the Master made an unless order against the plaintiffs in respect of specific discovery and allowed 28 days for compliance. Thereafter two judges granted final extensions. The defendants entered judgment in default of compliance with the unless order. At trial the plaintiffs applied to set aside the default judgment. The trial judge set aside the judgment and extended the time for compliance with the original unless order. The Court of Appeal held that the judge was wrong to do so in the exercise of his discretion, failed to ask himself the right question and erred in law. Peremptory orders were made to be obeyed. Final, peremptory or 'unless' orders were only made by a court when the party in default had already failed to comply with the requirement of the rules or an order, the court was satisfied that the time already allowed had been sufficient and the failure of the party to comply with the orders was inexcusable........*
>
> *..........It cannot be said that the fourth party by its behavior had reached the end of the line merely because it had failed to comply with one previous order of the court which in itself was not even a final or an 'unless' order.*
>
> *Accordingly, I have come to the conclusion that although the terms of Ord 24, r 16(1) gave the judge jurisdiction to make the order that he did, he none the less erred in principle in striking out a defence for breach of a non-peremptory order, that he should have made a final or 'unless' order and that he was plainly wrong in the exercise of his discretion in making such an order.*
>
> *The only question which remains is whether the judge was under an obligation to make an unless order in the absence of a specific application to do so supported by an affidavit. In my judgment the judge had an inherent power to do so of his own initiative and the absence*

of an application and affidavit did not preclude him from doing so. He could have proceeded on the basis of what counsel told him on her express instructions. In reaching this conclusion I take into account the dictum of Bingham MR in **Costellow v Somerset CC***[1993]1 All ER 952 at 959-960, [1993] 1 WLR 256 at 264. Bingham MR, having considered the position where a defendant sought dismissal of the action for want of prosecution and a cross-summons for an extension of time, said:*

'In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties...and the case is best viewed in the round ... It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not ...Save in special cases or exceptional circumstance, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs'.

49. The English Court of Appeal shares the same view in **Marcan Shipping (London) Ltd v Kefalas** [2007] 1 WLR 1864 where, at [36] Moore-Bick LJ said:

[B]efore making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in Keen Phillips v Field as "good housekeeping purposes".

50. Browne-Wilkinson VC in **In re Jokai Tea Holdings** [1992] 1 WLR 1196 at 1203B said:

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such

failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

51. Parker LJ opined at 1206 that:

I have used the expression "so heinous" because it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly be described as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for contempt of court by breach of an undertaking or injunction. Albeit deliberate, one deliberate breach may in the circumstances warrant no more than a fine, whilst another may in the circumstances warrant imprisonment.

CONCLUSION

52. The consent orders in question were made on the day of trial on 19 April 2018. Prior to this date, the defendant had raised as early as 2015 the need to join Pillai Naidu & Associates as a party and also the need to join the other beneficiaries.

53. These, it seems, have been the defendant's excuse all along for his inability to provide full detailed accounts. Why he has not complied, prior to the striking out of the defence, is anyone's guess so to speak.

54. The failure to file proper accounts, is a breach of the peremptory order. That peremptory order had been entered pursuant to a consent order. It was a contumacious breach as it was.

55. I refuse the defendant's application. The statement of defence remains struck out.

56. As to whether or not the defendant is entitled nonetheless to appear on the formal proof date to cross-examine the plaintiff. The purpose of cross-examination is twofold: firstly, it is to establish one's own case and secondly to attack the other side's case.

57. In my view, the defendant cannot be allowed to appear on formal proof and cross-examine the plaintiff for the purpose of establishing the defendant's case.

However, the defendant may be allowed to cross-examine the plaintiff to attack the plaintiff's own case.

58. I accept that it can be extremely difficult to draw the line between the two, for, by attacking the plaintiff's case, the defendant must necessarily be advancing his own case.

59. However, in my view, if the starting point is to be that the defendant will not be allowed to call any witness, then that in itself sets the ambit within which the defendant may cross-examine.

60. The defendant submits as follows which I accept;

*In **Basalingappa ChinnappaGoudar & Others V. Shantavva and Others, Karnataka High Court (9th August, 2001)** Kumar J sited the Supreme Court in **Modula India v. Kamakshu Singh Deo 1988 4 SCC 619** and held:*

> *"It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross examination. The mere statement of the plaintiffs witnesses cannot constitute the plaintiffs evidence in the case unless and until it is tested by cross examination. The right of the defence to cross-examine the plaintiff's witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiffs evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing in law to preclude him from demonstrating to the Court that the plaintiffs witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statue."*

Further, it held:-

> *"We, therefore, think that the defendant should be allowed his right of cross examination and arguments. But we are equally clear that this right should be subject to certain important safeguards. The first of these is that the defendant cannot be allowed to lead his own evidence. None of the observations or decisions cited have gone to the extent of suggesting that, in spite of the fact that the defence has been struck off, the defendant can adduce evidence of his own or try to substantiate his own case."*

61. A date for formal proof will be set in Court.

....
Anare Tuilevuka
JUDGE
Lautoka