

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 339 of 2014

BETWEEN : GANGULAMMA aka GANGALLAMMA aka GONGLAMMA aka
GANGALAMMA REDDY aka GANGULLAMMA aka
GANGULAMMAL REDDY aka BELLA REDDY aka
GANGULAMMA REDDY of 301 Heatherway, South Francisco,
California 94080, United States of America. Widow, as Administratrix of
the Estate of RAJANA REDDY aka RAJA REDDY aka RAJANA aka
SHIU NARAYAN aka SHIU NARAYAN REDDY aka S. N REDDY
PLAINTIFF

AND : YANKTESH PERMAL REDDY of Waterfront Hotel, Marine Drive,
Lautoka, Company Director.
1ST DEFENDANT

AND : REDDY CONSTRUCTION COMPANY LIMITED a company
duly incorporated in Fiji and having its registered office at 35 Ravouvou
Street, Lautoka.
2ND DEFENDANT

Counsel : Plaintiff: Mr. Singh. V
Defendant: Mr. Khan. M. A

Date of Judgment : 21.05.20

JUDGMENT

INTRODUCTION

1. This is an appeal from Master's interlocutory decision delivered on 20.4.2019. Leave was sought and obtained to appeal against the said decision of Master. Plaintiff's application to amendment of statement of claim for third time, was rejected. The application for third amendment was made after Defendants filed summons seeking strike out of the action. Summons for strike out was made in terms of **Sections 4, 9 and 10 of the Limitation Act 1971** read with Order 18 rule 18 and Order 33 rule 3 of High Court Rules 1988.

There was no affidavit in support of summons for strike out filed but the grounds of strike out were stated in the summons filed on 13.4.2017. Application for third amendment to statement of claim was objected, hence hearing of summons for amendment and strike out was held simultaneously. Master had refused third amendment to statement of claim and said that was sought for ulterior motive and in mala fide. It was also held that Plaintiff was not certain as to the cause of action and held that Plaintiff is guilty of laches and struck off the action. There is no requirement for Plaintiff to know show new material were discovered in order to seek amendment of pleadings. Plaintiff can seek to include a claim which could have by mistake or otherwise left previously, through an amendment, if it is not legally precluded, such as Limitation Act 1971. The fact that Plaintiff sought further amendment after Defendant sought a strike out is irrelevant for granting leave to amendment, as Order 18 rule 18 (1) allows court to direct amendment of pleadings while considering an application for strike out in terms of Order 18 rule 18(1) (a), (b),(c) or (d). The court may apply Order 18 rule 18(1) at any stage of proceedings. So even if there was no application for amendment court may consider whether an amendment could rectify any deficiency in pleadings and can give directions to do so. Application of laches to strike out an action at interlocutory stage under Order 18 rule 18 of High Court Rules 1988 is not suitable considering circumstances of this case.

ANALYSIS

2. Plaintiff was allowed to file second amended statement of claim upon application and this second amended statement of claim is found in affidavit in support of the said motion seeking amendment filed on 4.5.2017.
3. This second amended statement of claim was replied by the defendants by a statement of defence on 13.6.2017 and it specifically sought to strike out the statement of claim.
4. The second amended statement of claim *inter alia* contained claims for
 - a. Breach of fiduciary duty.
 - b. Failure to provide permanently Property at 50 Nayau St Samabula, Suva
 - c. Sum advanced to business
5. Second amended statement of claim contained thirteen pages and vivid description of relationship and contribution of Plaintiff and her late husband made to Defendants and promises or assurances given by family members of her late husband including first Defendant. There are obvious matters of evidence that was included in the statement of claim.

6. This inclusion of evidence had resulted unnecessary delay and counterproductive to the Plaintiff. It had resulted repeated requests for amendments of pleadings and also application for strike out by Defendant.
7. In the second amended statement of claim Plaintiff is also claiming relief under equity (see paragraph 12).
8. Upon service of the said second amended statement of claim a statement of defence was filed and along with that an application for strike out was made on the following grounds;
 - a. Statement of claim is prolix and drawn up in a manner that would prejudice, embarrass or delay the fair trial.
 - b. Barred any claim for laches.
 - c. Sections 4,9,10 of Limitations Act 1971.
9. Then Plaintiff filed an application to amend its statement of claim for third time the draft amended statement of claim is annexed to the statement of claim.
10. In Supreme Court Practice of 1999 (White Book) paragraph 20/ 8/6 under heading 'General principles for grant of leave to amend' at page 379 stated as follow:

"In *Tildesley v. Harper* (1876) 10 Ch. D. 393, pp 396, 397, Bramwell L.J. said:

*"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (per Brett M.R. *Clarapede v. Commercial Union Association* (1883) 32 WR 262, p263; *Weldon v. Neal* (1887)19 QBD 394 p.396. *Australian Steam Navigation Co. v. Smith* (1889) 14 App. Cas. 318 p 320; *Hunt v. Rice & Sons* (1937) 53 TLR 931, C.A and see the remarks of Lindley L.J. *Indigo Co. v. Ogilvy* (1891) 2 Ch. 39; and of Pollock B. *Steward v. North Metropolitan Tramways Co.*(1886) 16 QBD.178, p.180, and per Esher M.R. p.558, C.A.). An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided (*Kurtz v. Spence* (1888) 36 Ch, D. 774; *The Alert* (1895) 72 L.T. 124).*

On the other hand it should be remembered that there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time (see, per Lord Griffiths in Kettma v Hansel Properties Ltd [1987] A.C. 189 at 220).

Leave to amend will be given to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff, even though this might lead to additional delay and expense and much longer trial, e.g. that the plaintiffs have acted in contravention of Art. 85 (alleging undue restriction of competition) and Article 86 (alleging abuse of dominant market position) of the treaty establishing the European Economic Community (the "Treaty of Rome") which became part of the law of the United Kingdom by the European Community Act 1972, so as to become disentitled to their claim for an injunction (Application des Gaz SA v Falks Veritas Ltd [1974] Ch. 381; [1974] 3 All E.R. 51 CA)...

Where a proposed amendment is found upon material obtained on discovery from the defendant and the plaintiff also intends to use it for some purpose ulterior to the pursuit of the action (e.g. to provide such information to third parties so that they could bring an action), the plaintiff should not be allowed to amend a statement of claim endorsed on the writ and so it the public domain but instead the amendment should be made as a statement of claim separate from the writ and thus not available for public inspection (Mialano Assicuranziona SpA v Walbrook Insurance Co Ltd [1994] 1 W.L.R. 977 see too Omar v Omar [1995] 1 W.L.R. 1428, use of documents disclosed in relation to Mareva relief permitted to amend claim and at trial.

The Court is entitled to have regard to the merits of the case in an application to amend if the merits are readily apparent and are so apparent without prolonged investigation into the merits of the case (King's Quality Ltd v A.J. Paints Ltd [1997] 3 All E.R. 267)."

11. Plaintiff in the notice and grounds of appeal the grounds are stated. The said grounds and the discussion on each ground are as follows;
 - a. Master erred in paragraph 20-22 of the decision of 20.3.2019 failed to consider relevant law and principles for granting leave to amend pleadings. Principles regarding amendment of pleading starts from Order 20 rule 5 of the High Court Rules 1988. In terms of that subject to Order 15 rules 6, 8, and 9 of High Court Rules 1988 any pleading can be amended subject to terms imposed by

court. Master in paragraph 19 of the judgment had quoted said Order of High Court Rules 1988. Master had discussed the issues relating to amendment from paragraphs 24-28, and in paragraph 32 stated that Plaintiff was not confident as to the cause of action against defendant. Hence held that the third amendment was sought in *mala fide* and for ulterior motive. So in my judgment Master had considered relevant law in her decision, though in her finding she made an error that the amendment was sought in mala fide and ulterior motive. The court can infer mala fide if there is uncontroverted evidence at interlocutory stage. (See Court of Appeal decision of *National Bank of Fiji v Naicker* [2013] FJCA 106; ABU0034.2011 (8 October 2013). This cannot be inferred when the evidence based on the claim is largely oral evidence and promises and or conduct of the parties where claim on equity and fraud is pleaded. Whether Plaintiff had ulterior motive or mala fide in the institution of this action cannot be decided on the pleadings and other materials including affidavits before court.

In Supreme Court Practice of 1999 (White Book) at paragraph 20/8/6 under the heading 'General principles for grant of leave to amend' at page 379 it is stated that:

"General principles for grant of leave to amend (rr 5, 7 and 8) – It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or errors in any proceedings." (see per Jenkins L. J. in R. L. Baker Ltd v Medway Building & Supplies Ltd [1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540, p.546)."

"It is well established principle that the object of the amendment after the closing of the pleading Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of rights on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right"(per Bowen L.J. in Cropper v. Smith (1883) 26 Ch. D. 700, pp. 710 – 711, with which

observations A.L. Smith L.J., expressed "emphatic agreement" in Shoe Machinery Co. v. Cultam (1896) 1 Ch. 108. P. 112)."

Though Master had mentioned principles relating to amendments to pleading before the matter, they were misapplied. It was held that third amendment was sought in mala fide and also for ulterior motive. This cannot be decided on the type of evidence before court.

b. Limitation

Second appeal ground is regarding paragraphs 28- 31 of the Master's decision. Master had found that fresh claim of fraud included in the third amended statement of claim was in order to defeat the Defendant's application for strike out of the action under Limitation Act 1971. This is contrary to Master's own finding in paragraph 28 where , submission of the counsel for Defendant relating to fraud was rejected and stated that inclusion of fraud was not to bypass the restriction placed by Limitation Act 1971. Master had identified that there was a claim for equity in the second amended statement of claim, and the facts surrounding the same being pleaded to include a claim for fraud. The inclusion of fraud may be due to the application of strike out, but that alone cannot be a reason to strike out entire action of the Plaintiff, when same facts were already pleaded in the second amended statement of claim. If Plaintiff want to amend the statement of claim to include a claim for fraud, based on the same facts and circumstances, they are entitled to do so, irrespective of the result of that will defeat the strike out of action. There is no prejudice to Defendant as they can be compensated through costs for amendment..

Section 4 of the Limitation Act 1971 states

"4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that-

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

(2) *An action for an account* shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or imperial enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied".(emphasis added)

12. Action for an account is a common law remedy in equity¹ requiring one party to a relationship (eg a partner or trustee) to account to the other(s) for money received or due.

¹ Oxford Dictionary of Law

It may be pursued in addition to a claim for another remedy'. So any claim based on an action for account should be excluded from the statement of claim as it is clearly outside limitation period. Accordingly claim for accounts from 1958 which is the first order sought in the third amendment or similar requests fails, and needs to be excluded. The basis of such restriction is clear as a business records are not required to be preserved indefinitely and needs some certainty as to preservation of the same for any claim or otherwise.

Section 9 of the Limitation Act 1971 reads as follows

"9.-(1) No period of limitation prescribed by the provisions of this Act shall apply to an action by a beneficiary under a trust, being an action-

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid and to the provisions of the Trustee Act, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

(Cap. 65)

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under the provisions of this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence."(emphasis added)

13. There is no limitation for action based on Section 9(1) of Limitation Act 1971. Plaintiff's claim based on this provision can proceed and inclusion of fraud will only substantiate the claim and it cannot be stated that it was done mala fide or with ulterior motive.
14. Plaintiff would have been in two minds to include a claim in fraud, but that would not be a ground to strike out the amendment to include fraud when it was pleaded, on the same factual matrix.

Section 10 of the Limitation Act 1971 states

'10. Subject to the provisions of subsection (1) of section 9, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.(emphasis added)

It is clear that limitation in Section 10 of Limitation Act 1971 applies subject to Section 9(1) of the Limitation Act 1971. So the claim based on Section 9(1) of the Limitation Act 1971 cannot be struck off. It is not safe to apply laches and such application for strike out is premature as the matters before court are family disputes that had prolonged a considerable time and not suited for settlement by court of law in the first instance when they arose. Considering the circumstances of the case, the appeal is allowed and orders of the master made on 20.4.2019 is set aside. Plaintiff's action is reinstated. Plaintiff is allowed to amend statement of claim for the third time, in line of the directions given and also removing claim based on common law remedy on accounts, subject to a cost of \$2,000. The cost is granted considering the delay in said amendment and also additional costs required by Defendants from this third amendment

c. Availability of Materials

Master had erred on the finding that in order to seek an amendment, there should be new material that justify such amendment. There is no such legal requirement and Master's finding that amendment was sought in *mala fide* was also partly due to this error. Master held that Plaintiff was not certain as to the cause of action, and it is the obligation on the part of legal practitioner to ascertain proper claim. The court can strike out when there is no reasonable cause of action. If court see that there is even a weak case in at least one cause of action that cause of action should not be struck off, and directions can be given in terms of Order 18 rule 18(1) for amendment of pleading accordingly. Considering the facts stated in the pleadings and proposed third statement of claim, there is a claim based on equity covered in Section 9(1) of the Limitation Act 1971 which is not subjected to section 10 of the Limitation Act 1971.

There is no requirement for party seeking amendment to justify to court that prospective amendment is due to a new discovery. If so, a bad pleading or wrong claim included in a statement of claim will never be allowed to amend if party seeks an amendment to cure it. The purpose of the pleading is to present the facts

relating to a claim or defence for determination. If a party decide to omit certain claim or part of it that can be done through an amendment. So there is no need to show to the court that amendment sought was due to new material discovered.

d. Cause of Action

There is no statutory definition of what cause of action is , but courts have tried to define it.

*"...a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." See Letang v. Cooper [1965] 1 QB 232 at 243 per Diplock LJ."*²

Paragon Finance v DB Thakerar & Co [1999] 1 All ER 400. Deputy Master found particularly helpful observations of Millett L.J. at p. 405. Millett L.J. (with whom Pill and May L.J.J. agreed) quoted the classic definition of a cause of action given by Brett J. in Cooke v Gill (1873) 8 CP 107 at 116:

"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, - every fact which the defendant would have a right to traverse."

(Millett L.J. emphasised the words "which is material to be proved.") Millett L.J. continued a little later:

*"... only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."*³(emphasis added)

As stated under earlier ground of appeal perusal of second and third proposed amendment are factually similar. I agree that additional cost will be incurred to Defendant and there is inevitable delay in the action. This will have an affect on Plaintiff than Defendant, so they should be more careful about pleadings. Pleadings play a very important role in litigation and paying less attention to that can even lead to loss of a legitimate claim. (see Court of Appeal decision of Ali v Patterson Brothers Shipping Co. Ltd [2015] FJCA 138; ABU0045.2012 (decided 2 October 2015)

In Ali (supra) full court of Court of Appeal held,(Per Anthony Fernando JA)

"The purpose of a Statement of Claim is to inform the other party of the case against him. This imposes an obligation to inform the defendant in

² Lewisham And Guy's Mental Health Trust [2000] EWCA Civ 87 (23 March 2000)(Per Mummery LJ)

³ Savings & Investment Bank Ltd v Fincken [2001] EWCA Civ 1639 (6 November 2001)

the simplest terms of the case the defendant has to meet and for the court to be able to see what the issues are. In the case of The New India Assurance Company Limited v Fiji Development Bank & Brigspot Fashions Limited (2008) ABU 75/07 (apf HBC 299/03S) it was held that "Pleadings in civil cases are no mere technicality. They are fundamental to the administration of justice in civil causes. They set out the position of the parties. They define the scope of the litigation. Pleadings identify with precision who is making the claim and who is said to be liable." In Rajeshwar Dayal & Others V Watisoni Vunivi & Others FCA Civil Appeal Nos. 46 of 1991, 25 of 1992 and 66 of 1991 this Court held that when a pleading does not adequately direct attention to an issue, the issue will not be entertained by the Court. In that case negligence in providing seating arrangements had not been specifically pleaded and was not allowed. In S.L. Shankar V Fiji Foods Ltd, Court of Appeal No. 113 of 1985 this Court held: "The misleading state of the respondent's pleadings in the present case resulted in the Appellant being left to face Court with a defence which it could not have anticipated or been expected to meet, resulting in substantial miscarriage of justice..." In Clarke v Marlborough Fine Art (London) Ltd (2002) 1 WLR 1731 it was held a claim with contradictory facts should not be permitted. I am of the view that the Statement of Claim in this case contained contradictory facts as stated at paragraph 7 above and did not inform 'Faiyaz, the case he had to meet and was misleading. 'Faiyaz' in his Statement of Defence had averred that there is no cause of action pleaded against him. Although Counsel for 'Zahid' argued before us that 'Faiyaz' had failed to testify at the trial, in my view it was not necessary for him to give evidence at the trial in view of the pleadings."

15. In the above Court of Appeal decision the claimant lost a substantial damage granted by Labasa High Court due to defective pleading. The importance of pleading is the basis of allowing amendment if defeat can be cured..
16. In Supreme Court Practice (1988) at page 269 it was stated under the "**Material facts, not evidence**" 18/7/3 state as follows;

'Material facts, not evidence'- Every pleading **must contain only a statement of the material facts on which the party pleading relies**, and not the evidence by which they are to be proved (per Farwell L. J in N. W. Salt Co Ltd v Electrolytic Alkali C Ltd [1913] 3K.B. 422,425). "The distinction is taken in the very rule itself between the facts on which the party relies, and the evidence to prove those facts (per Brett L.J. in Philipps v Philipps (1878) 4 Q. B. D. 133). **All facts which tend to prove the fact in issue will be relevant at the trial, but they are not "material facts" for pleading purposes.** "It is an elementary rule in pleading

that, when a statement of facts is relied on, it is enough to allege it simply without setting the allegation" (per Lord Denman C.J. in *Williams v Wilcox* (1838) 8 A& E 314, p 331; and see *Stuart v Gladstone* (1879) 10 Ch. D. 644).....' (emphasis is added)

Master held that such amendment was mala fide and for ulterior purpose. Plaintiff may decide which of the facts are material in terms of remaining cause of action and can further reduce amount of unnecessary facts from pleadings. In my judgment the pleadings of the Plaintiff including proposed third amendment can be further improved and make it concise, with relevant facts.

There should be sufficient material before the court to find that the application for amendment for the third time was for ulterior purpose and or for mala fide. There was no such material before court at this moment as the claim is based on equity and fraud based on alleged conduct and or oral assurances.

a. Laches

At pleadings stage it is difficult to ascertain laches in a case such as this, as it deals with disputed facts that needs to be proved through oral testimonies, and the circumstances of the case. The claim had arisen from domestic commercial activity of an extended family. The claim of the Plaintiff is relating to some financial transactions, assurances, investment, occurred within a family business where late Shiu also worked. In such a situation it is difficult to ascertain laches of Plaintiff who is only representing estate of said Shiu. Plaintiff is elderly and may not have preferred litigation as her first option, and this can only be determined after consideration of evidence at hearing.

17. In *Ketteman and Others v Hansel Properties and Others* [1987] A.C 189 at p220 Lord Griffiths stated as follows (regarding the amendment)

"This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow ad defence which is wholly different from that pleaded to be raised by amendment at the end of trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his

*assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. **But justice cannot always be measured in terms of money and in my view judge is entitled to weigh in the balance the strain the litigation imposes on litigants.**"(emphasis added)*

18. It is clear that limitation time stated in Section 10 of Limitation Act 1971 is subject to Section 9(1) of the Limitation Act 1971. So the claim based on Section 9(1) of the Limitation Act 1971 cannot be struck off. It is not safe to apply laches and such application for strike out is premature as the matters before court are family disputes that had prolonged a considerable time and not suited for settlement by court of law in the first instance when they arose.

19. In Farrell v Secretary of State (Viscount Dilhorns) [1980] 1 All E.R 166 at 173 Lord Edmund –Davies held;

"It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work in justice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. The purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take step to deal with it."(emphasis is added).

20. The defects in the Plaintiff's second amended statement of claim can be cured through a third amendment statement of claim, without striking out of the action in terms of Order 18 rule 18(1) of High Court Rules 1988.

21. For above reasons, decision of Master made on 20.4.2019 is set aside. Plaintiff's action is reinstated. Plaintiff is allowed to amend statement of claim for the third time, in line of the directions given in this judgment in terms of Order 18 rule 18(1) of High Court Rules 1988 in lieu of striking out of action. Plaintiff is directed to remove cause of action based on common law remedy on accounts, beyond limitation time in terms of Section 4(2) of Limitation Act 1971. The request to amend statement of claim is allowed, subject to a cost of \$2,000. The cost is granted considering the delay in said amendment and nature of

the amendment, and also additional costs required by Defendants to reply to said third amendment.

FINAL ORDERS

- a. Appeal is allowed and the interlocutory Ruling of Master dated 20.4.2019 is set aside.
- b. Plaintiff action is reinstated.
- c. Defendant's application to strike out action is dismissed.
- d. Plaintiff is allowed to file third amended statement of claim within 21 days subject to payment of cost \$2,000.
- e. Considering the circumstances of case no cost is awarded for this appeal.

Dated at Suva this 21st day of May, 2020.



Justice Deepthi Amaratunga
High Court, Suva