

VERESI WAQA AND OTHERS *v.* MANSUR ALI

[FIJI COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and C. F. C. Macaskie, JJ/A), May 21, 1960]

CIVIL APPEAL No. 17 OF 1959

(Appeal from H.M. Supreme Court of Fiji—Knox-Mawer, Ag. J.)

Compensation to Relatives Ordinance (Cap. 20)—non-delivery of particulars required by s. 9—actions by persons beneficially interested under s. 10—pleadings—title of statement of claim.

The respondent claimed that his son had been killed through negligent driving in respect of which the appellants were liable. He sought to recover compensation under the Compensation to Relatives Ordinance (Cap. 20) by an action in his own name and upon his own behalf. Neither the appellants nor their Counsel appeared at the trial, and the respondent was awarded judgment for £2,000 and costs.

The respondent conceded, before the Court of Appeal, that he had not complied with section 9 of the Compensation to Relatives Ordinance. This requires delivery to the defendant or his solicitors of full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim. It was common ground that while the deceased had no executor or administrator, his mother was also entitled to claim under section 10 of the Ordinance.

*Held.*—(1) Non-compliance with the mandatory provisions of section 9 of the Ordinance invalidated the proceedings.

(2) The respondent was not entitled to institute this suit in his own name and for his own benefit: the pleadings should reveal that the action is on behalf of those persons beneficially interested under section 10 of the Ordinance, and the title of the Statement of Claim must show that the action is instituted upon their behalf.

*Appeal allowed; judgment set aside; case remitted to the Supreme Court.*

*R. A. Kearsley* for the appellants.

*F. M. K. Sherani* for the respondent.

The appellants were defendants in an action by the respondent, in his own name and on his own behalf, for damages for the loss suffered by him in consequence of the death of his son as a result of his being struck by a motor vehicle owned by one of the appellants and driven at the time of the event by another appellant under instruction by a co-appellant.

In the Supreme Court neither the appellants nor their Counsel appeared at the hearing and the case proceeded as undefended. In the result, judgment was given for the respondent for the sum of £2,000 and costs. The appellants have appealed against the judgment.

We did not find it necessary to consider all of the grounds of appeal as the preliminary point taken on behalf of the appellants is fundamental and goes to the root of the validity of the proceedings.

The right of action arose under the Compensation to Relatives Ordinance (Cap. 20) and was commenced within twelve months after the death of the deceased as required by section 8. Under section 9 the respondent, as plaintiff,—

“ . . . shall be required to deliver to the defendant or his solicitor, together with the statement of claim, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.”

That section was not complied with. Indeed there is no indication or suggestion anywhere in the proceedings that the respondent was suing in respect of any right other than his own exclusive right. We are in no doubt that the words “shall be required” can only be interpreted to mean “must” and that the section is mandatory. The legislation postulates that there shall be only one action in respect of all the rights of all persons entitled to claim. That is the plain meaning of section 8 which reads:—

“Not more than one action shall lie for the same subject matter of complaint . . .”

Compliance with section 9 therefore appears to be one of the concurrent conditions of validity.

The respondent disclosed in evidence that he had a wife who, so far as the record implies, was the mother of the deceased boy. Counsel for the respondent did not dispute the fact and, that being so, the wife would appear to be entitled to claim compensation in respect of the death of the boy. It was scarcely contested that the particulars required to be delivered pursuant to section 9 would require to include both of the deceased boy's parents.

Although the pleadings and the evidence are silent as to the estate of the son, we have assumed, as the action was commenced under section 10, that the deceased son had no executor or administrator. Section 10 (1) states that—

“ . . . such action may be brought by and in the name or names of all or of any of the persons, if more than one, for whose benefit such action would have been brought if it had been brought by and in the name of the executor or administrator.”

Section 10 (2) is as follows:—

“Every action so brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it were brought by and in the name of the executor or administrators.”

Those provisions can leave no doubt that in the circumstances the respondent was not entitled to bring a suit in his own name and for his sole benefit. It is well established law that in representative actions generally the person suing must state in his pleadings that his action is on behalf of those he represents in that action and that the title or heading of the statement of claim must show that he sues on their behalf. (Odgers 16th Edn., 173). In the circumstances the suit as framed and brought was invalid and the judgment given on the basis of that suit necessarily also lacks validity.

For those reasons we intimated that we would allow the appeal but that we would consider the question of sending the matter back to the Supreme Court. Counsel for the appellants gratuitously consented to an order that the case should be returned to the Supreme Court for future action and stated that if that course was adopted he would consent also to the delivery of particulars required under section 9 of the Ordinance.

The appeal is allowed and the judgment is set aside.

The time limit within which a new suit can be commenced having expired, the case is remitted in the interests of justice to the Supreme Court for further consideration so that such proceedings and procedures as might be properly open to any party may be available to that party. This Court expressly refrains from expressing any opinion as to the availability in law of any such proceeding or procedure.

The appellants operated a sawmill on land of which they were the registered proprietors. They borrowed Rs. 500 from Sri Henry Scott upon the security of a mortgage over this property. It was stipulated in the mortgage instrument that the loan would be fully repaid on 19th March, 1957. The appellants had fallen into arrears with the payments of interest and on the 20th March, 1957, the respondents as executors and trustees of Sri Henry Scott's estate served a notice upon the appellants. The notice was to the effect that the principal and interest amounting to Rs. 149 12s. 10d. was not paid within eight days the property would be sold. The appellants paid nothing. Accordingly on 25th June, 1957, the respondents sold the property to a buyer for Rs. 600. The appellants instituted an action against the respondents in the Supreme Court claiming damages for trespass, the respondents in certain chattels which they alleged did not form part of the security, damages for loss of business profits, a declaration that they were entitled to redeem the mortgage, and a statement of account and judgment was entered for the respondents. Against this judgment the appellants appealed. They argued two grounds of appeal. The one ground of appeal turned entirely upon the facts as found by the Supreme Court, and with this finding the Court of Appeal concurred. The other ground of appeal was that the notice of 25th March, 1957, was invalid. The appellants relied upon sections 61 and 63 (1) of the Land Transfer and Registration (Cap. 130) which read:— "61. A mortgage or an encumbrance shall, when registered as herein provided, have effect as a security but shall not operate as a transfer of the land thereby mortgaged or encumbered, and in case default is made in payment of the principal sum, interest, annuity or rent thereby secured, or any part thereof, respectively, or in the performance of any covenant expressed in any mortgage or encumbrance, or in this Ordinance declared to be implied in any mortgage and such a default is continued for one month, or for such other period of time as may be therein for that purpose expressly fixed, the mortgage or encumbrance may serve on the mortgagor or encumbrancer notice in writing to pay the money due or owing under such mortgage or encumbrance, or to perform and observe the covenants therein expressed or implied as in the case aforesaid, giving such notice to him or to him or by leaving it to the mortgagor or encumbrancer, or by sending the same by post, and the post office by a registered letter directed to the proprietor of the land at his address appearing in the register, or to the last-mentioned address if the respondent accepted the tender of D. B. Sharma on the 19th March, 1957.