

1. DHARAM SINGH
2. PREM SINGH
3. MAHENDRA SINGH
4. SAKATAR SINGH

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v

1. HARDAYAL SINGH
2. GYAN SINGH
3. CHARANJIT SINGH
4. MAHENDRA SINGH

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[HIGH COURT, 1994 ( Pathik J), 4 October]

Civil Jurisdiction

*Practice (civil)-disputed issues of fact-whether commencing proceedings by way of Originating Summons appropriate-High Court Rules 1988 Order 5 Rule 4; Order 28 Rule 9.*

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The defendants applied for an action commenced by Originating Summons to be struck out on the ground that it raised issues of fact and should therefore have been begun by Writ. Dismissing the application the High Court HELD: the grounds advanced did not justify dismissing the action which the Court could order to be continued or if commenced by Writ at a later stage.

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Cases cited:

*GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710

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*H.A. Shah* for the Plaintiffs

*R. Prakash* for the Defendant

Interlocutory application in the High Court.

**Pathik J:**

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By Summons dated 11 May 1993 the defendants applied to Court for an order that the plaintiffs' Originating Summons dated 7 April 1993 be struck out on the ground that it discloses no reasonable cause of action and it is otherwise an abuse of the process of the Court; and by Motion dated 16 August 1993 the defendants are asking for an Order that the Summons dated 11 May 1993 be heard before the hearing of the substantive action.

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The said Summons was not heard at High Court, Lautoka where the action commenced and when counsel for the parties appeared before me on 8 July 1994 it was ordered by consent that they file written submissions on the defendants' said summons which, as agreed and as reworded is, "that this action should have begun by Writ of Summons and not Originating Summons".

## HIGH COURT

That is the only issue before me to rule upon. Counsel have filed their written submissions accordingly.

A For the defendant Mr. Prakash submits that this action should have begun by Writ of Summons. He says that the Originating Summons procedure is inappropriate because there are "going to be substantial dispute of facts". Mr. Prakash says that the Plaintiffs "ought to have filed proper pleadings and disclosed proper cause or causes of action to enable the defendants to adequately meet the Plaintiffs' case without prejudice to them. The defendants and for that matter the Court ought not to be left to search through the numerous affidavits for the cause or causes of action". He further states that the "Court will have to hear oral evidence in the present case to be able to determine the matters in issue".

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C Mr. Shah for the Plaintiffs on the other hand argues that the action does not fall within the categories in which it is imperative to begin the action by writ as set out in Order 5 R 2 (a) to (d) of the High Court Rules. He says that the action was properly commenced under Or 5 Rule 4(1). He urges upon the Court to treat the Affidavits as part of the evidence in the Action under Order 28 r 5(3) and hear oral evidence in the nature of cross-examination of the deponents under Order 38 r.3. He is asking the Court to give directions under Order 28 r 5(4).

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E I have given careful consideration to the submissions made by counsel. This case has a long and chequered history after having been commenced at High Court Lautoka and dealt with there in various ways. It had become necessary to ascertain the true position of the action and to put the matters in issue back on the rails so to say. On 8 July 1994 as an initial step it was decided with the concurrence of counsel to deal with the said present outstanding application. The last of the submissions herein was not filed until 15 September 1994.

F Order 5 of the High Court Rules deals with the 'Mode of Beginning Civil Proceedings'. Rule 2 sets out the "Proceedings which must be begun by Writ." Rule 3 deals with "proceedings which must be begun by originating summons". Rule 4 provides for "proceedings which may be begun by writ or originating summons". (underlining mine).

The present proceedings by originating summons do not fall under Rules 2 and 3. It could come under Rule 4 which provides as follows:-

G 4. - (1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

## (2) Proceedings -

(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or

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(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ.” (underlining mine)

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Mr. Prakash argues that because there are disputed facts this is not an “appropriate” case which should have begun by originating summons. According to my interpretation, where Rule 4(2)(b) provides that proceedings “in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons”, it merely says “appropriate” meaning, according to dictionary meaning ‘correct’ or ‘suitable’, and does not preclude commencing an action by originating summons where there are disputed facts. It does not say that it ‘must’ issue as in Or 5 r.3. (underlining mine)

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Even Rule 4(1) provides that “proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate”.

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Also in Halsbury’s Laws of England 4th Ed. Vol 37 at para 559 it is stated, inter alia:

“Where it appears to the court at any stage of proceedings begun by originating summons that they should for any reason (Footnote: E.g. because a substantial issue of fact is likely to arise on which oral evidence will be required for which the ordinary trial procedure is more suitable) be continued as if begun by writ, it may order proceedings to continue as if so begun, even if the cause or matter in question could not in fact have been begun by writ.”

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The above passage from Halsbury is incorporated in the form of a Rule, namely, Or 28 r.9 in the High Court Rules where it is provided as follows:-

“9. - (1) Where, in the case of a cause or matter begun by

## HIGH COURT

A originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

B (2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

C (3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

D (4) Every reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun."

E To sum up, in this case for the reasons stated hereabove, I hold that it was appropriate to commence this action by Originating Summons. As already stated, there are ample provisions in the Rules permitting institution of proceedings by originating summons in the circumstances such as in this case. Furthermore, as stated hereabove Order 28 gives the Court very wide powers to order that the action be continued as if begun by writ.

F Apart from what I have stated hereabove, as submitted by Mr. Shah the Court has inherent jurisdiction in matters of this nature, and he has referred the Court to GSA Industries Pty Ltd v NT Gas Ltd (1990) 24 NSWLR 710 C.A. where at p.714 Kirby P said:

G "I part with this case with an indication that the rules of the Construction List, as the rules governing this Court, as any Division of the Supreme Court (or, indeed, of any court or tribunal) are there to serve the interest of justice. They are not designed to lock judges or members of tribunals, referees, arbitrators or others into an inflexibility which prevents the consideration of the merits of the particular case and frustrates the achievement of substantial justice as the special

circumstances of each case require.

It is essential in each case that the considerations of justice should be borne in mind. A degree of flexibility should be preserved to take into account the human errors and mistakes which sometimes lie in the path of litigation. Even Homer nodded. In the event that, seeking to comply with his Honour's order to supply statements by 4 p.m. tomorrow, the claimant faces difficulty in achieving a full compliance, it would be open to the claimant to apply again to his Honour for further variation of that order. What his Honour would then do would be a matter for him. But he would doubtless bear in mind what was said long ago "the rules must be the servant not the master of the Court": *Clune v Watson* (1882) *Tarl* 75; *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 *NSWLR* 104 at 108." (underlining mine)

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Also Master Jacob in *23 Current Law Problems 1973* at page 25 said:

"The inherent jurisdiction of the Court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the Court. The two heads of powers are generally cumulative, and not mutually exclusive so that in any given case, the Court is able to proceed under either or both heads of jurisdiction." (underlining mine)

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To conclude, I find that there is no substance in the defendants' application that this action should have begun by writ of summons instead of by Originating Summons, it is therefore dismissed with costs against the defendants which is to be taxed unless agreed upon.

Before I part with this matter, it is important that there be a speedy trial of this action as it has been pending for a long time without much, if any, progress having been made. I therefore direct that counsel appear before me on 11 October, 1994 at 9.30 a.m. so that Court can make orders and give directions particularly under Or.28 r.9 of the High Court Rules as to the future conduct of the action.

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*(Application dismissed.)*