DORSAMI RAO & OTHERS

v.

MARIAPPAN GOUNDAR & OTHERS

[HIGH COURT, 1998 (Pathik J) 22 May]

Civil Jurisdiction

Legal Practitioners- duties to the Court in the event of "double booking".

Counsel for the Plaintiffs failed to appear on the date of the trial. Counsel was double booked and did not arrange alternative representation for his clients. The Plaintiff's claim was dismissed. On application to restore the action the High Court once again explained the nature of counsel's duties both to the client and to the court in such circumstances. Having described counsel's conduct as "contemptuous" it allowed the application but indicated that it would order a wasted hearing fee against counsel personally (see High Court Amendment Rules 1998).

Cases cited:

Batten v. Wedgewood Coal and Iron Company (XXXI Ch.D. 1886)
Burgoine v. Taylor (1878) 9 Ch. D 1
Hart v. Hall & Pickles Ltd. [1969] 1 Q.B. 405
Lownes v. Babcock Power Ltd (The Times 19 February 1998)
Pople v. Evans [1969] 2 Ch. 255
Teheran-Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd. (No. 2) [1971] 2 W.L.R. 1113

Interlocutory application in the High Court.

S. Matawalu for the Plaintiffs
D.S. Naidu for the Defendants

Pathik J:

This is the Plaintiffs' motion dated 30 September 1997 seeking an Order that the Order made by this Court on 14 August 1997 dismissing the Originating Summons filed herein on 28 June 1996 by the Plaintiffs be set aside and a trial date be fixed for the hearing of the said summons.

Background to the case

The Originating Summons was set down for hearing in Open Court on 14 August 1997 at 10.10 a.m.

The Plaintiffs (except John Bharat) were present but their counsel Mr. Matawalu ("counsel") was absent. When asked, the Plaintiffs said that their counsel was at a Court-Martial. Mr. Matawalu did not instruct another counsel

to appear on his behalf. The Plaintiffs said they cannot present their case without their counsel.

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Mr. Naidu objected to any adjournment and said that he had come from Nadi for the hearing. He stated that counsel "has not shown any respect to Court".

I then dismissed the Originating Summons with the following remarks:

> "This is a clear case of contempt of Court. The Summons was
> B for hearing in Open Court.
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> The proper thing for any counsel to do, if he is unable to appear, to instruct another counsel in such circumstances and make the necessary application. Messages to clerks that he will be late will not do.
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> C It is not for me to tell Mr. Matawalu what to do. It was his duty to be present on the day of the hearing to represent his client.
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> When I was in practice about 40 years ago I as counsel used to hang around in the Government Buildings balcony for my case to be called in Court and others like late A D Patel Esq., and late
> D Sir Henry Scott did the same.
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> Not only has counsel let his clients down but he is in sheer contempt of Court which I cannot sitting as a Judge of this Court tolerate for one moment.
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> The Plaintiffs are unable to present their case and the learned
> E Counsel for the defendants is objecting to any adjournment and rightly so, I dismiss the Plaintiffs' Originating Summons with costs which is to be taxed unless agreed."

On 3 September, 1997 by Notice of Motion the Plaintiffs applied for the summons to be reinstated on the grounds stated in the affidavit filed in support
F by one of the Plaintiffs Dorsami Rao. The statement in item 5 is not correct that Court did not tell the Plaintiffs that they could proceed with their case without Counsel.

Mr. Matawalu was allowed to file an Amended Motion under Or 35 r2 of The High Court Rules and extension of 7 days' time was enlarged. Then on 30
G September 1997 an Amended Notice of Motion was filed seeking an Order to set aside the order dismissing the action and a trial date be fixed for a hearing of the Originating Summons.

An affidavit in reply was filed by the defendants through Muniratnam Reddy opposing the Motion.

On 19 November 1997 parties wished to discuss settlement but it did not materialise. Then counsel again appeared before me on 17 March 1998 when

I heard the motion. Counsel wished to file written submission which was allowed. These were filed by 16 April 1998.

Plaintiffs' submission

Counsel says he did not appear in Court at the time set down for hearing, but on the morning of the hearing he wrote to Chief Registrar stating that he is required at a Court-Martial.

The Plaintiffs say that they were not afforded the opportunity to seek advice as to what options were available to them. "Regrettably" counsel says "they were denied their day in Court".

Counsel respectfully submits that the "interests of justice will only be served by granting the Order sought by the Defendants".

Defendants' contention

Mr. Naidu submits that this action was instituted by the Plaintiffs against the Defendants as Office-bearers of the Suva Branch of the Then India Sanmargya Ikya Sangam (TISI) a limited liability Company registered under the Charitable Trusts Act challenging the propriety of the Annual General Meeting held in 1996.

He says that on the day of the hearing counsel was "not available, no other Counsel being instructed in the matter nor sufficient reason being advanced". It is clear from the sealed Order that the Plaintiffs were "unable to conduct their case in person and the matter was dismissed for want of prosecution".

Mr. Naidu submits that earlier on 19 March 1997 after an obtaining interlocutory injunction preventing the defendant from holding the Annual General Meeting on 23 March 1997 failed to apply for variation of the interlocutory injunction. Whereupon the Court allowed the AGM to proceed and it was open to the Plaintiffs to participate in it.

Mr. Naidu objects to the application and states, inter alia, that if the Court is minded to reinstate the matter for trial and set aside its order of 14 August 1997, then the Plaintiffs should pay the "costs of the day including all costs thrown away by reason of the trial becoming abortive and of the application to restore". He is asking for costs to be assessed on an indemnity basis. The Defendants have already incurred costs of $2500.00 and "this is a very liberal figure".

Consideration of the issues

I shall deal with the issues in this application under two different heads, namely, (a) dismissal of the action and (b) counsel's conduct in the due discharge of his duty as counsel representing his clients.

As for "dismissal" it is evident that the Plaintiffs were unable to present their

case mainly because they were unable to get their counsel to do his duty to them by being present in Court for the hearing of this action.

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The defendants had come prepared to argue their defence.

In dismissing the action the Court had taken into account the conduct of the parties and their lawyers. The excuses given by the Plaintiffs are unacceptable; they knew that their counsel was representing someone at a Court-Martial at the very moment when he should have been in this Court to represent the

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Plaintiffs when the case was specifically set down for hearing at 10.00 a.m. The Plaintiffs or their counsel should have obtained the services of some other Counsel to stand up in Court for the counsel they had engaged. In Lownes v. Babcock Power Ltd (The Times, Law Report 19 February 1998) Lord Woolf, Master of the Rolls, dealing with delay caused by solicitors as unacceptable, commented on the argument stated in the first paragraph below.

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The argument was:

> "The person who suffered because the action was dismissed was not the plaintiff's solicitor but the plaintiff personally therefore it could be said that the judge was visiting the sins of the solicitor on the client and should not let the desire to discipline the solicitor injure the plaintiff personally."

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The Master of the Rolls commented:

> "His Lordship was very conscious of the force of that point but it was wrong to give way to it. The plaintiff, even in a personal injuries case, had to be responsible for the conduct of his solicitor. Consideration had to be given to the position of parties to other litigation."

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The Master of the Rolls went on to say:

> "The solicitors were officers of the court under a duty to do all in their power to ensure that the plaintiff suffered no more than was necessary as a result of their default."

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The following further statement from the Master of the Rolls is a firm reminder to legal practitioners appearing before the Courts of their duty to their client and to Court:

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> "Delays also had an effect on the administration of justices by taking up court time and putting other cases farther back in the queue. That damaged the reputation of civil justice.
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> The message to the profession, which should be read and understood, was that the standard of diligence in this case was totally unacceptable. In balancing the prejudice to the plaintiff against the prejudice to the defendants, account had to be taken

> of prejudice to other litigants and the administration of justice generally."

The statement, presumably on advice, which they made in support of their application to reinstate, that they were not allowed to present their case that morning is not true. This is particularly disturbing coming from Plaintiffs who are well-educated.

The fault in the Plaintiffs not being able to present their case lies mainly on the shoulders of their counsel for being so negligent and contemptuous towards Court preferring to appear before the Court-Martial than this Court to which he has primary responsibility apart from a duty to his clients. It was so held in Batten v. Wedgewood Coal and Iron Company (XXXI Ch.D. 1886).

In giving the judgment of the Court in Batten (supra), Pearson J at p.349 said:

> "But he was acting as an officer of the Court, and in that character, I conceive, he was liable to the Court for the due discharge of his duty. Until I am corrected by a higher tribunal I shall hold that the Court has a summary jurisdiction to make a solicitor liable for not properly discharging his duty under such circumstances. I think, therefore, that he is liable to make good to the receiver the loss of interest which has resulted from the non-investment of the money."

This is a case where counsel is saying, to the effect that never mind him not appearing but he would ask the Court to accede to his application. On the Solicitor's negligence it is pertinent to note the following statements of Fry J in Burgoine v. Taylor (1878) 9 Ch. D p1 at p4:

> "He had ample means of knowing of the transfer. If I were to accede to the application, the result would be that a solicitor who asked to have a judgment, obtained against his client in default of appearance at the trial, set aside, would only have to show that he himself had been guilty of gross negligence. I do not think it right to encourage negligence to that extent, and on that simple ground I refuse the motion with costs."

In Burgoine the action was restored on the terms of the party in default paying the costs of the day, which included all costs thrown away by reason of the trial becoming abortive.

As to the effect of an Order dismissing an action for want of prosecution I refer to the following footnote to Or.25 25/1/36 The Supreme Court Practice 1979 Vol I at p435:

> "An order dismissing an action for want of prosecution is not a decision of the issues on their merits, and does not therefore

operate as res judicata, so as to preclude a second action being brought upon the same facts against the same defendant (Pople v. Evans [1969] 2 Ch. 255 and see Hart v. Hall & Pickles Ltd. [1969] 1 Q.B. 405).

An order dismissing an action for want of prosecution with costs does not have the effect of depriving the plaintiff of an earlier order for costs in his favour to which he remains entitled (Teheran-Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd. (No. 2) [1971] 2 W.L.R. 1113, C.A.)."

For the above reasons in the light of the facts of this case, the law on the subject of dismissal of action and the fact that the action was not dismissed on merits, the Court has the power subject to what I say hereafter to reinstate the action with costs.

(b) Counsel's conduct

I have said enough hereabove on the reprehensible conduct of counsel.

In my experience as a Judge of this Court there have been a few instances of counsel not appearing in Court when required and the instant case is an occasion which I should not let go without reminding legal practitioners of their duty to their client and to Courts and on this aspect particularly when disrespect is shown to Court by a member of the legal profession. I can do no better than quote the following passages from a lecture on "*Courts, Lawyers, and the Attainment of Justice*" delivered by Sir Garfield Barwick Q.C. at Hobart, Tasmania on 13 September 1957 (Tasmanian University Law Review P 1 at p 14).

Sir Garfield, talking of the relationship of the legal profession to the Courts and justice said:

"..... But, beyond this general responsibility which derives from the possession of knowledge and skill, there is the peculiar relationship which the practising man occupies in relation to his client, on the one hand, and to the Court and his brother professionals, on the other. For he is never merely the alter ego of the client. To him he owes unswerving loyalty. At his disposal must be placed the whole of the resources of mind and all the skill of which the lawyer is possessed. But that he is called an "officer of the Court" is no mere description. It is a recognition of the fact that the lawyer is an indispensable part of the administration of the law and the attainment of justice."

He goes on to say:

"But I am concerned to stress the part which the lawyer plays in seeing that the wheels of the Court run smoothly, and that its

> processes are efficient. The lawyer who thinks that there is an advantage in obstruction, or in refusal to abbreviate a matter and confine it to essentials, not only does the Court great injustice, but damages his own profession. For, to my mind it is axiomatic that efficiently conducted litigation which is not allowed to range more widely than the real matter in dispute, and which places expedition and certainty before sportsmanship, encourages litigation, and must tend to bring for resolution by law many differences which might not otherwise be litigated but be disposed of by the uneven and unjust compromises of necessity or the unsupervised decision of an administrator. Inefficient drawn-out litigation simply results in the failure of many not only to receive, but even to seek, redress for undoubted wrongs."

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He concludes with the following passage:

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> "The profession is never stronger than when it is able properly to balance these two calls - obligation to the client and the obligation to the Court and to the administration of the law. It is a difficult balance to maintain; but a strong profession does it. It is then able by its own strength and its own direct intervention to prevent needless waste of time in the idle pursuit of the immaterial and irrelevant and it is able to advance the efficiency of the Court's own processes."

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In all the circumstances of this case, I have given serious consideration to the making of a "wasted costs order" against counsel particularly because counsel has acted improperly and negligently in failing to appear in Court in the morning at 10.00 a.m. when the case was specifically set down for hearing at that time. He is duty bound not to take engagement elsewhere and keep the Court waiting. If he is in difficulties or is likely to be late then he should instruct another counsel to appear in Court on his behalf and not send messages through other people. This mode of communication is not the right practice when it involves a hearing in Open Court and it must cease forthwith.

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As a result of counsel's conduct the Plaintiffs have incurred unnecessary costs. I am satisfied that it was a serious dereliction of duty to Court and to his clients which has given rise to a consideration for a wasted costs and/or fee order.

For these reasons the action is reinstated with costs against the Plaintiffs which I would fix after hearing both Counsel. I also propose to make a "wasted hearing fee" order against the learned Counsel for the Plaintiffs but before doing so I would like to hear him on it if he wishes to say anything.

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(Application allowed - action restored to the list.)