

**SHARLA ALIAS SARLA, ESTATE OF SHALENDRA PRABHAS aka
SHALENDRA PREBAS SINGH v TURUKAWA NASAU, BIRJA NAND,
FIJI SUGAR CORPORATION LTD (HBC0086 of 2003L)**

5 HIGH COURT — CIVIL JURISDICTION

FERNANDO J

12 March 2012

10 **Practice and procedure — res judicata — party seeking to intervene — whether
notice of motion could be dismissed in limine — declaration of non-liability for action
— withdrawing summons — functus officio — evidence abandoned.**

15 The plaintiff objected to the applicant's notice of motion, although the said notice had
not been served on him. The applicant had previously made and withdrawn applications
for declarations of non-liability.

Held –

20 (1) When the issue of non-liability was withdrawn, it was done after going into the
merits, and as such that withdrawal and dismissal now acts as res-judicata to the current
application. Having delivered judgment, this Court is now functus officio in that it cannot
reopen the trial by making Sun Insurance Co Ltd a party to this action. The judgment of
the Court must carry finality, and a party that concedes its position after informed
knowledge, cannot be heard to seek another hearing after judgment.

25 (2) The application amounts to an abuse of the process of Court. Sun Insurance Co
Ltd knew very well that this action was going to trial and waited almost one year and three
months to make an application to be added.

Notice of motion dismissed.

H.A. Shah for the Plaintiff.

30 *Ashneel Sudhakar* for the Applicants.

Fernando J. First Call.

35 Mr Shah appearing for the Plaintiffs object to the Notice of Motion of
8/March/2012 made by AK Lawyers, and states that even though the Notice of
Motion had not been served on him he objects to AK Lawyers filing this motion
and states that 'in limine' the Notice should be dismissed. He further states that
though he has not been served, still it is a matter in which the party seeking to
intervene; (Submissions of Mr Shah;).

40 (1) has made an application by summons filed on 9/March 2005 for a declaration of
non liability in this action itself and it has been dismissed by Judge Connors by his order
of 21/10/2005, on the Sun Insurance Co Ltd withdrawing their summons.

(2) Subsequently Sun Insurance Co Ltd had filed action No 74 of 2006 by originating
summons seeking a declaration of non liability and that action too was withdrawn by
Sun Insurance Co Ltd and struck out.

45 (3) Both above applications have been in respect of liability of Sun Insurance Co Ltd,
in respect of the liability in this action which now again is being sought to be dealt with
by the current Notice of Motion.

(4) The matter sought to be revived is now res-judicata.

(5) The Court is functus officio.

50 (6) Mr Maharaj who is the standing counsel for the Sun Insurance Co Ltd and that
the fact that he has not made this application and AK Lawyers has made the application
and the fact it was Mr Maharaj who according to Mr Shah who had withdraw case No
74/2006, Mr Shah states that AK Lawyers should not ethically make this application.

Mr Sudhakar states in reply.

Mr Sudhakar for the Applicant Sun Insurance Co Ltd states that even though the other parties being the Defendants has not been served, still he moves that the objection of Mr Shah be taken up 'in limine' and his application be dealt with as he can then proceed to make an application to the Court of Appeal, as otherwise he states he has a difficulty of serving all the parties as set out in his application itself.

Mr Sudhakar submits that the current application and the previous withdrawal and dismissed applications referred to by Mr Shah deal with the same liability of Sun Insurance Co Ltd except in that in the summon of 9/March/2005 in this case the relevant policy number is erroneously sent out as 096881 whereas it should be 06771 as set out in action No 74 of 2006.

Fernando J.

Order (Extempore)

This is a 2003 action. After the institution of this action Sun Insurance Co Ltd has made an application for a declaration for non liability in this action itself in 2005 and that application had been withdrawn and struck out by Connors J in 2005. In addition to that Sun Insurance Co Ltd has again filed another action 74 of 2006, for a declaration of non liability in respect of the accident in this action, and that action was withdrawn by Sun Insurance Co Ltd a Plaintiff in action No 74 of 2006. That action filed in 2006 was withdrawn in 2010. In action No 74 of 2006 Sun Insurance Co Ltd had made the Defendant and Plaintiff of this action party Defendants. On the 27/9/2010 when the Sun Insurance Co Ltd withdrew their action 74/2006, they were represented by Counsel Mr Suresh Maharaj, and as such, it was informed withdrawal. Sun Insurance Co Ltd would no doubt have proceeded to so withdraw its action 74/2006 on legal advise and on being fully aware of the consequences. Sun Insurance Co Ltd could have defended this action or moved to be party to this action on withdrawing action 74/2006 if they were withdrawing with the intent of pursuing non liability. The trial commenced on 27/9/2010 and since then till judgment was delivered on 26/1/2012 the Sun Insurance Co Ltd did not make any application to be added as a party nor have they defended the Defendant as Insurance Companies do. Sun Insurance Co Ltd having conceded their application not once but twice, for declaration of non liability, now seeks to do so again after the judgment has been delivered.

I agree with Mr Shah, that when the issue of non liability was withdrawn, it was done so, as set out in the order itself in 74/2006 after reading the affidavit therein, and as such it is after going in to the merits, and as such that withdrawal and dismissal now acts as 'res-judicata' to the current application.

Furthermore, this Court having delivered judgment the Court is also now functus officio in that this Court cannot reopen the trial by making Sun Insurance Co Ltd a party to this action.

The judgment of Court must carry finality and a party that concedes its position, after informed knowledge cannot be heard, to seek another hearing after judgment. The application of Sun Insurance Co Ltd is without precedent in that, Sun Insurance Co Ltd knew of this action and withdrew their action No 74/2006 on the same day this action was taken up for trial in the same Court. While agreeing with the submission of Mr Shah as aforesaid items (1), (2), (3), (4) and (5), I shall not seek to comment on item (6) of Mr Shah's submission as it is not necessary though it certainly has merit.

Furthermore this is an action filed in 2003. The Copy Pleadings had been filed in 2006 and the Agreed Bundle of Documents filed in 2008. The matter finally came up to be fixed before me within a few weeks of commencing sitting for the first time in Lautoka in the latter part of 2009. The matter was fixed for trial thereafter for the 27/9/2010 as there were many such cases waiting to be taken up for trial there being a substantial backlog of many old cases not heard or dealt with. In some such cases this Court had to call up parties to attend to pretrial steps which were long overdue and manage and nurse their cases before this Court till they were ready for trial while attending to the trials already fixed before this Court. This Court recalls that sometime in May 2010, this Court had well over 30 trials for that month only and another substantial number of mention matters coming up before this Court to attend to pre trial steps long neglected and this Court had, concluded over 30 trials and dealt with the other matters as well within that month easing the backlog. It is due to such efforts that the High Court is now able to take up for trial matters instituted in 2011, within a year in 2012. To permit parties, to litigate with neglect forces the other parties to suffer an injustice. In this case, Sun Insurance Co Ltd has made the Plaintiff maintain this action, (who under difficult circumstances no doubt as a party who has lost her husband due to the accident) and was made to defend another action by Sun Insurance Limited in Case No 74/2006 for almost 4 years till they withdrew that action in 2010. The current application as such in addition to the submission of Mr Shah amount to an abuse of the process of Court and ought not to have been made by Sun Insurance Co Ltd, after having resisted the claims of the Plaintiff since 2003. Sun Insurance Co Ltd knowing very well that this action was going to trial on 29/7/2010 waited almost 1 year and 3 months to make an application to be added. Even that too after judgment was delivered. Now Sun Insurance Co Ltd cannot seek that they be given an opportunity to present any evidence that they themselves abandoned and did not present when they had ample opportunity to present when they knew the date time and place this case was to go to trial. At the trial evidence is tested by cross examination as against any affidavits that may be on the record, which are not tested by cross examination.

As such the Notice of Motion of 8 March 2012 made by Sun Insurance Co Ltd is dismissed in view of the submission of Mr Shah for the Plaintiff as aforesaid and as an abuse of the process of Court, in addition to the fact that this Court may well be functus officio. I consider this application as a fit matter in which this Court should award indemnity costs to Mr Shah, and Mr Shah seeking \$750/-, I award Mr Shah costs in \$750/- as indemnity costs summarily assessed.

As such Notice of Motion of 8/March/2012 of Sun Insurance Co Ltd is dismissed in limine subject to indemnity costs summarily assessed in \$750 to be paid to Plaintiff.

Notice of motion dismissed.

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