IN THE FIJI COURT OF APPEAL

CIVIL JURISDI CTION

CIVIL APPEAL NO: ABU0043 OF 1996S
(High Court Civil Action No. 298 of 1988)

BETWEEN:

VINITA RAJ F/N KISHORE LAL

APPELLANT

- AND -

SUMINTRA F/N SHIU SHANKAR
EXECUTRIX AND TRUSTEE OF
THE ESTATE OF PARAS RAM

RESPONDENT

Mr. V. Mishra for the Appellant
Dr. M.S. Sahu Khan for the Respondent

Date and Place of Hearing: 4 February, 1998, Suva
Date of Delivery of Judgment : 12 February 1998

JUDGMENT OF THE COURT

Introduction

This is an appeal from a reserved judgment of Sadal J., which judgment was delivered on 19 July 1996, some 4 years after the case was heard and written submissions filed. This Court had occasion to comment adversely on a delay by the same Judge of 2 ½ years between hearing and delivery of judgment in Chandra v. Narain and Others (Civil Appeal No. 134 of 1996, judgment 14 November 1997). Similar comments were made by the Court in British American Insurance Co. Ltd. v. Nand (Civil Appeal No. 318 of 1992, judgment 14 February 1997) where the delay was over 2 years.

The issues in the present case as simple as in the other cases noted. The delay of 4 years is indefensible. There was no reason for the delay given by the learned Judge in his reasons for judgment: nor could counsel suggest any. The Court commented in Chandra that a delay of 2 ½ years would not be acceptable, even in a complex or lengthy case. A delay which is measured in years is unfair to the parties and reflects badly on the administration of justice. In the present case, the Court reinforces the comments made by the Court in the Chandra case, with even greater emphasis in the present case, because the delay here was more gross.

Relevant History

The original plaintiff, Shiu Mati, (also known as Maya Wati) and her deceased brother, Paras Ram, were registered as proprietors of an estate in fee simple as tenants-in-common in equal shares in a residential section of land at Ba. Paras Ram died in 1987 and was survived by his second wife, the present respondent, the sole trustee in his estate. The original plaintiff died after the hearing the High Court: the appeal is brought by her sole trustee, the present appellant.

In 1972, a dwellinghouse divided into 2 flats was built on the land. The trial Judge found that the building was erected solely at the cost of Paras Ram. The Judge rejected the evidence of the Plaintiff that she had paid her half the building costs. It was accepted that she had paid her half of the purchase price for the section, i.e. $700. One flat was occupied by Paras Ram.

In 1976, the Plaintiff claimed in evidence that she had asked her brother for her share of rent from the property. In evidence, she said that he had agreed to pay it after his (first) wife had died. He did not do so. After his own death, the Plaintiff's solicitors wrote letters to the estate solicitors claiming rent for her half-share over the years. One of these letters was written on 24 August 1988, a week before the expiry of a public notice calling for claims against the estate of Paras Ram.

On 10 August 1988, the Plaintiff as one owner in common, issued an originating summons in the High Court seeking an order under s.119 of the Property Law Act (Cap. 130) for the sale of the land instead of a division. On 14 April 1989, Jayaratne J. in a written judgment made the order sought. He rejected a claim that the plaintiff had been registered on the title fraudulently. The Judge referred to a claim for rent for her share which the Plaintiff had heralded. He merely stated that the Plaintiff could prefer that claim against the Paras Ram estate. He gave no view as to the likelihood of success of such a claim. Consequently, no question of res judicata can arise.

Surprisingly, because the decision of Jayaratne, J. was obviously correct in law, the respondent appealed to this Court. On 8th June 1990, a document was signed by the Plaintiff and the respondent in these terms. The document was headed with the Court entituling for the originating summons.

"(1) That the Plaintiff to transfer all her rights, titles and/or interests in the Certificate of Title No.6923 being lot 44 on Deposited Plan 1203 to the defendant.

(2) That on the payment of the said sum of $12,000 (twelve thousand dollars) in the Trust Account of the Solicitors for the Plaintiff, the Plaintiff to execute and do all things necessary to transfer her share, interests, and/or title in the said Certificate of Title 6923 to the Defendant.

(3) That there be no order as to costs."

The document was signed by the parties and their solicitors and entered as a consent judgment of the High Court. The appeal was discontinued. The consequential memorandum of transfer recited that the transfer was signed by the Plaintiff pursuant to the order of the High Court.

The Court below was not informed how the figure of $12,000 had been arrived at. However, the Court heard how the word "claims" had been deleted after the words "share, interests and/or and the word 'title ' substituted in Clause 2 (a). The following clause, proposed by the respondent, had been rejected by the Plaintiff and not made part of the agreement:

> "That subject to the payment of the said sum of $12,000 (twelve thousand dollars) neither the Plaintiff nor the Defendant to have any further rights, interests and/or claims against each other."

This arrangement was brokered by a Mr Vijendra Kumar who gave evidence that the settlement was in full settlement of all claims by the Plaintiff against the respondent estate.

Such evidence was clearly inadmissible, as being contrary to the parol evidence rule. The rejected parts of the settlement document point clearly to the Plaintiff's determination to hold onto her claim for past rent. Sadal J. was clearly wrong to have held that the document recording a settlement of the appeal arising out of Jayaratne J's judgment embraced any claim by the Plaintiff for back rent.

Judge's Findings

Despite the fact that the Plaintiff's statement of claim sought an accounting of income received and outgoings, as distinct from a fixed sum, counsel for the Plaintiff in the High Court sought to justify a claim of $900 per annum for rent from 1973 until the date of the settlement. We agree with the Judge that it was hard to see how such a figure was calculated or justified. Normally, a Plaintiff must not only prove liability but also quantum. The rigidity of the second of those requirements can be softened by a prayer for an accounting, as was the case here.

The Judge held that there was no credible evidence that part of the property had been rented out by Paras Ram. However, that finding begs the question that one owner in common holds the property in trust for his or her other owner(s) in common and must account for his or her sole occupation of the commonly held property, regardless of whether the property is rented. Rent received from a tenant under a lease is only an indication of what a proper contribution might be from one tenant-in-common to the other for the sole use of the commonly owned property.

The Judge entered into an excursion about the effect of ss.39&40 of the Land Transfer Act (Cap. 131). With respect, we cannot see how these sections have anything to do with a claim by the appellant, as trustee for the late Plaintiff who had been one tenant-in-common against the other tenant in common. Such a claim is based on equitable grounds.

The Judge commented adversely on the Plaintiff is evidence: he found that she had made no contribution to the building of the house. He felt that she had made her claims simply because her name was on the title. He did not deal with questions of statutory limitation, laches or acquiescence.

The customary deference which an appellate Court should pay to the advantage enjoyed by a trial Judge in seeing and hearing the witnesses, must be eroded to almost zero when four years intervene between the date of hearing and the date of the judgment. An appellate Court will have to be more willing to interfere with findings of fact in such a case. However, looking at the evidence, we consider that the Judge was entitled to have been sceptical about the Plaintiff's contribution to the building of the house. She produced no receipts, unlike the respondent who produced a plethora. She was vague as to amount of any contribution. Therefore we consider that the Judge's findings in that regard must stand..

Legal Basis for Appellant's Claim

The Judge mentioned no legal authorities in his judgment, although many were cited in counsel's extensive written submissions. The rights of tenants-in- common inter se were

discussed by Lord Denning, M.R. in the English Court of Appeal in Bull v. Bull, [1955] 1 All E.R. 253, 255 thus:

> *"The rights of equitable tenants in common as between themselves have never, so far as I know, been defined; but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account."*

The right of one tenant in common to claim rent from the other tenant in common who is in possession of the commonly-owned property is an equitable one: see re Landi, [1939] 3 All E.R. 569.

Consequently, the equitable doctrine of laches can operate to defeat or diminish a stale claim rather than any statutorily-imposed period of limitation. The effect of the doctrine is well expressed in the following quotations.

In Re Cross; Hartson -v- Tenison (1882), 20 Ch.D. 109, 121. Bagallay, L.J. stated:

> *".....But the question remains whether, having regard to the nature of the breach of trust committed by (the trustee), and the subsequent conduct of the parties interested in asserting any claim in respect thereof, there has not been such an amount of acquiescence and laches on the part of the parties interested as to make it inequitable that relief should be given to them in the present action; for the doctrine, that*

where there is an express trust delay in seeking relief in respect of a breach of it is not material, does not apply to a case in which there has been acquiescence or gross laches on the part of the cestui que trust."

In Lindsay Petroleum Co. -v- Hurd & Ors. (1874), L.R. 5 P.C.221 in delivering the advice of the Judicial Committee, Sir Barnes Peacock observed at pp.239/240:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon the principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Later at 242: *'It is undoubtedly true that a delay, which might be available by way of defence to persons not under any fiduciary relation or obligation, might not be available by way of defence to those who are affected by a fiduciary relation or obligation.'*

The authorities suggests:

(a) There is no finite limitation period applicable to a claim based in equity - such as the claim by one tenant-in-common against

another for an accounting for the exclusive use of that other tenant-in-common's share in the commonly owned land.

(b) Equity discourages stale claims: see Smith v. Clay (1767), 3 Bro. C.C. 639n

(c) The Court must endeavour to do justice in a given situation. The principal considerations are the length of delay in asserting known rights and acts done by the parties during the period of delay.

The appellant sought an accounting from 1973 until 1990 for her share throughout the whole period. Although she never abandoned her claim, the Plaintiff's evidence was that she had asked her brother to account to her only once - in 1976. She took no positive action until 1988 - after his death. Equity should not allow her to make a claim for more than a reasonable period in the face of such a lengthy period of inaction when she deliberately failed to assert her rights. The statutory 6 years applicable to claims in contract or tort could be starting point for fixing a period over which an accounting should be given. An accounting would have to take account of reasonable outgoings for which both tenants-in-common would be legally liable but which only the tenant-in-common in possession has paid e.g. local authority rules.

Counsel for the respondent submitted that there should be no accounting in favour of the appellant for any period because of the Judge's finding that the house had been built solely at the expense of Paras Ram. We agree that equitable considerations must impact in granting an equitable remedy. We note too that the evidence of the actual amount the Plaintiff sought was confused both before the Judge and before this Court.

Nevertheless, we think that substantive justice would be done in this unusual case by awarding to the appellant a very modest amount for the use of by Paras Ram of the half share in the land owned by the Plaintiff over the years. In order to bring an end to this family litigation, we award $1,000 to the appellant to be paid by the respondent estate, but without interest.

The respondent is the trustee of the estate of Paras Ram deceased. She was sued in the writ in her personal capacity. Yet the trial and the appeal proceeded on the basis that she was sued in her capacity as trustee. Counsel for the respondent complained that she should not have been sued personally. That submission was technically correct. But because both trial and appeal have proceeded on the basis of a claim by the Plaintiff against the estate, we see no injustice in ordering any necessary amendment to the pleadings - even at this late stage - to reflect the understood position. Pleading points which lack merit should not encumber the appellate process. If the estate has been fully administered, it should not have been. The

Plaintiff gave due notice of her claim by solicitors' letter and by issuing her writ before the cut-off date for claims as fixed by public notice.

We stress that the order we have made is based on our view of the requirements of justice. Rather than order a taking of accounts over a nominated period, a procedure which would provide these parties with further opportunities for disputation, we have endeavoured to bring this family dispute to end without involving the parties in pointless extra cost. We have made a conservative assessment in favour of the appellant.

This case provided an ideal opportunity for alternative dispute resolution, particularly mediation in preference to the costly and protracted Court process in which the parties have indulged. Had such a solution had been attempted, then both sides could have saved a considerable expenditure of time, money and emotion. Family disputes of this nature are ideal candidates for mediation techniques.

The appellant having succeeded in a limited way is entitled to some costs both in this Court and in the Court below. We set aside the costs award against her in the High Court and award her $500 costs plus disbursments which are to be fixed by the Registrar if the parties are unable to agree.

Summary

(i) Appeal partly allowed.

(ii) Respondent Estate to pay appellant $1,000 but without interest to date of this judgment.

(iii) Respondent to pay appellant costs and disbursements as ordered.

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Sir Moti Tikaram
PRESIDENT

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Sir Ian Barker
JUDGE OF APPEAL

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Justice Gordon Ward
JUDGE OF APPEAL