

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0016 OF 2003S
(High Court Civil Action No. HBC 276 of 1997S)

BETWEEN:

CHANDAR BHAN

Appellant

AND:

VIDYA WATI

Respondent

Coram:

Barker, JA
Tompkins, JA
Pathik, JA

Hearing:

Wednesday, 19th November 2003, Suva

Counsel:

Mr. H. Nagin for the Appellant
Mr. S. Chandra for the Respondent

Date of Judgment: Wednesday, 26th November 2003

JUDGMENT OF THE COURT

This is an appeal from a decision of Scott J. delivered on 7 April 2003 in which he allowed the restoration of this action (being Civil Action No. HBC 276 of 1997) on the respondent's application by summons dated 22 July 2002.

By that summons the respondent sought an order that the Notice of Intention to Act in Person dated 31 December 1998 be withdrawn and that she be granted leave to withdraw the Notice of Discontinuance of even date and filed herein on 5 January 1999.

At the commencement of the hearing of this appeal, the Court drew counsel's attention to the provisions of **Order 21r.4 of The High Court Rules 1988** which provides that, after the filing of Notice of Discontinuance, a subsequent action could have been brought by the respondent, counsel conceded that this was correct.

Or.21 r.4 provides:

“Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.”

Mr Nagin for the appellant submitted, inter alia, that His Lordship took the unusual course of hearing evidence and made certain findings against the appellant. However, he agreed with the Court that it was in the exercise of his discretion that His Lordship gave his decision. He could not enunciate an error of principle in that regard to be able to challenge it in this appeal.

Mr. Chandra, for the respondent, submitted that although the respondent could have brought a subsequent action pursuant to the provisions of **Or.21r.4**, he did not advise the respondent with that Rule in mind. She was in financial difficulties when she consulted him, long after the filing of the said Notice of Discontinuance.

We consider that His Lordship had correctly analysed the evidence before him and formed a certain view on the issues in this case without in any way making a finding on credibility of the parties or the witnesses. It is still open for the respondent’s claim to be decided on merits in the trial of the action. This is quite clear from the last paragraph of Scott J’s decision which is as follows:

“In approaching this application I have borne in mind that to refuse it would be to shut out the Plaintiff entirely from prosecuting her claim to the land which previously belonged to her husband. To allow it on the other hand would be to give the parties an opportunity to have their claim to what after all is clearly a valuable asset fully tested. Having heard the Defendant I had a sufficient degree of doubt about his evidence to raise disquiet. The benefit of the doubt must be given to the Plaintiff. The application succeeds.”

We consider that His Lordship after considering both the affidavit and the oral evidence correctly exercised his discretion and applied the proper principles,. He was of the view that in the interests of justice the respondent was entitled to have her day in Court

so that the real issue between the parties could be decided in the trial of the action. For these reasons, we have come to the conclusion that there is no merit in the appeal.

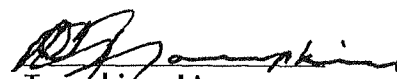
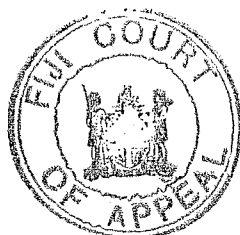

The appeal therefore has to be dismissed. We would like to however add that since Scott J has already heard some evidence on which he has expressed some tentative views this action should be heard by another Judge.

Conclusion

1. The appeal is dismissed.
2. The action is to be heard by another Judge.
3. The appellant is to pay the respondent's costs of the appeal which are fixed at \$500.00 plus disbursements as fixed by the Registrar.



Barker, JA


Tompkins, JA
Pathik, JA

Solicitors:

Messrs. Sherani and Company, Suva for the Appellant

Messrs. Maharaj, Chandra and Associates, Suva for the Respondent