

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

CIVIL APPEAL NO. ABU0044 OF 2006S  
(High Court Civil Action No.0027 of 2004S)

BETWEEN:

AVINASH SINGH

*Appellant*

AND:

RAKESH SINGH

*First Respondent*

NIRMALA DEVI

*Second Respondent*

SAROJINI KUMAR

*Third Respondent*

Coram:

Randall Powell, JA  
Izaz Khan, JA  
Andrew Bruce, JA

Hearing:

Wednesday, 2<sup>nd</sup> July 2008, Suva

Counsel:

A K Singh for the Appellant  
No appearances for the Respondents

Date of Judgment: Tuesday, 8<sup>th</sup> July 2008, Suva

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JUDGMENT OF THE COURT

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- 1 The Plaintiff and the 1st Defendant were married on 3 June 2003 in a civil ceremony. The traditions and religions of husband and wife were such that the process was not considered to be complete until there was a religious wedding ceremony. There was an engagement ceremony on 7 June 2003. The religious wedding ceremony for their marriage was to take place on 23 January 2004. The ceremony did not take place.

- 2 It would appear that there were extensive and, in many respects, expensive preparations for this wedding. In relation to the all-important religious wedding ceremony, invitations had been issued and in the days preceding the planned wedding ceremony, friends and relatives from near and far were gathering for the ceremony.
- 3 To put the matter neutrally, the ceremony was called off. There is a dispute about just about every aspect of this case. There is certainly a dispute about who called off the ceremony and how that occurred.
- 4 The day after the ceremony was called off, possibly reflective of the disappointment which must have been keenly felt by the Plaintiff and his family, the Plaintiff issued proceedings against the 1st Defendant (who was, in civil law, his wife). The mother of the 1st Defendant was joined as 2nd Defendant and the 3rd Defendant is said to be the aunt of the 1st Defendant. The relief sought was:
  - (1) an injunction restraining all Defendants from disposing and/or dealing with or removing from the jurisdiction their assets and money until further order;
  - (2) the Defendants to file a statement of assets within 14 days of service of the order;
  - (3) a writ of *Ne Exeat Civitate* was issued requiring each of the Defendants to execute a bond with sufficient security in the amount of \$50,000 and the Plaintiff's not to leave Fiji without the leave of the court;
  - (4) the Director of Immigration was ordered to stop the Defendants from leaving Fiji until further order.

Those orders were granted by the High Court.

- 5 On 4 February 2004, a Statement of Claim was signed and issued. This is a long and detailed document. However, the essence of it is that it is alleged that the third Defendant arranged the marriage of the first Defendant and the Plaintiff. Gifts were exchanged. Plans for religious ceremonies and celebrations were made. The Statement of Claim details many of the steps which were taken and the amount of money expended by the Plaintiff.

6 It would appear that on or about the 11th of January 2004 there was something of a disagreement about matters concerning the religious wedding and as paragraph 33 avers in part "it was decided by both parties to cancel the religious wedding." That may provide an explanation for the next significant averment in the Statement of Claim. Paragraph 35 of the Statement of Claim avers:

At that material time it was agreed by the parties that the wedding will go ahead on the condition that whoever cancels the wedding next time will be liable to damages.

7 The Statement of Claim asserts that preparations for the wedding then proceeded apace until the 18th of January when the Plaintiff and his parents were said to have received a call from the 3rd Defendant indicating that the wedding was cancelled.

8 The causes of action alleged by the Statement of Claim to have arisen include:

- (1) breach of an agreement;
- (2) breach of a duty of care to protect the Plaintiff from loss and damage;
- (3) defamation;
- (4) action based on false representation; and
- (5) fraud and deceit.

Special damages in the sum of \$52,049.46 were claimed. General damages were claimed in the sum of \$500,000. Interest was claimed at the rate of 13%.

9 On 4 May 2006, on the application of the 3rd Defendant, Coventry J ordered that the action be dismissed for want of prosecution and as an abuse of the process of the Court. He also ordered passport the 3rd Defendant to be returned to her forthwith and awarded costs.

10 It is that order which is the subject of the appeal.

11 The proceedings before Coventry J were initiated by the 3rd Defendant. Neither the 1st nor the 2nd Defendant appeared on that occasion.

12 On the hearing of the appeal in which all Defendants were made Respondents, none of the respondents appeared. Counsel for the Appellant informed the court that

solicitors appeared for the 3rd Respondent at the call-over of appeals to be sent down from this session. We were informed by letter delivered on the morning of the hearing that the solicitors no longer act for the respondents. No notice to cease to act was filed. That is a matter of regret. In the result, it has caused no inconvenience.

13 It is helpful at this point to recite the chronology of events found in the judgment of Coventry J. That chronology is as follows:

- 18.1.2004 - Wedding called off.
- 19.1.2004 - Filing of Writ and Notice of ex-parte Motion for Writ of Ne Exeat Civitate
- 19.1.2004 (4.00p.m.) - Writs of Ne Exeat Civitate/deposit of \$50,000.00 bonds issued. Orders granted preventing the defendants removing assets from the jurisdiction and requiring them to give statements of assets to the court. These orders were obtained ex-parte
- 22.1.2004 - First defendant files affidavit denying facts sworn in support of the orders of the 19<sup>th</sup> of January and exhibiting an e-mail in which she states it was the plaintiff's parents who cancelled the religious wedding ceremony.
- 26.1.2004 - Summons asking for the defendants to be returned their passports and be permitted to depart and enter Fiji freely without restriction. Further that the plaintiff's action be dismissed as showing no reasonable cause of action.
- 4.2.2004 - Affidavit of Abhay Kumar Singh filed stating he is the father of the plaintiff and applying to be joined as a plaintiff as "I have also suffered losses and damages" and seeking that Shiu Prasad of Ba be joined as a fourth defendant.
- 5.2.2004 - Full statement of claim filed.
- 27.2.2004 - Affidavit of plaintiff in response to that of the first defendant.
- 1.3.2004 - Defence of first, second and third defendants filed.
- 17.3.2004 - Notice of Ex-parte Motion to commit the three defendants for contempt of court for various alleged failures to comply with the order of the 19<sup>th</sup> of January.

- 18.3.2004 - Leave granted to issue committal proceedings, concerning statements of assets, against all three defendants and to serve first defendant in New Zealand by registered post.
- 22.3.2004 - Reply to defence and defence to counterclaim.
- 30.3.2004 - Statements of assets of defendants filed.
- 11.8.2004 - Summons for Directions.
- 1.9.2004 - Order on Summons for Directions (not issued and signed until 4.10.04).
- 4.10.2004 - Affidavit verifying plaintiff's list of documents filed.
- 17.11.2004 - Plaintiff's application to strike out defence and counterclaim.
- 2.3.2005 - Affidavit verifying defendants list of documents filed.
- 17.3.2005 - Refusal to strike out the defence and counterclaim
- 19.4.2005 - Third defendant fined \$300.00 for contempt of court to be paid within 14 days (Judge stated "there is no doubt that there has been contempt of court on the part of third defendant more likely because of what she was told by her counsel in this matter to the effect that there was no need for her to appear").
- 8.2.2006 - Notice of Intention to proceed.
- 13.2.2006 - Third defendant's summons that the action be dismissed for want of prosecution and return of her passport. Affidavit in support filed.
- 27.3.2006 - Affidavit of Shareen Lata, Clerk to A.K. Singh Law filed in reply.
- 31.3.2006 - Further affidavit of third defendant.
- 6.4.2006 - Further affidavit of third defendant.
- 13.4.2006 - Affidavit of Subhag Wati Singh, Clerk to A.K. Singh Law.

A pattern becomes immediately obvious from this chronology. It is to be seen that in the first 3 months after the happening of the event which gave rise to this litigation that there is a flurry of litigious action. That represents a model of the expedition that is expected of litigants and legal practitioners who conduct litigation before the courts

of Fiji. That activity starts to tail off in October/November 2004. Then nothing happens until March 2005 when there is an application to strike out the defence and counterclaim. From April 2005 until February 2006 nothing happened. Shortly after, a notice of intention to proceed is filed the 3rd Defendant then takes out a summons for the action to be dismissed for want of prosecution.

- 14 In the course of his judgment granting the orders which are the subject of appeal before this Court, Coventry J described the action as "a weak action". On the papers available to us, that would appear to be an accurate assessment of the situation. It must be said that, in coming to that conclusion, we are very conscious of the fact that not a word of evidence has been heard in this case. However, even allowing for such a qualification, the finding of the learned Judge in this regard is nonetheless a relevant matter to be taken into account in determining whether to grant the orders sought by the 3rd respondent.
- 15 Coventry J made the point (record, page 10) that apart from the failed application to strike out the defence and counterclaim, the Plaintiff had done nothing to move this action forward from October 2004 until the filing of a Notice of Intention to Proceed in February 2006. The judge made the further point that even after the filing of a Notice of Intention to proceed nothing further was done by the Plaintiff. The judge was told that part of the delay had been occasioned by personal difficulties experienced by the lawyer for the Plaintiff. The judge was not impressed by this as a reason to explain or ameliorate the delay. We agree.
- 16 The judge also took into account the orders made for the restraint of the assets of the Defendants and the requirement for bonds to be lodged by each of them and the surrender of passports. The judge observed (record, page 11) "Given the circumstances it was doubly important that the Plaintiff pursued his action with diligence."

- 17 The judge then referred to the authorities which set out the principles which inform the discretion that he was asked to exercise in this case. We shall return to a brief examination of those authorities in due course.
- 18 In the result, the judge found that there had been inordinate delay. In determining whether he should exercise his discretion to dismiss the action for want of prosecution, he considered whether he should make what is commonly known as an "unless order". The judge considered that this would not meet the justice of the case.
- 19 The judge found that the period of delay was something of the order of 12 to 16 months. He noted that the delay was against the background of the requirement to post \$50,000 bond and the loss of the right to travel which the 3<sup>rd</sup> Defendant would have enjoyed, but this action and the orders made in respect thereof. In addition, the judge found that the obtaining and maintenance of the orders made under the writ of *Ne Exeat Civitate* was itself an abuse of the process of the court given the delay. (Record, page 16 & 18).
- 20 Although the 1st and 2nd Defendants took no part in the application to dismiss the action for want of prosecution, nevertheless, the judge ordered that the whole of the action be struck out. The Judge indicated (record, page 19) that he considered the case of the 1st and 2nd Defendants. He held that the same considerations apply to them as to the 3rd Defendant.
- 21 Generally speaking, the courts of Fiji exist to resolve disputes based on rights and obligations derived from or given under the law. Those disputes may be between individuals and other individuals or individuals and the government. The law and the legal system of Fiji regulates the circumstances in which legal proceedings before the courts may be commenced and maintained. The law and that system also regulates the disposition of such proceedings. That is an important, if not fundamental, component of the rule of law which must underpin any just society. In that connection, a component of those principles is that parties must have access to the courts and the right to appropriate judicial remedies.

22 Accordingly, and the Constitution and the cases clearly recognize this, it is a very serious thing to deprive a litigant of his right to bring an action in the courts without giving the party who brings that action the opportunity of proving the claims asserted in the action.

23 Nevertheless, the law does provide the courts with the means of intervention where the process of the court is being abused. The process of dismissing an action for want of prosecution is but one of the tools available to the courts in this regard. These and other remedies available to the courts in this regard recognize the primacy of the right of a litigant to bring his case before a court and to have it heard and determined. There is also a recognition that there are exceptional circumstances where the court should intervene in a manner which has the effect of denying that right to a litigant. That, it appears to us, is the theme which runs through the many cases which deal with dismissal of an action for want of prosecution.

24 Section 29(2) of the Constitution provides:

Every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal.

Section 29(2) was enacted against the background of a developed system of civil law based on the common law system which regulates the practice and procedure of the courts in Fiji. Section 29(2) impliedly recognises the residual powers of a court to prevent an abuse of the process of that court. A system which permits litigants to continue to prosecute cases without regard to the accepted norms of conduct is not a system contemplated by section 29(2).

25 Against that constitutional background, the courts of Fiji have recognized the residual power to stay an action as an abuse of the process of the court or to dismiss an action for want of prosecution. For example, in *Abdul Kadeer Kuddus Hussein v Pacific Forum Line* ABU 0024 of 2000, the Court of Appeal held:

The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on



the part of the Plaintiff or his lawyers, and (b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendant either as between themselves and the Plaintiff or between each other or between them and a third-party.

26 This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship* [2006] FJCA 41. See also: *New India Assurance Co Ltd v Singh* [1999] FJCA 69. The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include: *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *Birkett v James* [1978] AC 297; *Lovie v Medical Assurance Society Ltd* [1992] 2 NZLR 244; *Agar v Hyde* (2000) 201 CLR 552. Indeed the passage from *Abdul Kadeer Kuddus Hussein v Pacific Forum Line* reflects closely *Birkett v James* (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and, to put the matter in another way, the court must stand back and ensure that sufficient regard is had of the interests of justice.

27 There is also developing a new line of authority which is not utterly critical to the decision of the learned Judge in this case. Nevertheless, it would be inappropriate to fail to refer to this development. The proposition is that regard should also be had to the impact of a case on the resources of the court. Those resources are not infinite and for every case which takes up time, another case is potentially delayed. If the case which takes up time and delays another case is, on any view, an utter waste of time and resources and stands in the way of other more deserving cases being heard at an earlier time, then that is a factor which the courts cannot ignore. Indeed, the learned Judge in this case at paragraph 20 of his judgment sets this out with admirable clarity:

There has been a sea change in the approach to delay in most if not all common law jurisdictions. Further, a new and important factor has entered the equation. That factor is the use of the court's time and resources. The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases to be heard within a reasonable time.

The observations of the learned Judge reflect a line of authority which has developed in England and Wales and may be seen in *Grovit & Others v Doctor & Others* [1997] 2 All ER 417. *Grovit & Others v Doctor & Others* may properly be seen as a precursor to new rules on civil procedure which have been developed in England and Wales. Nevertheless, there will be many cases where the sentiments quoted from the judgment of the learned Judge in this case and based on *Grovit & Others v Doctor & Others* will be highly apposite to the determination of whether to strike out proceedings for want of prosecution. The judge was right in the present case to have this new development in his mind. Clearly this was not the dominant concern of the learned Judge in the instant case.

- 28 Many cases have been and could be decided where delays of 7, 11 and even 40 years have been held not to be a basis for striking out an action for want of prosecution. Nevertheless, it is obvious from even the briefest examination of those cases that the decision in those cases was linked to the special circumstances of that case. Counsel for the Appellant in the present case recognised that proposition.
- 29 For the avoidance of doubt, the fact that there was a Notice of Intention to Proceed under Order 3 Rule 5 of the Rules of the High Court does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the Court's inherent powers. The application of this rule could not be used for the perpetration of an action where such a perpetration was, as here, an abuse. Further, Order 25 Rule 9 does not prevent such a course from being taken. Order 25 Rule 9(1) provides:

If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

The only step that was taken was the filing of the Notice of Intention to Proceed. That predated the application to dismiss a case for want of prosecution by a few days. We do not think that Order 25 Rule 9 provides the only circumstances in which the High Court could use its inherent powers. In the exercise of the discretion of the court, the

inactive period which predated the filing of the Notice of Intention to Proceed was available for the Court to consider. In any event, well over the minimum 6 months had elapsed. It could not seriously be contended that the Respondents would have had to wait for another 6 months after the filing of the Notice of Intention to Proceed upon the basis that this was a step taken within the meaning of Order 25 Rule 9.

- 30 The real issue on appeal which we have to consider is whether the discretion of the learned Judge miscarried. In our opinion, there was clearly evidence of prejudice to the 3rd Defendant who was the applicant on the motion for the dismissal of the proceedings. She was restrained from moving assets out of Fiji without the leave of the court. Her passport had been taken away for some time and she had had to post a bond of \$50,000. While she did not actually have to come forward with that sum of money she nevertheless had her economic rights interfered with to a significant extent by having to make a commitment to the court for that amount of money. It goes without saying that the denial of the right to move freely in and out of Fiji is also a relevant prejudice. Although the judge did not mention it, we also think that the Defendants having to disclose to the Plaintiff a list of their assets as required by the summons of the 19th of January 2004 was a significant invasion of rights to privacy.

We note that the 1st and 2nd Defendants were allowed to take their passports back within weeks of them being deprived of their passports. That is as may be. It is also said that the 3rd Defendant may have been able to claim her passport back at an earlier time. That does not take the matter very much further. It seems to us that the judge was right to find that there was been real and substantial prejudice to the Defendants in this case.

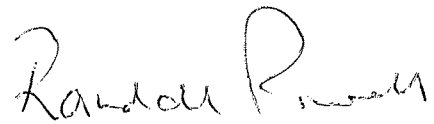
- 31 Was there inordinate delay? As the learned Judge rightly found, there was delay for which there was no acceptable explanation. He rightly held the delay to be inordinate. Whether delay is inordinate must be related to the particular circumstances of the case. It seems to us that when viewed by reference to the particular circumstances of this case that it was incumbent on the Plaintiff to move forward with substantially more expedition than was seen in the present case. In all

of the circumstances, we are firmly of the view that the judge exercised his discretion properly and was fully aware of the principles which inform the exercise of that discretion. He was fully and properly aware of the facts and circumstances of the case. We are firmly of the view that his discretion did not miscarry in this case.

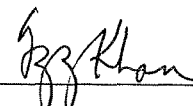
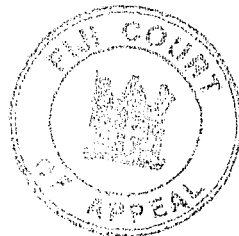
32 It is also appropriate to briefly allude to the issue of costs. Only the Appellant attended the appeal and apart from the possibility that the lawyers for the 3rd Respondent attended a call over of this matter, it would appear that the 3rd Respondent has, in effect, washed her hands of the matter. In all the circumstances, we think that the proper order in relation to costs is that there be no order as to costs.

33 For these reasons, we make the following orders:

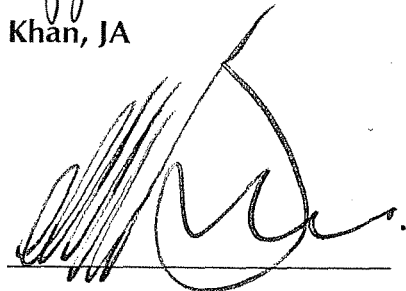
- (1) Appeal dismissed.
- (2) There be no order as to costs.



Powell, JA



Khan, JA



Bruce, JA

Solicitors:

A K Singh Law, Nausori for the Appellant  
No appearances for the Respondents