IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Appeal No. HBA 14 of 2013
Suva Magistrates Court Civil Case No. 340 of 2005

BETWEEN	:	**RAMAT ALI**
		Appellant
AND	:	**HARRY CHANDRA**
		First Respondent
AND	:	**JAGDISH CHANDRA**
		Second Respondent

BEFORE	:	Hon. Justice Kamal Kumar
DATE OF HEARING	:	28 April, 2014
DATE OF JUDGMENT	:	30 September, 2014
COUNSEL	:	Mr V. Maharaj for the Appellant Mr A. Vulaono for the Respondents

JUDGMENT

1.0 Introduction

1.1 On 13 March 2012, Appellant filed Notice of Intention to Appeal against the decision of the Learned Resident Magistrate Mr Yohanne Liyanage delivered on 7 March 2012 dismissing Appellant's Application to Issue Third Party Notice and for Security for Cost and the Ruling of Resident Magistrate Ms. Irani Arachchi delivered on 9 March 2012.

1.2 On 4 April 2012 Appellant filed Notice of Appeal and Grounds of Appeal, which are as follows:

"(1) The learned Magistrate erred in law and in fact in holding that the Appellant (original Defendant) did not provide adequate facts on the 'control' the intended third party had on the agreement when such control was apparent from the terms of the Sale and Purchase Agreement and from the evidence already given by the Plaintiff.

(2) The learned Magistrate's ruling was contrary to the established principles governing the rationale behind the joinder of third party and also contrary to Section 27(2) of the Magistrate Court Act Cap. 14.

(3) The learned Magistrate erred in law and in fact in dismissing the Defendant's application for Security for Costs to be provided by the Respondent (original Plaintiff).

(4) The learned Magistrate erred in law in his application of principles on which Security for Costs is generally ordered and wrongly ignored the evidence submitted by the Appellant.

(5) The learned Magistrate erred in law and in fact in ordering cost to be paid 'forthwith' by the Appellant/Defendant following the dismissal of the Appellant's (original Defendant's) two Notice of Motions, without stating the reasons for making a 'forthwith order'.

(6) The learned Magistrate exercised his discretion wrongly and/or improperly and misconstrued the provisions of Section 47 of the

Magistrate Court Act (on the assumption that such exercise of discretion was made pursuant to the said provision) in deciding to continue with the hearing of the proceedings from where it was left of by his predecessor instead of declaring trial de-novo given the stage the trial has reached.

(7) The learned Magistrate Irani Wakishta Arachchi erred in law and in fact in dismissing the Appellant's application of non-suit of the Plaintiff's claim.

(8) The learned Magistrate Irani Wakishta Arachchi acted contrary to the provisions of Order 32 (XXXII) of the Magistrate Court Rules.

(The Appellant reserves the right to add further grounds of appeal upon receipt of Court Record)."

1.3 The Appeal was called in this Court on 24 January, 2014.

1.4 On 24 January 2014, the Appeal was adjourned to 21 February 2014 to enable the Registry to compile Supplementary Copy Record to include missing documents.

1.5 On 21 February 2014, parties were directed to file Submissions and Appeal was adjourned to 28 April 2014 for hearing.

1.6 Parties filed their Submissions as directed and the Appeal was heard on 28 April 2014, and adjourned for Ruling on Notice.

2.0 Chronology of Events

2.1 **2005**

October 5: Writ of Summons was filed at Magistrates Court Suva in Civil Action No. 340 of 2005.

November 14: Writ of Summons was called before Resident Magistrate, Ms Philips.

December 6: Statement of Defence was filed.

December 21: Matter was adjourned to 10 February 2006 for hearing before Resident Magistrate Mr. A. Khan.

2006

February 10: Hearing was adjourned to 30 March 2006 by Resident Magistrate Ms. A. Prasad.

March 30: Matter was heard by Resident Magistrate Mr. A. Khan and parties were granted 14 days each to file submission which time was extended to further 14 days from 1 May 2006.

July 27: Judgement was delivered against the Defendant. Defendant appealed to High Court being Civil Appeal No. 7 of 2006.

2007

Number 2: High Court (Justice Jitoko) delivered Judgement allowing appeal and remitting matter back to Magistrates Court for trial de novo before another Magistrate.

Plaintiff then appealed to Fiji Court of Appeal (Appeal No. ABU0077 of 2007).

2008

July 11: Fiji Court of Appeal delivered its Judgment dismissing the Appeal.

Magistrate Court proceedings - De - Novo.

2009

August 11: Matter came before Resident Magistrate Ms. M. Muir for the

first time when parties were not present and this matter was adjourned to 22 September 2009.

September 22: This matter was adjourned to 19 March 2010 for hearing before Ms. Muir.

2010

March 19: This matter was heard by Resident Magistrate Ms Irani Arachchi.

At close of Plaintiff's case defendant's counsel submitted that there is no case to answer (non-suit) when parties were directed to file submission by 6 May 2010.

May 6: Ruling on "non - suit" submission was adjourned to 3 June 2010.

June 3: This matter was adjourned to 30 July 2010 for hearing.

Matter was called on 30 July 2010 and 20 September 2010 before Resident Magistrate Nannayakara when it was adjourned to 7 October 2010, for hearing.

October 7: This matter was called before Resident Magistrate Ms. Seruvatu when she adjourned it to 21 October 2010, to check if Ms. Arachchi (Former Chief Registrar) will complete this part heard matter. Thereafter this matter was adjourned to 26 October 2010 and 17 November 2010.

November 17: Ms. Seruvatu informed parties that Ms. Arachchi will hear this matter.

December 3: Defendant filed Application for Security for Costs and Application for Leave to issue Third Party Notice.

December 7: Both Motions were adjourned to 26 January 2011, to fix hearing date for both Motions.

2011

January 26: Motions were adjourned to 23 February 2011, for mention.

February 23: Motions were adjourned to 2 September 2011.

September 2: Motions were adjourned to 2 November 2011, by Resident Magistrate Mr. Liyanage as Resident Magistrate Seruvatu was on leave.

November 2: Motions were adjourned for hearing on 15 December 2011, before Resident Magistrate Mr. Liyanage.

December 15: Parties were directed to file submissions.

2012

March 7: Ruling on both applications were delivered by Resident Magistrate Mr. Liyanage.

March 13: Notice of Intention to Appeal was filed at Magistrates Court, Suva.

April 4: Grounds of Appeal was filed.

2013

January 8: Respondent's Solicitors wrote to Officer in Charge, Magistrates Court, Suva to forward the Notice of Intention to Appeal and Grounds of Appeal to High Court. (Lapse of 10 months)

November 18: Copy Record was certified by Senior Court Officer and Resident Magistrate. (Lapse of 9 months)

When file was referred to this Court and the Appeal was 1st called on 24 January 2014, Appellant's counsel informed Court that certain documents are missing from copy record.

2014

January 24: Appeal was adjourned to 21st February 2014 for Court to compile Supplementary Copy Record.

February 2: Parties were directed to file and serve submission. Appeal was adjourned to 28 April 2014 for hearing.

April 28: Appeal was heard in respect to dismissal of Application for Security of Costs, Application of joint third party and in respect to Application for Non - Suit and failure by Resident Magistrate to hear Magistrates Court matter de - novo.

3.0 Grounds of Appeal

Grounds 1 and 2

3.1 Grounds 1 and 2 relate to refusal by the Learned Magistrate to join Jagdish Chandra as Third Party and as submitted by Appellant's counsel it will be dealt together.

3.2 Application to join Third Party was made pursuant to Section 22-24 of High Court Act, Section 46 of the Magistrates Act, Order VIII Rule 5, Order XIV Rule 1 of the Magistrates Court Rules and Order 16 of the High Court Rules and inherent jurisdiction of the Court.

3.3 It must be noted at the outset that the Magistrate Court is created by statute and Magistrates derive their jurisdiction through the statute and therefore do not possess inherent jurisdiction (s101(2) of the Constitution of the Republic of Fiji).

3.4 Since there is no rule in the Magistrate Court Rules which permits a party to make application to join third party, High Court Rules is to apply.

3.5 Appellant at paragraph A page 3 of his submission submitted that:-

"We further submit that the learned Magistrate erred when he stated at para 20 of his ruling (see P117 of the Record) and we quote;

> *".....the Defendant has not provided the adequate facts on the 'control' the intended Third Party had on the agreement and as to how the intended Third Party was not able to effect the settlement within the period of the agreement."*

3.6 Appellant also submitted that in light of the evidence before the Court the Learned Magistrate erred in law in fact when he dismissed the Joinder Application.

3.7 Also at paragraph E of Appellant's submission he submits that:-

"E)(8) The learned Magistrate clearly overlooked the provisions of Section 27(2) of the Magistrates Court Act and Order VIII of the Magistrates Court Rules Cap 14. Section 27(2) states (in summary) a Magistrate has all the powers to grant all remedies or relief whatsoever, interlocutory or final, as any of the parties appear to be entitled to in respect of any legal or equitable claim.....so that, in so far as possible, all matter in controversy between the said parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning any such matters avoided."

3.8 Order VIII of Magistrate Court Rules does not make provisions for a party to make Application to join third party but rather gives Court power to direct person to be made parties on notice issued by Court. The Learned Magistrate rightly dealt with the Application pursuant to Order 16 of the High Court Rules.

3.9 Order 16 Rule 2 (2) of High Court Rules provide:-

"2-(1) .....

(2) An application for leave to issue a third party notice must be supported by an affidavit stating -

a. The nature of the claim made by the plaintiff in the action;

b. The stage which proceedings in the action have reached;

c. The nature of the claim made by the applicant or particulars of the question or issue required to be determined, as the case may be, and the facts on which the proposed third party notice is based; and

d. The name and address of the person against whom the third party notice is to be issued."

3.10 It is undisputed that the Learned Magistrate has unfettered discretion as to whether to grant orders to join third party or refuse it.

3.11 Appellant needs to establish that by refusing to join the third party the Learned Magistrate exercised his discretion wrongly or has taken into account irrelevant factors or has failed to take into account relevant factors in reaching his decision.

3.12 It is apparent from the Learned Magistrate's Ruling on Joinder Application that the lack of control and motive behind filing of the Application by the Defendant were only observations made by the Learned Magistrate.

3.13 The rationale for Learned Magistrates Ruling appears to be the failure by the Appellant (Defendant) to comply with the requirements of s16(2)(2) of the High Court Rules. At paragraph 21 of his Ruling the Learned Magistrate stated as follows:

"As per the requirements of Order 16 Rule 02, I hold that the defendant has failed to fulfil the requirements."

3.14 The case authorities cited by the Learned Magistrate in his Ruling also deals with this issue.

3.15 In **Esquires Fiji Ltd *v.* Dennis** [2009] FJHC 181; HBC 143.2009L (27 August 2009) his Lordship Justice Inoke (as he then was) stated as follows:-

"....affidavit in support must state the nature of the plaintiff's claim, the stage the proceedings were at, the nature of his claim against the third party, and the name and address of the third party."

3.16 At paragraph 16/2/2 of the Supreme Court Practice 1993 Vol. 1 it is stated as follows:-

"Paragraph (2) requires that the affidavit must state the nature of the claim in the action, the state of the proceedings, the facts out of which the claim against the third party arises and his name and address.

It is desirable practice for a time-table of the action to date to be given and the delay by the defendant to be explained in the affidavit in support; a copy of the intended third party notice should be exhibited. Copies of the writ and the defence should also be lodged."

3.17 The Defendant in his Affidavit in Support of Joinder Application has failed to comply with the requirements of Order 16 Rule 2(2) of High Court Rules by failing to state the stage which proceedings in the action have reached (Rule 2(2(b) and nature of the claim made by the applicant or particulars of the questions or issues to be determined (Rule 2(2)(c)).

3.18 As stated above substantial compliance with the requirements of order 16 Rule 2(2) are mandatory.

3.19 I agree with the Learned Magistrates finding that the Appellant failed to comply with requirements of Order 16 Rule 2(2) of the High Court Rules and as such I find that the Learned Magistrate did not err in law or in fact.

3.20 Accordingly grounds 1 and 2 of the Grounds of Appeal are dismissed.

Grounds 3 and 4

3.21 Appellant submits that the Learned Magistrate *"failed to take into account clear evidence produced by the Appellant from the Department of Immigration, specifically the Plaintiff's (Respondent's) departure card in which the Plaintiff stated his reason for absence from Fiji as 'migrating'. He also stated in the same form under 'absence of length' as 'over 5 years or permanently'."*

3.22 Appellant further submits that the Learned Magistrate "failed to discharge that onus and the Learned Magistrate erred in accepting his explanation, "that even though the Respondent had migrated, he nonetheless, has returned to Fiji"."

3.23 Order 33 Rule 4 of the Magistrates Court Rules provides:-

"where plaintiff does not, or does not ordinarily, reside in Fiji, the court may, either on its own motion or on the application of any defendant, require any plaintiff in any suit, either at the commencement or at any time during the progress thereof, to your security for costs, to the satisfaction of the court by deposit or otherwise or to give further or better security"

3.24 It is well established that the Learned Magistrate had discretion whether to award or not to award security for costs: **Sharma *v.* Registrar of Titles** [2007] FJAC 118; HBC 351.2001 (13 July 2007).

3.25 The purpose of Order for security for costs is stated by Sir Nicholas Brown Wilkinson VC in **Porzelack K. G. *v.* Porzeluck (UK) Ltd** [1987] 1 W.L.R. 420 as follows:-

"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiff's

resident within the jurisdiction. There is only one exception to that, so far as I know, namely, the case of limited companies where there are provisions under the Companies Act for security for costs. Where the plaintiff resident outside the jurisdiction is a foreign limited company, different factors may apply: see ***DSG Property Co. Ltd. v. Lotus Cars Ltd****. [1987] 1.W.L.R. 127. Under R.S.C., order 23, rule 1(1)(a), it seems to me that I have entirely general discretion either to award or refuse security, having regard to all the circumstance of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstance of the case, is the just answer." (pages 422-3)*

3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not or does not ordinarily reside in Fiji".

3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.

3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.

3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside' or "does not ordinarily reside" in the country then Court has to exercise its discretion as to whether to make Order for security for costs or not.

3.30 Of course in exercising discretion whether to make Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available of funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (**Sharma *v*. Registrar of Titles**) chances of Plaintiff's claim succeeding (Para 25.13.1 White Book. Vol 1, 2011).

3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.

3.32 The Learned Magistrate took into consideration following factors to determine whether Respondent (Plaintiff) was resident or ordinarily resident in Fiji:-

(i) Travel History from Department of Immigration and Departure Card showing Respondent (Plaintiff) migrated to New Zealand on 13 September 2009;

(ii) Although documents show "migrating" Respondent (Plaintiff) returned to Fiji on 28 September 2009;

(iii) Respondent's (Plaintiff) Affidavit evidence sworn on 13 January 2011 stating that he has not travelled to New Zealand since 27 February 2010;

(iv) Respondent (Plaintiff) was still Fiji citizen;

(v) Has given residential address in Fiji;

(vi) Respondent (Plaintiff) has been employed by Ministry of Health as Project Officer;

(vii) Respondent (Plaintiff) has always instructed his Counsel since 2005.

3.33 I am of the view that the Learned Magistrate took relevant factors in determining whether Respondent (Plaintiff) was resident of or ordinarily resident in Fiji and as such he has not erred in law or in fact.

3.34 It must be noted that mere fact that a person has a permanent resident visa for another country does not of itself is determinative that he or she is not resident or not ordinary resident in Fiji. Court needs to consider all relevant factors as was done by the Learned Magistrate.

3.35 Accordingly grounds 3 and 4 are also dismissed.

3.36 It must be noted that an application for security of costs can be made at any stage of the proceedings and can also be made at different stage of proceedings. For instance, one application can be made for completion of pre-trial procedures and the other prior to trial once the parties are able to determine the nature and type of evidence to be called and duration of trial. Obviously there should not be undue delay in making the Application upon becoming aware of the relevant facts.

3.37 In this instance, depending on my decision in respect to remaining grounds if this matter is listed for trial then if the Appellant (Defendant) is aware and has tangible evidences to prove that Respondent (Plaintiff) is no longer resident in Fiji then he may depending on advice from his legal advisor move the Court for security for costs for the trial.

Ground 5

3.38 Order 33 Rule 3 of the Magistrates Court Rules provides:-

"The cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the court; and the court shall have full power to award and apportion costs, in any manner it may deem just, and, in the absence of any express discretion by the court, costs shall abide the event of the suit proceeding..." *(emphasis added)*

3.39 The Learned Magistrate had full power to determine the manner in which costs are to be paid.

3.40 Whilst it is ideal that costs be not ordered to be paid "forthwith" there is nothing stopping the Magistrates to Order payment of costs as was done in this instance.

3.41 Accordingly this ground of appeal also fails.

Ground 6

3.42 Section 47 of the Magistrate Court Act provides:-

"Where a magistrate has issued any summons or warrant or otherwise taken or commenced any proceeding or matter whether civil or criminal, under any authority however conferred, and subsequently ceases to act as such magistrate, it shall be lawful for the person in whose hands such summons or warrant may be to execute or serve the same in the same manner as if the magistrate who issued such summons or warrant had not ceased to act as such magistrate and any successor of such magistrate, or any person acting for such magistrate, may hear, determine, execute, enforce and carry to completion any proceeding or matter so commenced as aforesaid save that, except where otherwise provided by the Criminal Procedure Code, such magistrate shall commence the trial of any such cause or matter ab initio."

3.43 Both Applications were dealt on Affidavit evidence and were dismissed for non-compliance with the High Court Rules and lack of Affidavit evidence to show that Respondent (Plaintiff) was not resident of or not ordinary resident in Fiji. The Learned Magistrate was seized of both the Applications from the beginning and as such he did not err in any way in dealing with both the Applications

3.44 Accordingly this ground of appeal also fails.

Ground 7

3.45 No submissions have been made as to how Learned Magistrate Ms Irani Arachchi erred in law and in fact in dismissing Appellant's (Defendant) application of non-suit.

3.46 Appellant must state as to how the learned Magistrate erred and by only stating that learned Magistrate has erred in not enough.

3.47 It seems that Counsel for the Appellant left it for the Court to assist him in determining in what way the Learned Magistrate erred in respect to this ground. If this is the practice adopted by Legal Practitioners then it must cease at once.

3.48 This ground also fails.

Ground 8

3.49 I accept Appellant's submission that the ruling on non-suit application should have been delivered in open Court as required by Order 33 of the Magistrate Court Rules.

3.50 I also accept Appellant's submission and following statement of Thomas J in **Bell-Booth *v.* Bell-Booth** [1998] 2 NZLR 2 that it is fundamental requirement of common law that reason for judgment be given by the judicial officer:-

"Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and Judge's reasoning - his or her reasons for the decision - is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievances is averted. Litigants are assured that their case has been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth of exercising their rights of appeal. At the same time public confidence in the legal system and the legitimacy and dynamic of the common law is enhanced. The legal system can be seen by working and, although possibly at times imperfectly, striving to achieve justice according to law."

3.51 I hold that failure to deliver the ruling in open court by Learned Magistrate Ms Irani Arachchi is procedural error and not an error of law which requires intervention of this Court.

3.52 At paragraphs 11 to 14 of her ruling the Learned Magistrate stated as follows:-

"11. I have very carefully perused the original case record as well as the written submissions filed by the Counsels on the issue of 'non-suit' application.

12. The Law as regards the power of a Magistrate to enter and decide on a case of 'non-suit' in Civil Cases had been looked into in detail by the then High Court and it has a binding effect.

13. The only question I have to decide as regards the application of 'non-suit' is to ascertain whether a prima facie case had been made out by the plaintiff.

14. Upon a perusal of the evidence placed before this Court by the plaintiff, I am of the view that there is a case to answer."

3.53 It is therefore evidently clear that the Learned Magistrate did take into consideration all the evidence and submissions before coming to the conclusion that there is a case to answer.

3.54 Accordingly this ground fails as it does not state as to how the learned Magistrate erred in holding that there is a case to answer.

3.55 Accordingly this ground is dismissed as well.

Substantive Matter

3.56 I note that substantive matter before the Magistrates Court was only part heard with Respondent (Plaintiff) completing his case.

3.57 Since the Magistrate who presided over the hearing is no longer in the Judiciary the substantive matter needs to be heard de-novo by another Magistrate.

4.0 Conclusion

4.1 I make following Orders:-

(i) Appeal is dismissed;

(ii) Appellant do pay Respondent's costs of this Appeal assessed in the sum of $800.00;

(iii) Magistrate Court Civil Action No. 340 of 2005 between the Appellant as Defendant and First Respondent as Plaintiff be heard de-novo by another Magistrate.

K. KUMAR
JUDGE

At Suva
30 September 2014

MC Lawyers for the Appellant
Siwatibau and Sloan for the Respondents