IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Action No. HBA 02 of 2014

BETWEEN	:	**SALEN KUMAR** of Vuci Road, Nausori, Taxi Driver
		APPELLANT
AND	:	**DAVENDRA KUMAR** of 137 Laucala Bay Road, Suva, Businessman
		RESPONDENT
BEFORE	:	**Hon. Justice Kamal Kumar**
COUNSEL	:	**Appellant in Person**
	:	**Ms M. Rakai for the Respondent**
DATE OF JUDGMENT	:	31 March 2016

JUDGMENT

Introduction

1. On 3 October 2013, Appellant filed Notice of Intention to Appeal Magistrates Court decision delivered on 27 September 2013, whereby the Learned Magistrate ordered Appellant to pay Respondent a sum of $29,165.00.

2. On 15 October 2013, Appellant filed Grounds of Appeal.

3. The Appeal was first called in this Court on 21 February 2014, when this Court directed as follows:-

   (i) Appellant to seek legal assistance and file Submissions by 21 March 2014;

   (ii) Respondent to file and service Submission by 4 April 2014;

   (iii) Appellant to file and serve Submission in Reply by 18 April 2014;

   (iv) Appeal be adjourned to 16 May 2014, at 9.30am to fix hearing date.

4. Appellant filed Submissions on 19 March 2014.

5. On 16 May 2014, time for filing Respondent's Submission was extended to 23 May 2014 and Appellant was diverted to file Submission in Reply by 6 June 2014.

6. On the same day the Appeal was adjourned to 25 June 2014 at 2.30pm for hearing and Respondent was ordered to pay Appellant's cost of $150.00 for the day.

7. On 25 June 2014, the appeal was heard and adjourned for Judgment on Notice.

Background Facts

8. Parties are related to each other by virtue of Appellant's marriage to Respondent's cousin sister.

9. Respondent gave certain loan to the Appellant.

10. On 12 April 2010, Respondent filed action in Suva Magistrates Court being Civil Action No. 21 of 2010 against the Appellant claiming $29,165.00 (Twenty nine thousand one hundred and sixty five dollars) from the Appellant allegedly due pursuant to Promissory Note dated 14 October 2005.

11. On 5 May 2010 and 16 June 2010, Appellant filed Notice of Intention to Defend and Statement of Defense respectively.

12. On 19 July 2010, Respondent filed Reply to Defense.

13. The Magistrates Court Action was called for mention on 30 July, 16 September and 12 November 2010, with Appellant failing to appear on all these occasions.

14. On 12 November 2010, when Magistrates Court Action was listed for mention the Learned Magistrate who had conduct of the action at that time entered Judgment by Default against the Appellant for the sum of $29,218.13 (Twenty nine thousand two hundred eighteen dollars and thirteen cents).

15. Appellant applied to set aside default judgment which application was granted pursuant to Ruling delivered on 5 September 2012, by the then Learned Magistrate.

16. The substantive matter was heard on 11 March 2013, and adjourned to 15 May 2013, for Judgment.

17. Judgment by the Learned Magistrate was delivered on 27 September 2013.

Appeal

18. The grounds of appeal are as follows:-

"1. That the Learned Magistrate did not in fact evaluate the facts and evidence since the Defendant's counsel failed to provide and point out to the facts, such negligence has affected the proceeding.

2. That the Learned Magistrate erred in law and failed to take into consideration that the Plaintiff with trickery deception has got the Promissory Note signed before a clerk and the contents therein was

never read and or explained by the clerk or by any lawyer or legal person at Sherani and Company office.

3. ***That the clerk jointly and collectively fraudulently with the Plaintiff beside Promissory Note had other documents signed by the Defendant too. And the Defendant was told by the clerk that he will inform when to collect the documents which never took place until after four years in January 2009 when the said Promissory note and Demand letter for payment was served to the Defendant. Such actions by legal firm is not reasonable and justified.***

4. ***Therefore the Promissory Note signed on 14th day of October 2005 is defective null and void. There is serious question of law and ethics which needs to be tried, the lawyer who signed the Promissory note did not witness the Defendant's signatures or explained the contents therein. The Defendant further states that the Promissory Note was fraudulently made and executed by trickery deception.***

5. ***That the Defendant after judgment took copies of all documents to a social worker to read the contents therein and explain. Now the Defendant fairly believes that the submissions filed on his behalf by his counsel is misleading, misrepresenting and ultra vires which ought to be dealt with.***

6. ***Further that the Learned Resident Magistrate erred in law in fact not coming to the conclusion that non documented and receipted transaction took place prior to the premeditated fraudulently signed Promissory Note. And in Plaintiff's Affidavit in Reply filed on 17 August 2011, refer to annexure marked "A", the Plaintiff who was not issuing any receipts has tendered a self style hand written contradicting statement is abuse of court process.***

7. ***The Plaintiff fraudulently claims to have paid off ($12,700.00) a loan for van registration number DW512, which the Defendant never owned is not reasonable. Further the Plaintiff deviously***

claims that $7,300.00 was paid through sales of DW512 is mischievous and annoying. The Defendant paid $7,300.00 which was received from monies which was shared from a FNPF contributed fund for which the Defendant has proof.

8. Therefore the Learned Resident Magistrate ought to have understood that the Plaintiff filed a misleading claim. For which the counsel of the Defendant neglected to point out to bring to the attention of the Hon. Court during the hearings and or proceedings.

9. That such further and or other grounds as will be made out of the production of the copy record of the proceedings at the Magistrates court."

19. Grounds 3, 4 and does not state how the Learned Magistrate erred in his Judgment. The matters stated in these grounds are more of Appellate submission in support of his other grounds of appeal.

20. The gist of Appellant's grounds of appeal is as follows:-

(i) Applicant's Counsel was ineffective and incompetent (Part of Ground 1 and Ground 5 and Part of Ground 8);

(ii) The Learned Magistrate erred in fact and in law when he failed to take into account that the Respondent got Promissory Notice signed by Appellant by deception and failed to evaluate the facts and evidence.

(iii) The Learned Magistrate failed to take into consideration transaction not documented or receipted that took place prior to signing of Promissory Note.

21. It is clear from what is stated at paragraph 20(ii) and (iii) hereof that Appellant is appealing the Learned Magistrate judgment in respect to evidence and facts produced before him during trial.

Ineffective/Incompetent Representative by Counsel

22. This court is not aware of any authority which would allow this court to set aside the judgment of the court on the ground that the Counsel for the Appellant was ineffective or incompetent during the course of a trial in a civil case.

23. There is no doubt incompetent legal representation may be raised and dealt with in Criminal cases.

24. In respect to Civil case if the parties feel that the legal practitioner violated the standard of conduct which violation caused the party damage then that party subject to legal advice may take legal action against the legal practitioner.

25. I therefore have no alternative but dismiss the grounds of appeal relating to ineffective/incompetent legal representation.

Whether Learned Magistrate's Judgment should be Set Aside

26. The Appellant submits that Learned Magistrate erred in fact or law by:-

    (i) Not evaluating the facts and evidence since Appellants Counsel failed to point out the facts;

    (ii) Failing to take into consideration that Respondent got Promissory Note by trick and deception and the content of Promissory Note was never read and explained to him by the Clerk or Solicitor;

    (iii) Failing to take into consideration that transaction took place prior to signing of Promissory Note.

27. It is clear from submissions filed by the Appellant that Appellant is challenging finding of facts by the Learned Magistrate on basis of evidence produced in Court both oral and documentary and demeanour of witnesses (last paragraph-page 21 of Copy Records).

28. It is well settled that the Appellate court will not interfere with finding of facts by the lower court except in extreme and exceptional cases.

29. In **Devries *v.* Australian National Railways Commission** (1993) 177 CLR 472, their Honours Brennan, Guadron and McHugh JJ stated as follows:-

"10. More than once in recent years, this Court has pointed out that a finding by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact ((12) See Brunskill [1985] HCA 61; (1985) 59 ALJR 842; 62 ALR 53; Jones v. Hyde [1989] HCA 20; (1989) 63 ALJR 349; 85 ALR 23; Abalos v. Australian Postal Commission [1990] HCA 47; (1990) 171 CLR 167.). If the trial judge's findings depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his (or her) advantage" ((13) S.S. Hontestroom v. S.S. Sagaporack (1927) AC 37, at p 47.) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" ((14) Brunskill (1985) 59 ALJR, at p 844; 62 ALR, at p 57.)."

31. In ***Devries*** case the Plaintiff suffered injury to his back whilst trying to free tie tamper that was jammed under a railway sleeper. Plaintiff's oral evidence was inconsistent with the medical report he filed at the time of the accident. Based on the oral evidence of the Plaintiff and Expert witness, trial judge found that the Defendant has failed to provide reasonable care for the safety of the Plaintiff. Defendant appealed to Full Court of Supreme Court (SA) which held that due to the inconsistency in the statement given by Plaintiff and oral evidence the Trial Judge could not make the finding that Defendant failed to take reasonable care for Plaintiff's safety. Plaintiff then appealed to High Court of Australia which appeal was allowed.

32. The principle in ***Devries*** case was applied by the Fiji Court of Appeal in **Yaba *v.* The State** [2005] FJCA 76; AAU004J.2002 (25 November 2005).

33. In **Benmax *v.* Austin Motors Co. Ltd** [1955] ALR 326, Lord Reid at page 329 stated as follows:

"The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in Watt (or Thomas) v. Thomas (3), and particularly the passage which I now quote ([1974] 1 All E.R. at p. 587):

> ***"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.***
>
> ***II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.***
>
> ***III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."***

34. In **Stutchbery v. Tappoos Holdings Ltd** [2005] FJCA 12; ABU0034.2004S (18 March 2005) Fiji's Court of Appeal adopted from comments made by his Honour Thomas J in Rae's case and stated as follows:-

"An appellate court will not reverse the trial judges finding of fact unless there is clear and irrefutable evidence that the finding is erroneous."

35. The Learned Magistrate in respect to execution of Promissory Note stated as follows:-

"From the evidence in Court this Court finds that the promissory note which was entered into between the parties was witnessed by a lawyer.

No issues were raised on the role of the lawyer who witnesses the signing of the Promissory Note. The Court finds that there are no issues on the authenticity or otherwise of the promissory note and therefore the promissory note was valid and binding upon the parties. The primary question for the Court to determine is whether the Defendant owes the sum claimed by the Plaintiff. The Defendant for his part admits owing the Plaintiff $7,540.00 as per his Statement of Defence."

36. The Learned Magistrate after considering the evidence before him came to the conclusion that Promissory Note was signed by Plaintiff in the presence of Solicitor.

37. There is nothing before this Court which suggests that the Learned Magistrate **"has failed to use or has palpably misused his advantage"** and there is no **"clear and irrefutable evidence that the finding is erroneous"**.

38. Even though I do not see any reason to disturb the finding of the Learned Magistrate in respect to execution of the Promissory Note by the Appellant I make following observations which show the inconsistency in Appellant's case before the Magistrate Court:-

(i) At paragraph 5 of the Statement of Defence (Page 70 - Copy records) Appellant alleges that he was induced into signing Promissory Notice by Respondent's promise that he will give Appellant all receipts for all payments made by the Appellant and that he signed promissory notice although the amount owing at that time was far less than $40,000.00;

(ii) At first paragraph, of page 6 of Appellant submission filed in the lower Court after the trial Appellant submitted as follows:-

"Upon arriving at the said Solicitors office the Defendant stated that a clerk named Neal served them and took their respective signatures on a blank sheet after which the Defendant left the office alone without knowing the full particulars of what is being written on the executed page."

(iii) During evidence in chief in the lower court Appellant gave evidence that **"Neel interpreted the documents"**.

(iv) At his Submission in Reply dated 11 June 2014 in his Appeal, the Appellant stated as follows:-

"Further I submit that when the promissory note was signed the lawyer's name which appears in the promissory note was not present and I was asked sign before a clerk at Sherani and company and was not explained the contents thereof. This was explained my lawyer representing me in the Magistrate court."

39. As stated at paragraph 36 of this judgment I uphold the Learned Magistrates finding in respect to the signing of the promissory note by the Appellant.

40. In respect to the amount claimed by the Respondent in the Magistrates the Learned Magistrate stated as follows:-

"The primary question for the Court to determine is whether the Defendant owes the sum claimed by the Plaintiff. The Defendant for his part admits owing the Plaintiff $7,540.00 as per his Statement of Defence.

Sadly in this case no receipts were issued for the dealing between the two. Both kept their own records which are not tallying up. A promissory note was issued for a sum of $40,000.00 of which the Plaintiff claims the Defendant has only paid $10,835.00 while the defendant as per his statement of defence claims he owes the Plaintiff $7,540.00, however later in cross-examination and re-examination the Defendant agreed owing $17,000.00 to the Defendant.

The Court does not believe the Defendant due to his changing of versions on how much he owes the Plaintiff. The Plaintiff was consistent in his evidence and was not discredited. His records were also not in question. This Court believes the Plaintiff and finds that the Plaintiff is owed the sum claimed by him."

41. The Learned Magistrate's findings are based on the credibility of Appellant's and Respondent's evidence during trial and documentary evidence.

42. Again there is nothing to suggest that the Learned Magistrate has failed to use or has **"palpably misused the advantage"** that he has during the course of the trial.

43. Also there is no evidence which shows that Magistrates Court judgment was erroneous.

44. The Learned Magistrate has considered all evidence thoroughly included the fact that no receipts were issued for payments made by the Appellant to Respondent.

45. I therefore have no alternative but to uphold the Learned Magistrate's Judgment and dismiss the appeal.

Costs

46. As for costs I take into consideration that both parties filed Submissions and both parties relied on Submissions filed.

Orders

47. I make following Orders:-

(i) Appeal is dismissed and struck out;

(ii) Appellant do pay Respondents costs assessed in the sum of $1,000.00 within twenty-eight (28) days of this Judgment.

HIGH COURT OF FIJI SUVA

.....

K. Kumar

JUDGE

At Suva

31 March 2016

Appellant in Person

Sherani & Co. for the Respondent