

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 08 of 2013**

**BETWEEN** : **HIROKAZA TAKAYANAGI** aka **TAKAYANAGI HIROKAZU**  
**PLAINTIFF**

**AND** : **SSS INTERNATIONAL HOTEL (FIJI) LIMITED**  
**DEFENDANT**

**AND** : **YOU CHENG CAO** aka **CAO YOU CHENG** aka **YOU CHANG CAO**  
**3<sup>RD</sup> PARTY**

**Counsel** : Ms. J. Nair for the Plaintiff (for a limited purpose) o/i M/s. Patel & Sharma Barristers & Solicitors. (Plaintiff absent)  
Mr. Ashnil Narayan for the Defendant (Defendant Present)  
3<sup>rd</sup> Party absent and no representation

**Date of Trial** : 29<sup>th</sup> May, 2018

**Date of Judgment** : 29<sup>th</sup> May, 2018

**Judgment by** : Justice Mr. Mohamed Mackie

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**J U D G M E N T**

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1. This is an action against the Defendant, filed by the plaintiff by his writ of summons coupled with the statement of claim dated 24<sup>th</sup> January 2013, praying for the following reliefs;

- a. for the recovery of a sum of \$ 2,60,000.00 from the Defendant being the balance purchase price on account of selling a land and premises to the Defendant by the Plaintiff.
  - b. For general damages,
  - c. Interest at the rate of 18% per annum on any monetary award
  - d. Cost of this action on solicitor/client indemnity basis
  - e. Any other reliefs the Court shall deem fit in the circumstances.
2. The Defendant Company by its amended statement of Defence dated 23<sup>rd</sup> October 2013 took up the position that it does not owe the plaintiff \$ 2, 60,000.00 except for \$18,750.00. The Defendant also denied that it agreed to pay the Air fare and cost of moving for the plaintiff or for insurance of the Plaintiff as the Plaintiff had a Power of attorney Holder in Fiji to attend the dealing.
  3. Thereafter, on the application of the Defendant, by order dated 9<sup>th</sup> March 2017, third Party Notice was issued on the Power of Attorney Holder of the Plaintiff, namely, YOU CHENG CAO aka CAO YOU CHENG aka YOU CHANG CAO, and same being served by substituted service, it was not responded third party.
  4. Though, the Defendant filed summons dated 27<sup>th</sup> June 2017 for default judgment against the third party, prior to the substantial trial, the Court reserved it to be considered at the trial against the Defendant.
  5. Accordingly, two days trial was fixed of consent for 28<sup>th</sup> and 29<sup>th</sup> May 2018.
  6. While the trial stood fixed as above, the Solicitors for the Plaintiff on 23<sup>rd</sup> may 2018 filed summons for leave to withdraw as Solicitors for the plaintiff and same being supported before me on 25<sup>th</sup> May 2018, this Court having allowed the withdrawal, ordered the Order for withdrawal be served on the Plaintiff and his Power of Attorney Holder (not the aforesaid P.A holder) and to file the affidavit of service.
  7. When the matter came up for trial on 28<sup>th</sup> May 2018 being the 1<sup>st</sup> date of trial , since there was no affidavit of service of the withdrawal order, the trial was adjourned to the 29<sup>th</sup> May 2018, which also happened to be the 2<sup>nd</sup> date of trial.
  8. The only mode of communication, the plaintiff's Solicitors had with the Plaintiff and his Power of attorney Holder in Australia was the e-mail address that had been provided to the plaintiff's Solicitors. The Court being satisfied that the plaintiff had maintained communications via the said e-mail address and it is still in operation had ordered the Order for withdrawal too to be served through the said e-mail address.

9. When the matter came up to submit the proof of service of the Order for withdrawal and for trial, the Counsel for the Plaintiff, who appeared for the limited purpose, submitted the affidavit of service on which, I was satisfied that the Order had been duly served. The Plaintiff or his Power of Attorney holder was not present in Court nor had they given any further instructions to the Solicitors. Accordingly, the Solicitors for the Plaintiff were allowed to fully withdraw from the proceedings.
10. Subsequently, the learned Counsel for the Defendant made his application for the dismissal of the Plaintiff's action under Order 35 R 1 of the High Court Rules 1988 as he is not present in court to prosecute the action. Counsel made further application for the Cost of \$10,000.00, stating that the Defendant came to Court all the way from China and he has already incurred substantial cost on travelling, legal cost and other expenses on account of this case . Counsel urged that though he is instructed to claim \$20,000.00 as cost he is limiting it to \$10,000.00.
11. Order 35 Rule 1 (1) of the High court Rules 1988 reads as follows.

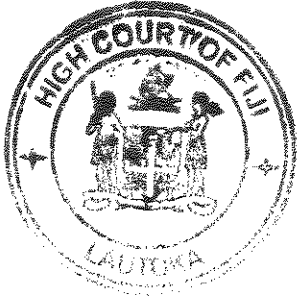
Order 35 – PROCEEDINGS AT TRIAL

*Failure to appear by both parties or one of them (O.35, r.1)*

*“1.-(1) If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a judge”.*

12. I am satisfied that the Plaintiff, despite being served with the order for withdrawal of his solicitors and being aware that the matter has been fixed for trial today, has chosen not to appear in person or through his Solicitors and/or instruct his Solicitors to appear.
13. Accordingly, having considered the application of the learned Counsel for the Defendant, this Court with no alternative, decided to strike out the plaintiff's action with reasonable cost in favor of the Defendant.
14. It is observed, that when the plaintiff's action against the Defendant is dismissed as above, no necessity will arise to proceed against the **THIRD PARTY**, who was brought in by the Defendant to indemnify it, in the event a judgment is entered in against the Defendant and in favor of the plaintiff. Since no such events occurred, the proceeding against the **THIRD PARTY** is not warranted.
15. **Final Orders**
  - a. Action of the Plaintiff against the Defendant is hereby struck out.
  - b. Proceedings against the **THIRD PARTY** terminated.

- c. The Plaintiff shall pay unto the Defendant a total sum of \$ 7,000.00 being the summarily assessed costs.
- d. Copy of this judgment together with the perfected Order of this Court on it (to be filed by the Defendant's Solicitors) may be sealed and served by the Registry on the Plaintiff via the e-mail address found in the case record.



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A.M.Mohammed Mackie

**Judge**

**At Lautoka  
29<sup>th</sup> May, 2018**