

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISIDCTION**

Civil Action No. HBC 106 of 2016

**BETWEEN:**                    **SHAKUNTALA KUMAR SINGH AKA SHAKUNTALA KUMAR** of Aidney Road, Raiwaqa, Suva as the administratrix of the estate of **DHIRAJ MANI SINGH** deceased.

**PLAINTIFF**

**AND:**                         **ALL ENGINEERING (FIJI) LIMITED** a limited liability company having its registered office at 49 Ravouvou Street, Lautoka.

**FIRST DEFENDANT**

**AND:**                         **SEKOPE DURI** of Lautoka, Boat Captain.

**SECOND DEFENDANT**

**AND:**                         **FIJI PUBLIC TRUSTEE CORPORATION PTE LIMITED** (as Trustee of the Estate of **SEKOPE DURI**, deceased).

**NOMINAL DEFENDANT**

**Counsel**                    : **Plaintiff: Mr. Maharaj. V**

                                  : **Defendant: Ms. Devi. S J**

**Date of Hearing**        : **19.11.2020**

**Date of Judgment**    : **12.08.2022**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff had instituted this action as administratrix of the estate of late Dhiraj Mani Sing. On the date of hearing counsel for first Defendant raised a preliminary issue that Plaintiff had not pleaded how she become entitled to sue for damages in this action. Counsel for the Plaintiff at that point sought to amend the statement of claim. So, Plaintiff was directed to file and serve an application seeking leave to amend with proposed amended statement of

claim on the same day. This was filed and served and hearing was conducted regarding said summons following day. At the hearing counsel for the first Defendant raised a preliminary legal issue that precluded Plaintiff from proceeding with this action in terms of Law Reform (Miscellaneous Provisions) (Death and Interest) Act .Late Dhiraj Mani Sing died as a result of an accident and Plaintiff is a sister of the deceased and administratrix of the estate of deceased. Counsel for the Plaintiff stated that the, Plaintiff is not claiming under Compensation to Relatives Act 1920. Plaintiff's claim is for tort, and it is based Section 2(3) of Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. According to Section 2(3) (b) of the said Act , states that no action for tort can be proceeded where 'the cause of action arose not earlier than six months before his death **and** proceedings are taken in respect thereof not later than six months after his personal representative took out representation.'. There is no dispute that Plaintiff obtained Letters of Administration (LA) on 14.9.2015. It is also admitted that no action was filed within six months from the said grant of LA. Accordingly, this action cannot proceed, and struck off.

## FACTS AND ANALYSIS

2. This is an action for tort against the Defendants that resulted death of Plaintiff's brother due to an accident where a barge collided with a fishing boat in sea.
3. Plaintiff had instituted this action as the administratrix of the deceased, in terms of Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, and Section 5(h) of Succession Probate and Administration Act 1970. (According to proposed amended statement of claim.). It should be noted that there is no section 5(h) in the said Act.
4. In the written submissions filed by Plaintiff relied on Section 6(h) of Succession, Probate and Administration Act 1970. This has no relevance to claim as Plaintiff had filed on behalf of the estate and distribution of the estate is not a cause of action based on tort. If the action is successful Plaintiff as the trustee and administrator is entitle for the damage and beyond that there is no issue remaining in the tort. Distribution of funds in an estate among the beneficiaries, is not pleaded hence, Section 6(h) is irrelevant to this action.
5. It should be noted Succession Probate and Administration Act 1970, was not pleaded in the statement of claim before me. It was pleaded in the proposed statement of claim filed along with the application for amendment. So inclusion of Succession, Probate and Administration Act 1970, in the proposed amendment serves no purpose, as there is not dispute with Defendants relating to distribution of estate.
6. Plaintiff in the statement of claim as well as in the written submission relied on Section 2 of Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. It reads,

*"Effect of death on certain causes of action*

2.-(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 32 of the Matrimonial Causes Act for damages on the ground of adultery. (Cap. 51)

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry shall be limited to such damage (if any) to the estate of that person as flows from the breach of promise to marry;

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either-

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) the cause of action arose not earlier than six months before his death **and** proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed for the purpose of this Act to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Compensation to Relatives Act, and so much of this Act as relates to causes of actions against the estates of deceased persons shall apply in relation to causes of action under the said Act as it applies in relation to other causes of action

not expressly excepted from the operation of subsection (1).  
(Cap. 29)

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.”

7. From the above it is clear that when a person is dead from a tortious act of another the action filed by the administrator of the estate, must to be filed within six months from obtaining such a grant. This is a mandatory provision. This time period cannot be extended using High Court Rules 1988.
8. In this case it is an admitted fact that Letters of Administration No 57034 was granted, to Plaintiff, on 14.9.2015 (see paragraph B. 2 under Background on the written submission of Plaintiff).
9. In term of Section 2(3) (b) of Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, an action in tort relating to death of a person must be filed within six months from, 14.9.2015. This had not happened in this action. This is an admitted fact in the written submissions of the Plaintiff. (see paragraph 3 of the written submissions of the Plaintiff).
10. This is an error that is fatal to this action as statutory provision is clear and unambiguous, and cannot be given any strain meaning to defeat its purpose. Common law position
11. Plaintiff had tried to rely on Order 3 rule 4 of High Court Rules 1988 for extension of time. This can only applies to time periods stipulated by High Court Rules 1988. This is clear in Order 3 rule 4 (1) of High Court Rules 1988. So, this has not application to time period fixed by Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, which is a separate statute.
12. Without prejudice to above, Plaintiff cannot rely on extension of time without a proper application for such extension before the writ of summons filed.
13. Plaintiff had submitted a decision of Master delivered on 25.10.2011 in Civil Action No 31 of 2009, Hari *Chand V A.Rahim* (unreported). This was an action that pleaded section 9 of Compensation to Relatives Act 1920, where three year time period is granted from death in Section 8 of the said Act, and not applicable to the issue before me. Counsel for Plaintiff at the outset stated he is not relying on that Act, and it was not pleaded in statement of claim or proposed statement of claim seeking amendment.

14. There is no dispute the cause of action is vested with the Plaintiff as administratrix, but the time period to institute an action for tort is statutorily restricted to six months from the grant of LA. This is irrespective of the Limitation Act and general time period to institute an action for tort. Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, is a special statute that address a special situation, when a person is dead due to tort. In the common law that cause of action die with the death of person is changed but a limited window is allowed with time period fixed for six months. It is axiomatic that this time period of six months should be within the time period for under Limitation Act.1971.
15. So it is inevitable that this action is struck off.
16. Defendant had waited till the date of hearing to raise this objection. So, in my mind cost incurred till the date of hearing could have been avoided if the counsel for the Defendant raised this objection much earlier. So unnecessary costs were incurred by both parties, as this defect was not realized much earlier.
17. When the writings were on the wall, the Plaintiff, without admitting this fatal error had sought an amendment, which could not cure the defect. Hearing of the preliminary objection and also summons for amendment taken together to minimize delay and reduce cost. Hearing fixed for trial was taken utilized for this matter but, Defendant is entitled for cost for additional expenses to prepare for this hearing, and it is summarily assessed at \$500 to be paid within 21 days. Delay is regretted.

#### **FINAL ORDERS**

- a. The action is struck off.
- b. There is no need to decide the summons for amendment filed on 18.11.2020, as the amendment could not cure the defect.
- c. First Defendant is granted a cost of \$500 to be paid by Plaintiff, within 21 days.

**Dated at Suva this 12<sup>th</sup> day of August, 2022.**



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**Justice Deepthi Amaratunga**  
**High Court, Suva**