IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 106 of 2009

BETWEEN	:	MAIMUN NISHA	Plaintiff
AND	:	DIVENDRA CHAND	First Defendant
AND	:	CHANDAR SEN BROTHERS TRANSPORT LIMITED	Second Defendant
COUNSEL	:	Mr. D. Singh for the Plaintiff Mr. R. Vananalagi for the Defendants	
Dates of hearing	:	19th August, 2015	
Date of Ruling	:	2nd September, 2015	

RULING

[1] This is an action for personal injuries. The plaintiff instituted these proceedings by way of writ of summons on 31st March 2009, claiming damages for the injuries caused to her due to the negligent driving of the 1st defendant who, at the time of the accident, was driving the truck bearing registration number EW 192 as an

employee of the 2nd defendant which collided with the bus bearing registration number CY 758.

[2] The defendants raised the following preliminary objections to the maintainability of the action;

1) The plaintiff has instituted these proceedings after expiration of the period prescribed by section 4 of the Limitation Act [Cap 35].

2) The plaintiff has filed this action in a wrong Court whereas it should have been filed in the Lautoka High Court.

[3] The submission of the learned counsel for the plaintiff is that the Court has already made a ruling on the question whether the action has been brought outside the time period prescribed by law.

[4] The initial question for determination therefore is whether the learned High Court Judge before whom this matter came up has made a ruling on the question whether the case of the plaintiff has been filed out time.

[5] It is the position of the learned counsel for the plaintiff that the learned High Court Judge has in fact made a ruling and allowed the plaintiff to proceed with the action. The position of the defendants is that there is no such order made by the Court.

[6] On 11th November 2010 the learned High Court Judge allowed the plaintiff's counsel to amend the writ of summons. On 20th June 2013 the learned counsel for the plaintiff confirmed that the application to amend the writ of summons had been allowed and informed Court that he would file the amended writ of summons within 14 days. The Court on 22nd August 2013 granted 28 days for the defendants to file their defence. It is the contention of the learned counsel for the plaintiff that by allowing the plaintiff to amend the writ of summons the learned High Court Judge has allowed her to proceed with the action.

[7] There is no ruling on record to the effect that the Court overruled the objection of the defendants that the action has been instituted out of time and allowed the

plaintiff to continue with her action. The learned counsel submits that the Court has made an extempore order. An extempore order means an order given without preparation. Whether the order is extempore or otherwise it must be in writing and the record of the Judge must clearly show that an order has been made and what that order is.

[8] The learned counsel for the plaintiff assumes that the learned High Court Judge has in fact made an order allowing the plaintiff to continue with the action from the following notes made by the learned Judge on 11th November 2010;

> **Before Hettiarachchi J – Ruling on Notice**
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> **Both Counsels inform that they would rely on written submissions and Affidavits filed and seek a ruling. Mr. Singh further informs that the name of the 2nd Def. should be corrected as Chandra Sen Brothers Transport Company. Counsel is directed to file an amended caption.**
>
> **Ruling on Notice.**

[9] By reading the above notes of the learned Judge one cannot say that he has made a ruling on the issue before him which is whether the action of the plaintiff had been filed out of time. In fact he has reserved the order. If not, there was no reason for him to mention the words "**Ruling on Notice**" in his notes.

[10] Therefore, the submission of the learned counsel for the plaintiff that the learned Judge by an extempore order decided that the action of the plaintiff has been filed within the time prescribed by the provisions of section 4 of the Limitation Act is without merit.

[11] Having so decided I will now proceed to consider whether the action of the plaintiff is time barred by the provisions of the Limitation Act.

[12] It is common ground that the accident which led the institution of this action occurred on 18th March 2006 and this action was instituted on 31st March 2009.

Section 4(1) of the Limitation Act provides as follows;

The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) actions found on simple contract or on tort;

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that-

(i). in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this section shall have the effect as if for the reference to six years there were substituted a reference to **three years**; and

(ii). …… [Emphasis is added].

[13] In view of the above provisions an action of this nature should be brought within three years from the accrual of the cause of action.

[14] The learned counsel for the defendants referred to the affidavit of Arvendra Kumar who is an assistant manager attached to Sun Insurance Company Limited in which he has referred to the letter dated 11th May 2009 [**AK 5**] written by the solicitors of the plaintiff where it says that they in fact brought the writ of summons to the registry of the High Court but it was closed due to water cuts. However, they managed to handover the writ on the following day. The High Court, as admitted in the said letter by the solicitors of the plaintiff, has endorsed the writ only on 31st March 2009.

[15] When the writ was filed in the registry the counter clerk has made the following notation;

"Time expire – 3 years"

[16] This shows that the clerk has observed that the writ had been filed out of time. On the other hand there is no material before the Court to arrive at the conclusion that the registry was closed on the 18th March 2009 and also that it took the registry twelve days to affix the date stamp on the writ. It has always been the practice of the registry to affix the date stamp on summons as and when it is handed over to the clerk at the counter. For the Court to arrive at the conclusion that it was due to the mistake of the registry that the plaintiff could not file the writ of summons on time, there must be some material to substantiate the allegation that the registry in this case has deviated from its usual practice and has taken about two weeks to place the date stamp on the plaintiff's writ of summons. A mere allegation is not sufficient for the Court to arrive at such a conclusion.

[17] Accordingly, I hold that the plaintiff has instituted this action outside the period prescribed by the provisions of section 4(1) of the Limitation Act and therefore, is liable to be dismissed.

[18] The next matter for determination is whether the plaintiff has instituted these proceedings in a wrong Court. The accident has occurred within the territorial jurisdiction of the High Court of Labasa.

[19] Order 4 Rule 1(1) of the High Court Rules provides that proceedings must ordinarily be commenced in the High Court Registry located in the Division in which the cause of action arises. It is the submission of the learned counsel for the defendants that since the accident occurred in Labasa the action should have been instituted in the High Court of Labasa. In the letter "**AK 5**" the plaintiff's solicitor has agreed to have this case transferred to Lautoka.

[20] Order 33 Rule 4(1) of the High Court Rules provides that in every action begun by writ, an order made on summons for directions shall determine the place and

mode of the trial and any such order may be varied by a subsequent order of the Court made at or before the trial.

[21] In this regard the learned counsel for the plaintiff relied on the decision in ***Kelera Bolatini v. Fiji Forest Industries Limited***[1] where it was observed as follows;

> The application is made under Order 33, Rule 4 of the Rules of this Court and now Order 33 is silent as to the guidelines governing the most appropriate place of trial. However, the former Rule 10 provided some guide about the place of trial and laid it down that the Court should "**have regard to the convenience of the parties and their witnesses and the date at which the trial can take place.**" This is still a useful indication.

[22] However, since the Court has already decided that the plaintiff's case must necessarily fail for the reason that it has been filed outside the period prescribed by section 4 of the Limitation Act the question of transferring the case to another Court does not arise for consideration.

[23] For the reasons aforementioned I make the following orders.

ORDERS.

1) The action of the plaintiff is dismissed.

2) I make no order for costs of this action.

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Lyone Seneviratne

JUDGE

HIGH COURT OF FIJI
SUVA

[1] **[1991] FJHC 54**