In the High Court of Fiji
at Suva
Civil Appeal HBA 14 of 2017

Debbie Singh and Mark Borg
Appellants
v
Sangeeta Maharaj
Respondent

Counsel: Mr A. Liverpool for the appellant
Ms E. Lagilevu for the respondent
Date of hearing: 8th November, 2017
Date of Judgment: 30th November, 2018

Judgment

1. The appellants appeal from a judgment of the Magistrates' Court, on the following grounds of appeal:

   (i) the Learned Magistrate erred in law and in refusing to grant an adjournment in the said trial.
   (ii) the Learned Magistrate erred in law and in fact in granting costs against the Defendant.
   (iii) the Learned Magistrate erred in law and in fact in not allowing the Defendant to defend the case on its merit.
   (iv) the Learned Magistrate erred in law and in fact in not allowing the Defendant further time to allow us to defend the claim put forward by the Plaintiff- claim when it was explained to the Court that the matter was a part heard and that the solicitor who was in carriage of the matter was no longer employed by the firm and that it would be most fitting to have a trial de novo in the matter.

2. Mr Liverpool, counsel for the appellant contended that the appellants moved for an adjournment in the lower court on two grounds. Firstly, they wanted a trial de novo, as evidence was heard before another Magistrate. Secondly, the Learned Magistrate was informed that counsel who was in carriage of this case had resigned from his firm and not left instructions.

3. Mr Liverpool relied on Or 28, r 1 and 2 of the Magistrates Court Rules.

4. Ms Lagilevu, counsel for the respondent submitted that the third and fourth grounds of appeal, as urged by Mr Liverpool were not taken up in the lower Court.

5. Ms Lagilevu relied on the principles laid down by the Court of Appeal in ***Goldenwest Enterprises Ltd v Pautogo,*** [2008] FJCA 3; ABU0038.2005 (3 March 2008) with regard to the discretion of a trial judge to decline an application for an adjournment.

The proceedings in the Magistrates' Court

6. The respondent filed a claim against the appellants for $ 4922.41. The appellants filed their defence. The respondent filed her reply. The matter was fixed for trial.

7. On 21st August,2015, Learned Magistrate Mr N. Rupasinghe heard the evidence of the respondent. The case was adjourned for 8th October,2015, for continuation of the trial.

8. The case was subsequently taken up before Learned Magistrate Mr P. Liyanage on 22 July,2016.

9. On 22 July,2016, both parties agreed to adopt the evidence led before the former Magistrate and continue the hearing. The case was adjourned to 8th December,2016, as counsel for the appellant was "*not ready with his evidence*", as recorded by the Learned Magistrate. Counsel for the respondent had no objection to the adjournment.

10. On 8th December,2016, counsel for the respondent had informed Court that the case for the respondent was concluded. Counsel for the appellants stated that he was not ready and moved for an adjournment. The application was declined. The Order of the Learned Magistrate of 8th December,2016, reads as follows:

> *The defence counsel was not ready on the last occasion and a date was granted. Today the defence is making the same application and even the client is not present. This is fairly an old matter. Though the cost can compensate the opposing parties it cannot compensate the court time. Accordingly I refuse any adjournment of hearing. I ask the defence to lead whatever evidence they have. The defence is not leading any evidence. Accordingly I conclude the case and fix the matter for Ruling.*

The determination

11. This appeal is concerned with the refusal of the Learned Magistrate to grant an adjournment to the appellants on a trial date .

12. On a perusal of the record, I find that no application was made for an adjournment before the Learned Magistrate Mr P. Liyanage, on the grounds that the lawyer in carriage of this case had resigned and neither party had moved for a trial de novo, as incorrectly urged in the third and fourth grounds of appeal and argued by Mr Liverpool. On the contrary, on 22 July,2016, both parties had expressly agreed to adopt the evidence led before Learned Magistrate Mr N. Rupasinghe.

13. Mr Liverpool relied on Or 28, r 1 and 2 of the Magistrates Court Rules. Or 28 deals with the postponement of hearing. Or 28, r 2 is concerned with an application made in the absence of a witness, which did not arise in the instant case.

14. Or 28, r 1 reads as follows:

> ***The court may postpone the hearing of any civil cause or matter, on being satisfied that the postponement is likely to have the effect of better ensuring the hearing and determination of the questions between the parties on the merits, and is not made for the purpose of mere delay.*** *The postponement may be made on such terms as to the court seem just.* (emphasis added)

15. The section clearly provides that the court has a discretion to postpone a hearing, if it is of the view that the adjournment sought is made to delay the case.

16. The law is well settled. A court sitting in appeal will be slow to overturn a refusal to grant an adjournment, except upon good reason.

17. In ***Goldenwest Enterprises Ltd v Pautogo***,(*supra*) the Court stated :

> *It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. It is further universally accepted that an appeals court should be loath to overturn the trial court's exercise of discretion as to the grant of an adjournment or its refusal, except upon good reason. This principle is stated in various ways, each nonetheless confirming it:*

A trial court's decision on request for adjournment will not be reversed absent a clear showing that the trial court erroneously exercised its discretion: ***State v. Elliot****, 203 Wis. 2d 95, at 106; 551 NW 2d 850, at 854 (Ct. App.)(1996);* ***Re Joshua GH, A Person Under the Age of 18****, Wis. Ct Apps, Dst 1, No. 99-1357(1999)*

The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed: ***Go Pak Hoong Tractor and building Construction v. Syarikat Pasir Perdana*** *(1982) 1 MLJ 77;* ***Ayer Molek Rubber Company Berhad (1292-P) v. Mirra SDN BHD (153829-A)*** *(2007)(Company Winding-up No: D2-28-14-2006) High Court of Malaysia at Kuala Lumpur, 12 December 2007)*

... adjournments of cases fixed for hearing are not obtainable as a matter of course but may be granted or refused at the discretion of the court ... The exercise of this discretion, however, is a judicial act against which an aggrieved party may lodge an appeal, but since it is a matter or discretion, an appellate court will be slow to interfere with it ... It would however appear that in order to succeed in an appeal against such exercise of discretion, the appellant shall satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant: ***Okeke v Oruh*** *(1999) 6 NWLR (Pt 606) 175, at 188;* ***Unilag v Aigoro*** *(1985) 1 NWLR (Pt 1) 143;* ***Alsthom v. Saraki*** *(2005) 1 SC (Pt 1) 1;* ***Caekey Traders Ltd v. Gen. Motors Co Ltd*** *(1992) 2 NWLR (Pt 222) 132;* ***George v. George*** *(2001) 1 NWLR (Pt 694) 349;* ***Nigerian Telecommunications PLC v. Chief SJ Mayaki*** *Ct App. Lagos, 2006 (12 April 2006), at 6*

This Court is well aware that it must be very slow to interfere with the discretion of the trial judge on such a question as an adjournment of a trail or, as in this case, the refusal to grant one. It will only do so in very exceptional circumstances where it appears that the result of the order to refuse the adjournment would be to defeat the rights of the affected party altogether and to cause an injustice to one or other of the parties*: Sookdeo v. Ali and Ali Ct App. Rep. Trinidad & Tobago, 2001 (18 May 2001), at 2*(underlining mine)

18. In ***Re Yates' Settlement Trusts. Yates and Anor v. Paterson and Ors,*** [1954] Ch D 618 Evershed MR said:

> *There is, I think, no doubt that, if a judge adjourns a case, just as if he refuses an adjournment of a case, he has performed a judicial act which can be reviewed by this court, though I need not say that an adjournment, or a refusal of an adjournment, is a matter prima facie entirely within the discretion of the judge.* ***This court would, therefore, be very slow to interfere with any such order, but, in my judgment, there is no doubt of the jurisdiction of the court to entertain appeals in such matters****: at 621*(emphasis added)

19. In the present case, the application for an adjournment was made on the ground that counsel was not ready. The appellants were not present in Court. The Learned Magistrate, in his Order of 8th December,2016, has also considered that the claim was considerably old. I note that the statement of claim was filed on 8 January,2013.

20. The Learned Magistrate, in his judgment of 28th February,2017, has noted that the defence counsel was not ready on the second consecutive day.

21. In my judgment, the Learned Magistrate has considered the evidence of the respondent and granted judgment in her favour with costs.

22. Or 33, r3 of the Magistrates Court Rules provides that costs is in the discretion of the court.

23. In my judgment, this is not an appropriate case for intervention in appeal. The Learned Magistrate has exercised his discretion correctly and declined the application for an adjournment and granted costs against the appellants.

24. The appeal fails.

25. *Orders*

(a) The appeal is dismissed.

(b) The appellants shall pay the defendants costs summarily assessed in sum of $1500.

A.L.B. Brito-Mutunayagam
JUDGE
30th November, 2018