

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. 127 of 1990

BETWEEN : **NAYAN SINGH** son of Manohar Singh of Sabeto, Nadi, now of 10 Spoonbill Court, Carrum Downs, Melbourne 3201, Retired.

Original Plaintiff

AND : **INDAR MATI SINGH**, daughter of Suraj Nath as Trustee of the Estate of Ram Sukh son of Manobar Singh.

Original Defendant

AND NOW

BETWEEN : **HERMANT KUMAR SINGH**, of 45 Toogood Court, Pakenham Upper, 3810, Melbourne, Vitoria, Australia as Administrator of the Estate of Nayan Singh (Diseased)

Substituted Plaintiff

AND : **PHILIP JAGDISHWAR SINGH** of Sabeto, Nadi, Businessman as Administrator of the Estate of Ram Sukh

Substituted Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. R. Charan (on instruction) for the Substituted Plaintiff
Mr. N. Padharath for the Substituted Defendant

Date of Ruling : 19.02.2021

RULING

(Application for reinstatement, consent order,
when cause of action does survive for the benefit of Estate,
section 2 of Law Reform (Miscellaneous Provisions) (Death and Interest) Act)

01. The substituted plaintiff filed the Ex-Parte Summons on 03.05.2018, which is supported by his affidavit, and sought the following orders from this court:

1. That this action be re-listed to the cause list.
2. That leave be granted for the parties to be substituted and added as follows:

(a) The plaintiff to be substituted by Hermant Kumar Singh of 45 Toogood Court, Pakenham Upper, 3810, Melbourne, Victoria, Australia as the Administrator of the Estate of Nayan Singh (Deceased).

(b) The Defendant to be substituted by Philip Jagdishwar Singh of Sabeto, Nadi, Businessman as the Administrator of the Estate of Ram Sukh and to be referred to as the 1st Defendant in this action, and

(c) The Registrar of Companies Office and the Attorney General's Office be added as the 2nd and 3rd Defendants respectively in this action, and

(d) Further or any other Orders that this Honorable Court deems just.

02. Upon hearing the counsel for the substituted plaintiff and reading the supporting affidavit, it was observed by the court that, this matter commenced in 1990 and was taken off the cause list by consent of the original plaintiff in 1996. Therefore, the court made the summons inter-parte and directed the substituted plaintiff to serve it on proposed 'substituted-defendant' - the administrator of the original defendant. The substituted-defendant appeared through his solicitor and consented for the orders sought in paragraph 2 (a) and (b) of the summons and objected the matter being reinstated to the cause list. The court, by consent, granted leave and allowed substitution of the original plaintiff and defendant. The court then directed parties to file their affidavits in respect of other order – mainly the order for reinstatement - sought in paragraph 1 of the summons. Both parties filed their affidavits. At hearing of the summons, both counsels made their oral submission and tendered the written submission.

03. The factual background of this matter is that, the original plaintiff and his late brother Ram Sukh formed a partnership to carry on bus transport business under the name and style of “Nadi General Transport Company”. Both were the equal partners. Later on, as claimed by the original plaintiff, he purchased the interest of another person, namely Muthusamy and increased his shares in the partnership, becoming the owner of 75% shares and the remaining shares (25%) were held by his late brother, Ram Sukh. After death of Ram Sukh, the original plaintiff brought originating summons against the original defendant who was the legal representative of his late brother and partner - Ram Sukh. The original plaintiff in his summons sought orders for dissolution of partnership and distribution of shares to the partners.
04. It appears, though there is no specific order on the record, that there was an order to continue this matter as if it begun by a writ. The reason being that, the matter was on normal cause and thereafter the original plaintiff filed the statement of claim and sought the following orders from the court:
- a. All the accounts to be stated, taken and certified in accordance with law,
 - b. Order for sale of all assets of Nadi General Transport Company,
 - c. Payment of plaintiff’s share and interest, and
 - d. Costs.
05. The original defendant filed his statement of defence and denied the allegation in statement of claim. He claimed that, the original plaintiff was not entitled to any shares. The original defendant further stated that, the claim was statute barred and should be dismissed. The original plaintiff then filed his reply to the defence. The pleadings were closed; copy pleading was filed and served; and the matter was set for trial before Sadal J. On 11.09.1996 the matter was called before Sadal J and the following was the order made by the court on that day:
- “Taken off the list **by consent**. Defendant now deceased. Seen letter from Sahu Khan & Sahu Khan dated 30.08.96.” (Emphasis added).
06. In the meantime, Justice Connors and Justice Finnigan ordered on 26 April 2005 to strike out all civil cases prior to 1990 in which no action was taken by the parties. This was a decision taken at that time for the case management purpose, because the court did not, at that time, have jurisdiction to act on its own motion and issue notice to the parties who

failed to take steps in civil matters for long time. The jurisdiction to act on its own motion was later conferred to High Court by Order 25 rule which came to effect on 19 September 2005. This case was one of those that were struck out pursuant to the orders of Justice Connors and Justice Finnigan.

07. Nevertheless, the current application was filed by the substituted plaintiff to reinstate this matter that was taken off the list on 11.09.1996 as reflected in the minutes of the then presiding judge – Sadal J. It was the practice to take the matters off cause list when the plaintiffs fail to appear or comply with the directions of the courts. In those circumstances, the courts generally consider (a) the reasons for non-appearance or non-compliance, (b) the length of the delay in making application for re-instatement, and (c) the prejudice caused to the defendant or other party, when an application is made for reinstatement of such matters. Both counsels in their submission alluded to the above factors and moved the court to consider the same in this case too.
08. However, those factors could not be considered in this matter, because the circumstances of this matter are quite different. The order to take the matter off the list was not made due to non-appearance or non-compliance of the original plaintiff. The court ordered to take the matter off the cause list **by consent** of the original plaintiff himself, after seeing the letter dated 30.08.1996. The letter dated 30.08.1996 and referred to in the minutes of the judge is found in the record. It was written by the solicitors for the original defendant to the solicitors of original plaintiff before the hearing date. The solicitors for the original defendant, by that letter, informed the original plaintiff's solicitors that, the former passed away and the hearing could not proceed as fixed. The solicitors for the original plaintiff then consented to take the matter off the record on 11.09.1996. The impugned partnership was still running its business. However, the original plaintiff neither took steps to reinstate the matter, nor did he attempt to substitute original defendant till he died on 25.02.2010. The original plaintiff, by his failure to take steps for reinstatement during his lifetime, decided not to try out the issues in this matter, and by his consent to take the matter off the list, had compromised those issues that were to be determined by a proper trial. When a compromise takes place without trying out the actual issues or questions, it would be extremely difficult to interfere with that order made by consent.
09. In **Huddersfield Banking Co Ltd v. Henry Lister and Sons Ltd**, CA [1895] 2 Ch.D 273, Kay LJ held at page 285 that:

Now, what constitutes a compromise? A compromise takes place when there is a question of doubt and the parties agree not to try it out, but to settle it between themselves by a give-and-take arrangement. I quite agree

that if this was a case of that kind it would be extremely difficult to interfere with the order.

10. In that same case, Lindley L.J. expressed the view on the consent order and said at page 280 that:

A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.

11. Indeed, it would have been extremely difficult for the original plaintiff to reverse his 'consent order', had he applied for the same during his lifetime. In that same case **Huddersfield Banking Co Ltd v. Henry Lister and Sons Ltd** (supra), Vaughan Williams J said:

I agree that if the arrangement come to was a compromise of doubtful rights and a give-and-take arrangement, parties to it could not afterwards have the compromise set aside because upon obtaining fuller information they thought they had made a bad bargain.

12. In any event, the original plaintiff did not want to reverse his 'consent order' during his lifetime spanning over nearly 14 years from the date of the order in 1996 to his death in 2010. He had abandoned his action after the said order was made with his consent due to the death of the original defendant. Therefore, it would be extremely difficult for the substituted plaintiff – the administrator of the original plaintiff - to reverse it now, after another 8 years from the death of the original plaintiff.

13. Furthermore, the substituted plaintiff's attempt to reinstate this matter is on the basis that he is the Administrator of the Estate of original plaintiff – late Nayan Singh. The pertinent question that arises here is whether the cause of action, which accrued to the original plaintiff to bring this action, does survive for the benefit of his Estate after his death. The substituted plaintiff, in his capacity as the Administrator of Estate of the original plaintiff, can proceed with this matter only if the cause of action of the original plaintiff survives for the benefit of his Estate. The effect of death on certain causes of action should be considered in order to answer this question. All causes of action, **that was subsisting against or vested in a person**, shall survive against or, as the case may be, for the benefit of, his or her estate after his or her death, according to section 2 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, which reads:


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. (Emphasis added).

14. Being a partner of business “Nadi General Transport Company”, the original plaintiff had a cause of action, though the original defendant claimed to have statute barred, to sue the legal representative of other partner after his death for dissolution of the partnership. The original plaintiff exercised his right by suing the legal representative of the other deceased partner, based on that cause of action. However, he voluntarily consented for an order to take the matter off the list after death of the original defendant. In addition, he opted not to proceed with this matter, as he never made any attempt to get this matter reinstated till his death. The matter was, accordingly, concluded with that consent order. Therefore, no cause of action was vested in the original plaintiff at the time of his death, because, the matter was concluded with that consent order which he did not attempt to set aside during his lifetime. As a result, his cause of action, for which he obtained a consent order, does not survive for the benefit of his Estate, as it was not vested in him at the time of his death. The duty of any Administrator of any Estate, inter alia, is to act on any cause of action that was either subsisting against or vested in the deceased at the time of his or her death, because only that cause of action can survive for the benefit of any Estate. It follows that, the substituted plaintiff, being the Administrator of the Estate of original plaintiff, cannot move to reinstate this matter, because a consent order was made on the cause of action of the original plaintiff during his lifetime and it was not vested in him at the time of his death, for it to survive for the benefit of his Estate.
15. The above discussion reveals that, the original plaintiff with his free will consented for the matter to be taken off the cause list upon death of the original defendant. Since the original plaintiff did not wish to set aside and proceed with this matter for nearly 14 years during his lifetime after the said order was made in 1996, it appears that he had abandoned this matter. Therefore it is extremely difficult to interfere with the said order. Further, the cause of action of the original plaintiff to sue for dissolution of the partnership ceased with his consent order. It was not vested with him at the time of his death for it to survive for the benefit of his Estate. For these reasons I decide that, this matter cannot be reinstated and the application made by the substituted plaintiff ought to be dismissed with the reasonable costs to the substituted defendant.
16. In result, I make the following orders:
 - a. The application for reinstatement is dismissed, and

- b. The substituted plaintiff should pay summarily assessed costs in sum of \$ 1500 to the substituted defendant within a month from today.

**At Lautoka
19.02.2021**




U.L.Mohamed Azhar
Master of the High Court