

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. HBA 02 of 2020

BEWEEN: SANJAY SINGH VERMA

APPELLANT

AND: SHAWANA ZAFAR NISHA

RESPONDENT

Counsel : Appellant: Mr. Kunal Singh

: Respondent: In person

Date of Hearing : 16.07.2020

Date of Judgment : 20.10.2021

JUDGMENT

INTRODUCTION

1. This is an appeal from decision of learned Resident Magistrate (RM) made on 23.8.2019, rejecting the application of Plaintiff-Appellant's (Plaintiff) for reinstatement of action. Action was struck off on 14.2.2019 for refusal to adjourn the matter when it was taken up for hearing. It was informed to court below that counsel for Plaintiff was appearing in another matter in Magistrate's court, when it was taken up for hearing by RM. The requested for adjournment, was rejected by RM and requested Plaintiff to proceed. As no witnesses were available, Plaintiff could not lead evidence. RM stated 'matter was therefore non suited and struck out'. RM stated that the claim was \$4,600 hence is 'devoid of jurisdiction'. Plaintiff made an application on 15.3.2019 for reinstatement but this was rejected on 23.8.2019. This is the appeal against said refusal to reinstate. There were three reasons given by RM for refusal to reinstate. Firstly, on the ground that postponement was sought only on 'mere delay' and on ground of case management. Secondly, Application for postponement was belated. Thirdly the case had become 'non suited'. Fourthly, sum claimed was below the threshold of

Small Claims Tribunal hence lacked jurisdiction. The Notice of Intention to Appeal was filed on 29.8.2019. The time of court is limiting factor and it causes of the delay in litigation. When a time is allocated for hearing parties should endeavor to take every effort to proceed to hearing at time allocated, unless some unforeseen, unavoidable circumstances prevent them from proceeding to hearing. This is entirely discretion of RM and higher court will seldomly interfere with such a decision. The fact that the claim was below \$5000 was not a reason to strike out for want of jurisdiction. RM had non-suited the action and this is a common law jurisdiction, and not recognized in Magistrates' Court Act 1944 or Magistrates Court Rules 1945.¹ Subject to said variations, ruling of RM is affirmed.

FACTS

2. Plaintiff filed an action against Defendant claiming a sum of \$4,600 and interest. The action was based on breach of contract to pay specific sum and legal fees.
3. Defendant alleges that Plaintiff was illegal money lender in the statement of defence.
4. Defendant admits taking a sum of money and entering to an agreement to pay principal sum and interest as requested.
5. On the date of trial Plaintiff was not present to conduct hearing, but a request was made to adjourn the hearing till afternoon.
6. It was informed to the court below that Plaintiff was appearing before another Magistrate's Court and he would be available for hearing in the afternoon.
7. According to judgment when the matter was called in the afternoon a request was made by the counsel who appeared on that that to vacate the hearing or further adjournment.
8. Plaintiff was not present in the court hence no evidence could be adduced for Plaintiff.
9. Plaintiff's application for adjournment to another date was refused on following reasons according to minutes of 14.2.2019
 - a. The reason given for not attending court was another matter in Suva, where Plaintiff was not a witness to give evidence. Since he was represented by a counsel in the said matter at Suva, there was no valid reason to be absent on hearing date.

¹ *Clack v Arthurs Engineering Ltd* [1959] 2 All ER 503

- b. Counsel for Plaintiff was requested to proceed with action but could not due to unavailability of Plaintiff as witness, hence matter was 'non suited'.
 - c. The amount claimed, \$4,600 was below the jurisdiction of court below, hence the matter was struck off.
10. Plaintiff filed summons to reinstate the matter on 15.3.2019 and issued on 27.3.2019.
 11. This summons for reinstatement was purportedly made in terms of Order 27 rule 2 and 4 of Magistrates' Court Rules 1945. I used the word purportedly as said provisions of law, do not allow a matter struck off to be re-instated.
 12. Said summons seeking reinstatement of the struck off action was heard on documents and decision handed down on 23.8.2019 refusing the request to reinstate.
 13. The reasons for not allowing reinstatement are found in paragraphs 9-18 of the said decision.
 14. RM had discussed Order 28 of Magistrates' Court Rules 1945 and held that application for reinstatement was belated, and there was no proper justification not to be present in court to give evidence. As an additional ground he held that he lacked jurisdiction to deal the claim as it was below \$5,000.
 15. Grounds of appeal are:
 - "1. That the Learned Resident Magistrate erred in law and in fact by not allowing the Appellant herein the reinstatement on the Motion and Affidavit filed with reasons that was satisfactory, while the Appellant and counsel for the Appellant were before the Chief Magistrate in another matter (JDS 93/2015) is relevant.
 2. That the Learned Resident Magistrate erred in law and in fact by not considering that there was a counsel appearing on behalf of the firm and the Appellant was seeking the matter to be stood down for another hour and hearing could have been conducted the same day with the presence of the Plaintiff and his Solicitor Mr Kunal Singh.
 3. That the Learned Resident Magistrate erred in law and in fact, when he failed to analyze that there was no "Jurat" in the affidavit in Response of the Respondent which was addressed in Court, therefore the Applicant's Affidavit in support of reinstatement should have been deemed to be uncontested whilst determining the application to reinstate, as the Response for the Respondent filed via affidavit was defective.

4. That the Learned Resident Magistrate erred in law and in fact when he did not direct himself properly that there were other matters before the Magistrates Court with claims less than Five Thousand Dollars and this was not the only one through the system. He also failed to realize that the Respondent was influential and a claim was earlier filed at SCT and later withdraw as the Referee was seen as a visitor at the Respondents Residence on celebration of EID by the Appellant herein and his wife.
5. That the Learned Resident Magistrate erred in law and in fact, when he took notice that the Appellant is an unlicensed money lender and uttered words in open court on the date of this matter was set for hearing before striking off this matter which has resulted in a gross misconduct and miscarriage of justice.
6. That the Learned Resident Magistrate erred in law and in fact, when he didn't hold his emotions and made comments in open court that showed bias against the Appellant and in favour of the Respondent."

ANALYSIS

16. In paragraph 2 and 3 of the decision handed down on 23.8.2019 indicate that first adjournment of hearing was allowed from 10 am to 12 noon and on second occasion another adjournment was sought, which was refused.
17. Contrary to above, the minutes of RM indicate that he had made a Ruling in the first occasion itself, after hearing both sides.
18. Plaintiff in his affidavit in support stated that he had reached the court on or around 10.30 am and by that time the matter was already struck off.
19. Irrespective of whether the first adjournment was refused or second adjournment was refused the legal position is same as regarding adjournment of matters before RM.
20. If first adjournment was refused and the matter was stuck off, there was nothing to prevent Plaintiff or his solicitor from making an application on the same day for reinstatement of the action.
21. Such a prompt application would have proved the bon fides of the Plaintiff.
22. Instead Plaintiff had made an application to reinstate on 15.3.2019, more than one month after struck off.

23. In the circumstances of this case this was a substantial delay considering the amount claim, nature of claim and other facts as alleged by Plaintiff in his affidavit in support.
24. Plaintiff and his counsel had taken a very relaxed attitude regarding prosecution of a claim before RM.
25. According to affidavit in support of the summons to reinstatement, the other matter which he had attended was listed for oral arguments and he was represented by a counsel. There was no reason for him to give priority and be present for a matter fixed to oral arguments, when he was represented by a counsel.
26. So the reason that he could not attend for hearing due to another matter was without any merit on his own admissions contained in the affidavit in support.
27. Appeal ground 1 has no merits. It is the RM who can decide whether to adjourn a hearing matter or not. Higher court will not interfere with such a decision as it is entirely a matter for the RM to decide considering numerous factors, including amount of the claim.
28. RM had considered the amount of the claim, delay conduct of the Plaintiff, and also case management reasons. I cannot see any error on the factors that he had considered.
29. Plaintiff is misconceived that he should be allowed adjournments by RMs, to suit his availability to the courts. This is not correct position. Plaintiff should be ready for hearing when the matter is fixed for hearing and court below may adjourn a hearing upon satisfaction of several factors. So adjournments are discouraged as much as possible, but allowed only in limited instances. This is stated in Order 28 of Magistrates' Court Rules 1945.
30. Order 28 rule 1 of Magistrate's court Rules 1945 states
 - "1. 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."
31. So a Magistrate needs to rule out that the application was not mere delay tactic and be satisfied that postponement in effect will better for the parties to determine the issues before court.
32. Upon the facts contained in the affidavit in support of Plaintiff, he had not explained why he had could not have sought vacation of one matter.

33. So I cannot find anything wrong in RM's finding that Plaintiff was trying to delay the matter.
34. So the contention of the Plaintiff that since he was before another RM cannot be accepted for several reasons to adjournment of a hearing,
- Why he or his counsel did not mention and vacated the hearing earlier?
 - Why his presence was needed when a counsel was appearing in oral argument?
 - When did he or his counsel become aware of the other matter being listed on the same day?
 - Why he or his counsel did not vacate one matter?
35. Order 29 of Magistrates' Court Rules 1945 states
- "Days of sitting*
1. Subject to the provisions of the Act, the court may, in its discretion, appoint any day or days, from time to time, for the hearing of causes and matters, as circumstances require."
36. Accordingly this matter was fixed for hearing on 14.2.2019 and Plaintiff must be ready to lead evidence for his claim. If he fails or not prepared to do the discretion of the RM can be exercised.
37. Appeal ground 3 is misconceived. Plaintiff needs to satisfy the court to reinstate his claim irrespective of the errors on the affidavit filed by Defendant. Technical errors on affidavits are path of least resistance to deny justice. Even if I am wrong on that, any technical error of the Defendant's affidavit in opposition will result in reinstatement of his claim.
38. Order 31 rule 11 of Magistrates Court Rules 1945 states that
- "The court must exercise reasonable control over the presentation of evidence with a view to avoiding wastage of time"
39. Avoiding wastage of time is paramount consideration, hence case management is a factor that needs consideration by allowing or disallowing adjournments. Though adjournments are inevitable in certain unavoidable circumstances, it should not be considered as order of the day to delay or postpone matters for the convenience of the parties. It should be borne in mind that wasted time of court is lost time for all prospective litigants who awaits time of the court, for hearings.
40. Appeal ground 4 contained some factual matters. RM had stated that claim which was below \$5000 cannot be dealt by court below. This is wrong. Civil Jurisdiction of Magistrate's Court

is stated in Section 16 of Magistrates' Court Act 1944. Accordingly Section 16(b) of the said Act limits only the upper limit of \$50,000 regarding a debt or balance of a debt.

41. Small Claims Tribunal does not have exclusive jurisdiction to deal with claims that do not exceed \$5,000. It is a division of Magistrate's Court for convenience, but it may have some limitations and may not suit in all instances depending on circumstances.
42. As the long title of Small Claims Tribunal Act 1991 states it was established to 'provide prompt and inexpensive relief to claimants'. This is to encourage claimants whose claims are practically not viable to be litigated due to cost of litigation and other factors. So they can be efficiently dealt in an alternate manner, by a division created specifically to suit such claims.
43. It is noteworthy that Section 3(2) of Small Claims Tribunal Act 1991 states

“(2) A tribunal established under subsection (1) shall be known as a small claims tribunal”
44. Accordingly, there is nothing to prevent any claim that does not exceed \$5000 being filed in Magistrate's Court or transferred from Small Claims Tribunal to a Magistrate's Court.
45. Small Claims Tribunal is created for the convenience of the parties, considering mainly the amount claimed needs inexpensive method of determination. This does not preclude any matter below \$5000 being determined by Magistrate's Court.
46. Sections 22 and 23 of Small Claims Tribunal Act 1991 is clear that there can be transfer of actions from Small Claims Tribunal to Magistrate's Court and vice a versa.
47. Section 22(2) of Small Claims Tribunal Act 1991 states that the tribunal could even transfer any matter before it on its own motion, without any application when it thinks that it will 'more properly' be determined by Magistrate's court.
48. A party is not precluded from seeking a transfer of a claim from Small Claims Tribunal, in terms of Section 22(2) of Small Claims Tribunal Act 1991.
49. In this case no such an application was made to the Tribunal for obvious reasons. The reasons for withdrawing the claim and filing an action in Magistrate's Court are given in the affidavit in support. In my mind, law does not preclude a party from filing a fresh action subject to issues of limitations. So RM was in error on the issue of want of jurisdiction.
50. It was an error on the part of court below to state that it was struck off for 'want of jurisdiction'. Plaintiff's claim though below \$5000.

51. Though RM was wrong on the said finding the amount of the claim is a factor to be considered in the reinstatement. Plaintiff had wasted time of the court being not ready for the matter when it was called for hearing.
52. I also agree with the submission that Magistrate Court Act 1944 or Magistrates Court Rules 1945 do not allow a matter to be non –suited. The jurisdiction of a Magistrate is statutorily determined.(see *Clack v Arthurs Engineering Ltd*, [1959] 2 All ER 503)
53. It should be noted purported appeal grounds 5 and 6 are not supported by decision of 23.8.2019 or Appeal Record.

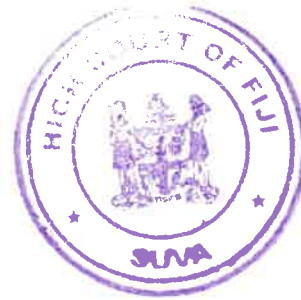
CONCLUSION


54. This is an appeal against decision of RM delivered on 23.8.2019. The notice of appeal against said decision was filed on 29.8.2019 and grounds of appeal was filed 23.9.2019. RM refused to reinstate the action which was struck off due to Plaintiff –Appellant (Plaintiff’s) failure to prosecute the claim on the day of hearing. RM had refused to reinstate on several grounds. When a matter was fixed for hearing on a particular time a court had already reserved its limited time for a particular case and this time should not be wasted. It is the responsibility of client as well as the legal practitioner assigned for that case to prepare and be ready for hearing, without wasting time of the court and seeking adjournments. This is specially applicable to Magistrate’s Court where there is a heavy workload. Plaintiff should understand that when a court allocates a time for a particular case it is exclusively for that matter only. Hence it deprive time from other litigants awaiting a hearing of their claims. A lost time of hearing in court, can never be compensated. There is a case management reason not to reinstate this matter considering circumstances. Plaintiff had taken a very relaxed attitude in attending court and specially for hearing. RM is within his power and discretion to dismiss a matter when a party is not ready for the matter. Though he was wrong on the issue of want of jurisdiction and non-suit, the amount of the claim is a factor to be considered. So subject to above variations in his findings, the decision of RM is affirmed. Considering circumstances of the case, no cost awarded.

FINAL ORDERS

- a. Appeal is dismissed.
- b. No costs.

Dated at Suva this 20th day of October, 2021.




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Justice Deepthi Amaratunga
High Court, Suva