IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 169 of 2016

BETWEEN: **JAYANTI CHANDRA REDDY** of 2/3A Stamford Park Road, Mt Roskill,Auckland, New Zealand as the Adminstratrix in the **ESTATE OF WARDA CHANDRA REDDY** late of 2/3A Stamford Park Road, Mt. Roskill, Auckland, New Zealand, Retired, Deceased, Testate.

PLAINTIFF

A N D: **SHASTRA DEVI** of Drasa, Lomolomo, Lautoka, Domestic Duties.

DEFENDANT

Appearances: Ms. Sadrata for the Plaintiff
Date of Hearing: 06 December 2021
Date of Ruling: 10 December 2021

RULING

INTRODUCTION

1. Before me is an *Ex-Parte* Notice of Motion dated 01 December 2021 filed by Iqbal Khan & Associates seeking the following orders:

   (a) an interim order be granted that the Order granted on the 9th day of November 2021 by the Learned Master Azhar be set aside until the determination of this application next week.
   (b) an interim order be granted for Stay of Execution of Order dated 9th November 2021 by the Honorable Justice Stuart and/or any other application by the Plaintiff to issue Writ of Possession against the Defendant until the determination of this application filed herein.
   (c) an interim order be granted that the execution and all further proceedings to enforce any Writ of Possession be stayed pending the determination of this matter.
   (d) any other Orders this Honorable Court deems just.
   (e) costs on the Solicitor /Client indemnity basis.
   (f) that the service of time for this motion to be abridged.

2. The application is supported by an affidavit of the defendant, Shastra Devi, which was sworn on 01 December 2021. In her affidavit, Devi deposes that on 09 November 2021, Master Azhar granted leave to the plaintiff to issue a Writ of Possession. The Master's Order was based on an Order of Mr. Justice Stuart of 28 July 2020. In that Order, Stuart J had directed Devi to pay the sum of $62,550.00 (Sixty-Two Thousand Five Hundred and Fifty Dollars) on or before the 31 July 2021. If Devi defaulted, Reddy would be entitled to immediate vacant possession of the land in question.

3. The land in question is all compromised in State Lease Number 16065 being Lot 8 on Plan No. BA2403. This land is situated in the island of Viti Levu in the district of Vuda. The land comprises an area of 9.1392 hectares.

TERMS OF SETTLEMENT

4. Stuart J's orders had been based on a Terms of Settlement between Devi and Reddy. Their respective lawyers had entered into the said Terms of Settlement. At the time, Devi was being represented by Fazilat Shah Legal.

DEVI PLEADS IGNORANCE OF THE SAID TERMS OF SETTLEMENT

5. However, Devi deposes that Messrs Fazilat Shah **"did not advise me of the Order granted on the 28th day of July 2020, issued against me and as such I was unaware of it"**. She further deposes that she only came to learn of the Order in 2020, upon liaising with Sugar Cane Growers Fund about the progress in her cane proceeds.

6. She further deposes that she then went to inquire with Messrs Fazilat Shah Legal who advised her that **"they were not aware of the same"**. Devi says that she then went to the High Court Registry and whilst perusing the relevant Court file, she "**became aware that there was a terms of settlement filed on the 4th day of May, 2020, wherein Counsel for the both the parties have signed in absence of the Plaintiff and the Defendant and which I was not aware of"**.

7. She then proceeded to Fazilat Shah Legal with a copy of the Order and the Terms of Settlement in question. However, Messrs Fazilat Shah told her that they were not aware of the said Terms of Settlement and that they were only being made aware of it for the first time by the copy which Devi had given them.

8. Reddy then deposes that, subsequently, she applied for a loan from the Sugar Cane Growers Fund. SCGF then asked her to provide SCGF certain things before SCGF could process her application. She then wrote to her former counsel Fazilat Shah Legal on 28 June 2021 and instructed them to write a request to the plaintiff's counsel and seek further time to pay the balance settlement amount of $62,550.00. The plaintiffs solicitors responded vide a letter dated 21 July 2021.

9. Reddy deposes that due to COVID-19 pandemic crisis during the period 2020, the Court system was closed and there being a lockdown, she has been unable to take any further action and as such, all she could do was wait for things to return to normalcy.

10. She then deposes that she was served with an Inter-Party Notice of Motion and Affidavit of Jayanti Chandra Reddy in Support filed on 30 August, 2021 by the plaintiff's Bailiff. The return date on the Notice of Motion was 09 November, 2021 to be called before the Learned Master Azhar.

11. She deposes that she then contacted her previous counsel upon receipt of the documents, however they were closed during COVID-19 pandemic crisis.

12. She deposes that during the period 2021 the COVID-19 pandemic continued and the judiciary and legal firms were closed due to lockdown, however she managed to consult the office of her present counsel, Messrs Iqbal Khan & Associates on 03 September 2021 and sought legal advice in respect of her case.

13. On 03 September 2021, her current Solicitors filed a Notice of Change of Solicitors.

14. She further deposes that on 09 November 2021, Mr. Tevita Kaloulasulasu from Messrs Iqbal Khan & Associates appeared for her and informed the Master's court that Iqbal Khan & Associates had

just been instructed in this matter and sought 21 days to file a response. That the upon hearing Mr. Tevita Kaloulasulasu, the learned Master refused to grant 21 days and leave was granted in favour of the plaintiff to issue Writ of Possession against her.

15. Devi deposes that she has invested approximately $27,450.00 towards the purchase of the property. She deposes that she is a widow and has nowhere else to reside. She says that her financiers namely the Sugar Cane Growers Fund has agreed to consider the loan in the sum of $40,000.00 subject to the following:

(i) Current loan balance on farm no: 18873 Drasa Sector to reduce to below $10,000.00;
(ii) Both the farm's production (111/18873 & 111/14092) to be collectively over 400 tonnes from 2022 season, and
(iii) Existing Estate farm (111/818873) to be transferred under the Defendant's name or a High Court approval to be obtained to borrow above $10,000.00. Annexed hereto marked with letter "SD-8" is a copy of the letter from Sugar Cane Growers Fund dated 21st May 2021.

16. Devi further deposes that she has superannuation funds to make deposit with her financiers for the grant of loan in the sum of $40,000.00.

17. She seeks the following:

a) an interim order that the Order granted on 09 November 2021 by the Master be set aside until the determination of this application filed herein.

And/Or or Alternatively:

b) an interim order for Stay of Execution of the Order dated 09 November 2021 by the Honorable Justice Stuart and/or any other application by the Plaintiff to issue Writ of Possession against the defendant until the determination of this application.
c) an interim order that the execution and all further proceedings to enforce any Writ of Possession be stayed pending the determination of this matter.
d) any other Orders this Honorable Court deems just.
e) Costs on the Solicitor /Client indemnity basis.
f) that the service of time for this motion to be abridged.

MASTER'S ORDER

18. The Master's Order granting leave to the plaintiff to issue Writ of Possession against Devi on 09 November 2021. The Order was sealed on 17 November 2021.

19. That Order was made pursuant to an *Inter-Parties* Notice of Motion dated 27 August 2021 filed by Patel & Sharma for the Plaintiff pursuant to Order 45 Rule 2 (1) and (2) of the High Court Rules 1988.

20. The application had been supported by an affidavit of Jayanti Chandra Reddy sworn on 13 August 2021.

21. Reddy had deposed that on 28 July 2020, the plaintiff and the defendant entered into consent orders. They had agreed that the defendant (Devi) will pay Reddy the sum of $62,550.00 (Sixty Two Thousand Five Hundred and Fifty Dollars) on or before 31 July 2021.

22. The agreement further states that, if Devi should be in default of paying Reddy the sum of $62,550-00 by the stipulated deadline, Devi will give immediate vacant possession of the land comprised in state lease number 16065 to Reddy being Lot 8 on the Plan No. BA 2403 in the island of Viti Levu and in the district of Vuda compromising an area of 9.1392 hectares.

23. The said Consent Orders were sealed and served on Devi's solicitor on 14 August 2020 and this was duly acknowledged.

24. Devi has failed to pay the sum of $62,550.00 and is in therefore in default. Reddy further deposes that Devi's solicitors have sought an extension for payment for a period of 12 months. However, Reddy has rejected this.

COMMENTS

25. I am not inclined to grant a stay of execution when the consent orders entered by Stuart J are still in force and are not being challenged.

26. As to how to challenge a consent order, the authorities are clear that in order to set aside a consent order, the applicant will have to institute fresh proceedings rather than file an application in the same proceedings in which the consent order was entered and sealed. (as per Mr. Justice Connors in **Ram v Martinez** [2004] FJHC 388).

27. The Kenyan High Court's decision in **E.T. v Attorney-General & Another** [2012] eKLR[1] is very useful in its description of the principles involved:

> A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and thus avoid litigation or to put an end to one already commenced. When it complies with the requisites and principles of contracts, it becomes a valid agreement, which has the force of law between the parties.
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> When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties. Having been sanctioned by the Court, it is a determination of the controversy and has the force and effect of a judgement and is covered by the doctrine of res judicata.(my emphasis)

28. At common law, courts have full power to rehear or review a case until judgment is drawn up, passed and entered. But once entered, the judgment could not be set aside subject to any right of appeal (see Scutt J's Ruling in **Naigulevu v National Bank of Fiji (No. 2)** [2009] FJHC 65; Civil; Action 598.2007 (10 March 2009), see also **Pitatails & Ors v Sherefettin** [1986] QB 868 cited by Scutt J in **Naigulevu**).

29. The public policy that underlies the principle of finality was thus described by Lord Wilberforce in **Ampthill Peerage** (1976) 2 WLR 777:

> English law .... place(s) high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. [It]...is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of

peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

(my emphasis)

30. The same applies in the case of Consent Orders. The Order may be set aside on the same grounds as the court would normally set aside any contract or agreement. As Lord Denning said in **Siebe Gorman Ltd v Pneupac Ltd** [1982] 1 WLR:

> ....by consent " may evidence a real contract between the parties. In such a case the court will only interfere with such order on the same grounds as it would with any other contract...."

31. **Halsbury's Laws of England** Volume 3(1), 4th edition, paragraph 521, states that:

> ...a consent order or compromise may be set aside on a ground which would invalidate any other agreement between the parties including mistake, illegality, duress or misrepresentation.

32. In **Scammell & Ors v Dicker**[2005] All ER (D) 153, Ward and Rix LJJ said:

> In theory it was possible that a **consent** order might be declared void for uncertainty, just as a **consent** order might be set **aside** for misrepresentation or fraud or for mistake....

33. Hammett PJ in **Mohammed Rasul v Hazra Singh** 8 FLR 140 at page 144, said as follows:

> In my opinion, once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct.

34. Assuming that the plaintiff's former counsel did act without the plaintiff's authority to settle the matter on terms embodied in the Consent Order, can that settlement be set aside on account of the fact that it all happened without the plaintiff's instructions.

35. As a general rule, counsel have general apparent authority to settle claims even without express authority of clients.

36. In **Mathews v Munster** (1888) 20 QBD 141, the defendant's counsel had consented to judgement in favour of the plaintiff for a particular amount. The defendant was not in court when his counsel consented. He wanted to set aside the consent order on the ground that he had given no authority to his counsel to consent.

37. The House of Lords held that a counsel who settled a claim on behalf of his client, in the absence of, and without the instructions of, his client, had the apparent general authority to do so. Accordingly, any consent judgment entered upon that compromise was binding on the client as against the other party.

38. The above statement is justified on the ground that a client who retains a counsel as his advocate represents to the other side that counsel is to act for him in the usual course, that counsel is acting in accordance with his (client's) will, and accordingly, the client is therefore bound by any representation of his counsel.

> No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for **he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues**,.....
>
> (as per Lord Esher MR).

39. Hence, as Lord Esher MR said in **Matthews**, a client who secretly withdraws his authority to his (former) counsel without the knowledge of the other party, will still be bound by a the representations of the counsel. This is because, as far as the other party is concerned, the counsel still has apparent authority to act for the client, as Lord Esher MR has said.

> .....so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, **and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.**
>
> I apprehend that it is not contended that this power cannot be controlled by the Court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate.
>
> I have said that the relation of an advocate to his client can be put an end to at any moment, but that the withdrawing of the authority must be made known to the other side, and this shews that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so.
> Now let me consider what authority there is on this point. In **Swinfen v. Lord Chelmsford** (1), Pol lock, C.B., in delivering the judgment of the Court said (2),
>
> *"We are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial –we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."*

The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the **consent** of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it". If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed. This case is a still stronger one, for the client was not present, and it is not pretended that he ever withdrew his authority to counsel, but he now comes forward and asks that because he does not like what has been done it should be set **aside** as between himself and his opponent. This the Court will not do, and this appeal must be dismissed. (my emphasis)

40. Bowen LJ said:

The case was called on the second day, and the defendant, instead of coming into court where he might have exercised his influence on the course the case might take, was absent. During his absence he left his counsel with complete command and with authority to do whatever he thought best. Counsel agreed to a verdict for the plaintiffs, which the Court below refused to set aside.
It seems to me that within certain limits the retainer shews that counsel has authority to bind his client. What those limits are seems to me to be laid down by Pollock, C.B., in the passage that has been read. Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party. It has been frequently discussed, as far back as the time of Best, C.J., if not further, whether counsel can be called the agent of his client, but on this it is sufficient to say that even if he is called an agent he is not one in the ordinary sense, but has a particular authority, the origin of the limit of which it is not necessary to examine. What is to be done if the client is in Court? Is it the duty of counsel to consult him? I should say – yes, with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears that it would be injurious to the client's interest. He has the alternative of returning his brief. I should be sorry to say that counsel ought not to consult his client on such a matter as compromise of the action, but that is a point we have not go to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise. In this particular case it was clear what was done as within the reasonable scope of the advocate's authority within the rule laid down by Pollock, C.B.
(my emphasis)

41. Fry LJ said:

Prior to the compromise in this case counsel had received no instructions as to a compromise. In the compromise itself there was nothing collateral to the action, nothing unjust, and there was no mistake of fact on the part of counsel. In the absence of all these matters it was plainly the duty of counsel to do that which he considered best for his client. I think it would be disastrous-I do not say in the interest of the bar but-in the interest of litigants if we had to decide otherwise, for such a

result would often necessitate the refusal, because the client happened to be absent, of an offer of compromise highly advantageous to him.

(my emphasis)

42. The High Court of Malaysia in **Yap Chee Meng v Ajinomoto (Malaysia) Berhad** [1978] 2 MLJ 249, succinctly summarises the approach to be taken and reiterated that a solicitor is authorized to effect the clients' settlement:

> It is quite clear, therefore, that there are two contradicting versions of what exactly were the instructions plaintiff gave to his solicitor AEH.
>
> Whatever may the truth be, how does it affect the defendants. This raises the question with regard to the relationship between solicitor and client.(my emphasis)
>
> It is settled law that a solicitor once retained has full authority to act on behalf of his client and this authority extends to negotiations to effect settlement out of court.....

43. In Singapore, a solicitor instructed to conduct legal proceedings has an implied authority of the client to compromise them, once legal proceedings have commenced, in the absence of instructions to the contrary. This was the position in **Bank of China v Maria Chia Sook Lan** [1976] 1 MLJ 41 at 48 and upheld on appeal by the Singaporean Court of Appeal in **Maria Chia Sook Lan v Bank of China** [1976] 1 MLJ 49.

44. The observations of the High Court of Malaysia in **Yap Chee Meng v Ajinomoto** (supra) is on all fours:

> As a general rule, it is against public policy to allow settlements concluded between solicitors on behalf of their respective clients in accident cases to be challenged with impunity. To do so would open the flood-gates of endless litigation initiated by parties who become wise after the event. It will also discourage the practice of out of court settlements. That would be a great pity. But a settlement is a contract and like all contracts it is voidable on specific grounds e.g. undue influence, misrepresentation, fraud or mistake. If this can be shown it is then the duty of the court to interfere so that justice is done. In this case, prima facie there is a valid settlement, conducted between advocates and solicitors of this court.

CONCLUSION

45. I am not inclined to grant a stay of the Master's decision when there is no challenge of Stuart J's decision on foot. To challenge Stuart J's decision which was essentially a Consent Order based on a Terms of Settlement entered into between both counsel, the applicant will have to file fresh proceedings.

HIGH COURT OF FIJI LAUTOKA

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Anare Tuilevuka

JUDGE

Lautoka

10 December 2021