

IN THE HIGH COURT OF FIJI
[WESTERN DIVISION]
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 58 of 2005
Consolidated with Civil Action No. 74 of 2005

BETWEEN : **UMA PRASAD** of Maqere, Tavua, Fiji, Farmer, as the
Administrator of the **ESTATE OF PRASHANTIKA ANJANI**
DEVI also known as **PRASHANTIKA ANJINI DEVI** of Maqere,
Tavua, Student, Deceased.

PLAINTIFF

AND : **CHANDAR PRAKASH** of Vatia, Tavua.

DEFENDANT

AND : **FIJI SUGAR CORPORATION LIMITED** a body corporate
constituted under the Fiji Sugar Corporation Limited Act (Cap 209)
having its registered office at Western House, Private Mail Bag,
Lautoka, Fiji.

THIRD PARTY

Civil Action No. 74 of 2005
Consolidated with Civil Action No. 58 of 2005

BETWEEN : **SWASTIKA DEVI** of Maqere, Tavua, Student.

PLAINTIFF

AND : **CHANDAR PRAKASH** of Vatia, Tavua.

DEFENDANT

AND : **FIJI SUGAR CORPORATION LIMITED** a body corporate
constituted under the Fiji Sugar Corporation Limited Act (Cap 209)
having its registered office at Western House, Private Mail Bag,
Lautoka, Fiji.

THIRD PARTY

Counsel : **Mr. Nilesh Virendra Kumar for the Third Party**
Mr Niven Ram Padarath for the Defendant

Date of Hearing : 20th February, 2018
Date of Ruling ; 27th March, 2018

R U L I N G

1. The matter before me stems from an application filed by the Third Party seeking the following Orders:-

1. *There be a trial of preliminary point to determine whether the Defendant's Third Party action against the Third Party is statute barred and ought to be struck out pursuant to Section 4 of the Limitation Act;*
2. *The cost of this application be on a Solicitor/Client indemnity basis;*
3. *Such other further orders or relief as this Honourable Court deems just and fair.*

ON THE FOLLOWING GROUNDS:

- A. *The preliminary determination of the issue will so far as practicable will save time, expenses and resources of the parties and dispose of the Third Party proceedings.*
- B. *The Defendant abused the process of the Court by commencing the action outside the limitation period pursuant to Section 4 of the Limitation Act; and/or*
- C. *The Defendant had caused prejudice to the Third Party; and/or*
- D. *The Defendant has created a substantial risk that there will not be a fair trial.*

This application is made pursuant to Order 33 rule (3) and Order 18 rule 1 (b) (c) (d) of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.

2. The application was made by Summons dated 30th August, 2017 and supported by an Affidavit sworn on 25th August, 2017 by "Mereoni Mafi Lord". The application is made pursuant to Order 33, rule 3 and Order 18, rule 1(b),(c) and (d) of the High Court Rules, 1988 and the inherent jurisdiction of the Court. In the body of the Affidavit the deponent states that she is the Legal Counsel of the Third Party.
3. The application was vigorously opposed. An answering Affidavit sworn on 08th November, 2017 by the Defendant was filed.

4. What are the circumstances that give rise to the present application?

The Plaintiff is the Father and lawful administrator of the estate of deceased Prashantika Anjani Devi. The deceased was a passenger in the Motor Vehicle No. BT635 which was owned and driven by the Defendant. On 24th June, 2012, at Lausa, Ba on the Kings Highway, the said Motor Vehicle collided with a locomotive rail cart. As a result of the collision the deceased sustained injuries and succumbed to her injuries on 12th June, 2003. The Plaintiff alleges that the collision occurred due to the negligence of the Defendant, who was at the time the driver and the owner of Motor Vehicle No. BT635.

The Defendant served the Statement of Defence on 10th August, 2005. On 11th December, 2006, Order 34 Summons was taken out by the Plaintiff to enter the action for Trial. The trial date was set for 15th October, 2007 and subsequently Counsel for the Defendant sought an adjournment since the Defendant is intending to join a Third Party. On 28th July, 2008, Ex-Parte Motion for leave to join Third Party was filed by the Defendant. On 13th August, 2008 leave was granted and Third Party Notice was filed on 10th September, 2008 and details of the Defendant's claims are set-out therein.

5. The Defendant claims against the Third Party as follows;

- (a) *The Defendant on the 24th June, 2002 at Lausa, Ba, on the Kings Road drove vehicle Registration No. BT635.*
- (b) *The Third Party is in the business of processing sugar cane at their various mills.*
- (c) *In addition, the Third Party owns and operates locomotives for carting sugar cane and other products.*
- (d) *On the 24th of June, 2002 in the hours of darkness, the Third Party through its Servants or agents left a locomotive and/or carts unattended on a railway line which crossed Kings Road.*
- (e) *The Defendant's vehicle collided with this locomotive and/or cart and the said collision was caused by the negligence of the Third Party.*

PARTICULARS OF NEGLIGENCE OF THE THIRD PARTY

- i). *Failure to keep its locomotive and/or carts properly lighted in the hours of darkness.*
- ii). *Failure to remove the locomotive and/or stray cart away from the railway line crossing the main road.*
- iii). *Failure to put any warning signs showing the presence of locomotive and/or the stray cart.*

- iv) *Leaving its locomotive and/or cart in a position and in manner which was dangerous to all road users.*
6. Following the Third Party Notice filed against “Fiji Sugar Corporation Limited”, by the Defendant, the “Fiji Sugar Corporation Limited” filed a Statement of Defence against the said Third Party Notice.
7. At paragraph 4, 5, and 6 of the Statement of Defence, the “Fiji Sugar Corporation Limited”, the Third Party, asserts as follows;
- 4. *As to paragraph 5 of the Third Party Notice; the Third Party:-*
 - (i) *Admits that it is in the business of processing sugarcane at its various mills;*
 - (ii) *Admits it owns and operates locomotives for carting sugar cane and other products;*
 - (iii) *Avers that it is not aware of the alleged accident involving vehicle registration No. BT635 and its locomotive and/or carts.*
 - (iv) *Otherwise denies the contents thereof.*
 - 5. ***FURTHER OR IN THE ALTERNATIVE***, the Third Party says that the said accident was caused or alternatively contributed to by the Defendant.

Particulars of Negligence of the Defendant

- (a) *Failing to keep any or any proper lookout or to have any sufficient regard for other motorists using the road;*
- (b) *Driving below the standard of a careful and prudent driver;*
- (c) *Failing to heed the presence of the locomotive and/or cart;*
- (d) *Driving without due care and attention;*
- (e) *Driving at an excessive speed;*
- (f) *Failing to swerve, manoeuvre and control the vehicle to avoid the accident;*
- (g) *Driving in a reckless, careless and dangerous manner without any regard to the road rules.*

6. **FURTHER OR IN THE ALTERNATIVE** the Third Party says that the Defendant's Third Party action against it is statute barred by virtue of Section 4 of the Limitation Act [Cap 35].

8. The argument of Counsel for the Third Party, as I understand it, proceeds as follows:

This is a claim based on the tort of Negligence for which the Limitation period prescribed under Section 4(1) (a) of the Limitation Act is three years. The Defendant filed the Acknowledgment of Service on 10th August, 2005. Counsel for the Third Party submitted that the Defendant's cause of action against the Third Party accrued when the Defendant filed the Acknowledgment of Service to the Plaintiff's Claim. From the accrual of the cause of action, three years expired on 10th August, 2008. The Defendant filed Third Party proceedings on 10th September, 2008, which is well outside the limitation period. In other words, the Third Party was joined as a party to the proceedings outside the limitation period. In a nutshell, the position of the Third Party is that at the time of filing of the Acknowledgment of Service the Defendant had within his knowledge the requisite documents or evidence pertaining to the accident. Therefore, the Defendant should have instituted Third Party proceedings on or before 10th August, 2008. Counsel for the Third Party relies on a decision of Pathik J in *Eliki Saratavuni and Lepani Tagicakibau and Housing Authority, Civil Action No.: 278 of 1994, decided on 05th October, 1999*.

Mr Padarath, on the other hand seeks the dismissal of the application on the basis that this cause of action took effect for limitation purposes on the date of service of the Statement of Defence and accordingly, they fell within the limitation period of three years.

9. The question is whether the Defendant's cause of action alleged against the Third Party is statute-barred by virtue of the provisions of the Limitation Act.
10. The cause of action here against the Defendant is separate from the cause of action against the Third Party. The cause of action pleaded against the Third Party in essence asserts that:-

On the 24th of June, 2002 in the hours of darkness, the Third Party through its Servants or agents left a locomotive and/or cart unattended on a railway line which crossed Kings Road.

The Defendant's vehicle collided with this locomotive and/or cart and the said collision was caused by the negligence of the Third Party.

PARTICULARS OF NEGLIGENCE OF THE THIRD PARTY

- (i) Failure to keep its locomotive and/or cart properly lighted in the hours of darkness.

- (ii) Failure to remove the locomotive and/or stray cart away from the railway line crossing the main road.
- (iii) Failure to put any warning signs showing the presence of locomotive and/or the stray cart.
- (iv) Leaving its locomotive and/or cart in a position and in manner which was dangerous to all road users.

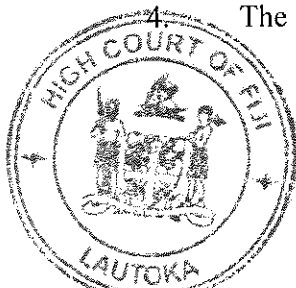
Putting the matter very shortly at this stage, the Defendant's cause of action against the Third Party is based on the tort of negligence which involves duty of care, breach of that duty and resultant damages.

11. As I understand the Law, no dispute can arise between the Defendant and the Third Party until after the disposal of the action of the Plaintiff against the Defendant in favour of the Plaintiff. More precisely, the relevant liability of the Third Party will arise upon a judgment in favour of the Plaintiff against the Defendant. The Plaintiff's trial is yet to take place. Therefore, at this stage it would be premature to examine the issue of whether or not the Defendant's claim against the Third Party is statute barred by virtue of the provisions of the Limitation Act. I leave the issue to be determined at an appropriate stage.

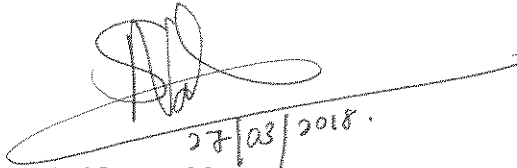
Orders

1. The Third Party's application to strike out the Defendant's Third Party Notice is hereby dismissed.
2. The issue of whether or not the Defendant's claim against the Third Party is statute barred under Section 4 of the Limitation Act (Cap 35) is reserved for the substantive trial.
3. The Third Party is ordered to pay costs of \$500.00 (summarily assessed) to the Defendant within 14 days hereof.

The matter will proceed for Trial.



At Lautoka


27/03/2018.
Jude Nanayakkara
Judge

Tuesday, 27th March 2018.