

In the High Court of Fiji at Suva  
Probate Jurisdiction

HPP Action No. 06 of 2018

In the matter of Jan Sahib aka Jan Sahib and In the matter  
of an application pursuant to Section 23 of the Succession,  
Probate and Administration Act and Order 85 of  
the High Court Rules, 1985.

Sheik Naizamul Sahib of Sydney  
Plaintiff

And

Zeena Tun Nisha aka Jinatun Nisha of  
Nailuva Road, Suva

First Defendant

Fahiruna Nisha, Sheik Mukhtar Saheb, Sheik Faruk Saheb,  
Nazmun Nisha, Sanina Bi Saheb as  
Administratrix of the estate of the Sheik  
Liaquat Saheb

Second Defendant

COUNSEL: Ms I.Lutu for the Plaintiff  
Ms D Gandhi for the first and second defendants

Date of hearing: 15<sup>th</sup> October, 2018

Date of Ruling: 16<sup>th</sup> October, 2018

**Ruling**

1. By summons dated 2<sup>nd</sup> October, 2018, the plaintiff moves that this action be reinstated.
2. Mr Shelvin Singh, Barrister and Solicitor in his affidavit in support states that his firm Shelvin Singh Lawyers, solicitors for the plaintiff took over the brief in this case from AP Legal, but by inadvertence on his part, he did not enter an appearance on 28 September, 2018, when this matter was struck out.

3. The first defendant, in her affidavit in opposition states that she is not in a position to state when Mr Shelvin Singh received instructions from the plaintiff. Shelvin Singh lawyers only filed notice of change of solicitors on 2 October, 2018, after the action was struck out on 28 September, 2018. AP Legal was still on record for the plaintiff on that date, but failed to appear. If Mr Shelvin Singh had instructions, he had a duty to his client to appear on 28 September, 2018. He had no locus standi to appear on that date, as he had not filed his notice. He should have filed his notice of change of solicitors before 28 September, 2018. She is advised that inadvertence is not a “*proper ground*” to have the matter reinstated. There are no valid grounds for the Court to exercise its discretion to reinstate this matter. The plaintiff does not have a valid cause of action. He filed an originating summons HPP Action No. 04 of 2016. The Court held that the application was incorrectly brought. The writ in the current action is not issued in compliance with Or 76.
4. At the hearing, Ms Lutu, counsel for the plaintiff submitted that Or 35, r 1 enables a Court to strike out a matter for want of appearance only on a hearing date. In the present matter, the case was fixed for mention. The defendant’s application for striking out under Or 18, r 18 has not been heard nor determined.
5. Ms Gandhi, counsel for the defendant in reply reiterated the matters contained in the affidavit in opposition of the first defendant. She submitted that the reasons given by Mr Shelvin Singh for not appearing on 28 September, 2018, were inadequate. There is no evidence that he had instructions to appear on that date. In terms of Or 67, r 1, until notice of change of solicitor is filed and copy served, the solicitor on record represents the party. An action can be struck out on a calling date Ms Gandhi, submitted further that the case filed by the plaintiff is an abuse of process.
6. On 12 September, 2018, the defendant filed an application for striking out the plaintiffs under Or 18 r (1) (a) and (d). On 28 September, 2018, when this matter was called, the plaintiff was absent and unrepresented. Ms Gandhi moved that the case be struck out.

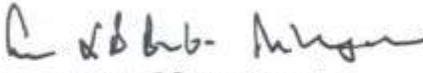
7. This application for reinstatement is concerned with my order of 28 September, 2018, striking out the plaintiff's case on a calling date, due to non-appearance of plaintiff's counsel.
8. Ms Gandhi cited the case of *Singh v Purnima*, (Civil Action no 13 of 2014). In that case, Ajmeer J cited the judgment of Hettiarachchi J in *Prasad v Rup Investments Ltd*, [2012] FJHC 1396; HBC182.2006 (19 October 2012) as follows:

Therefore, it is my considered opinion *that the striking out of the action by the Master on a mention date due to the non-appearance of the plaintiff's counsel was legally unacceptable* and also could not be considered as an order made under Order 25 rule 9 of the High Court Rules.....

Had it been struck out by the Master Tuilevuka on merits after the adjudication of the issues, certainly by Master Amaratunga has no jurisdiction to re-open the case. *..When an action is struck out by a judge for want of appearance by the plaintiff, the remedy available for the plaintiff is to make an application for a re-instatement before the same judge.* (Emphasis added)

9. The words which I have emphasised in this passage are apposite.
10. Having considered the matter further, I have come to the conclusion that it is in the interests of justice to reinstate this matter, in order that the application of the defendants for striking out the plaintiff's action be heard and determined. In the exercise of my discretion, I order that the plaintiff's action be reinstated.
11. **Orders**
  - (a) The plaintiff's application for reinstatement is allowed
  - (b) I make no order as to costs.



  
A.L.B. Brito-Mutunayagam  
Judge  
16<sup>th</sup> October, 2018