IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 66 of 1984

Between:

RAUZIA MOHAMMEO
d/o Rahimat Ali — Appellant

and

ANZ BANKING GROUP — Respondent

S.M. Koya & Feroza N. Adam for the Appellant
B.C. Patel & C.B. Young for the Respondent

Date of Hearing: 16th July, 1985
Delivery of Judgment: 20th July, 1985

JUDGMENT OF THE COURT

O'Regan, J.A.,

The appellant and her husband Deedar Mohammed are the shareholders and directors of R.D. Mohammed (Furniture Traders) Limited, a duly registered private company, ("the company"), which on 23rd September, 1981 gave a first debenture charge over all its assets to the defendant ("the bank"). The debenture was supported by personal guarantees executed by both the wife and the husband and by a first mortgage executed by the wife over freehold land owned by her at Tamavua, Suva, being described as Lot 5 D.P. 4219 and all the land comprised in Certificate of Title No. 18643, upon which is erected the matrimonial home of the wife and the husband.

The appellant has deposed that when these securities were executed the overdraft accommodation arranged was in the sum of $25,000. That contention is supported by the fact that the debenture was stamped as a security debenture for that amount. Neither the debenture nor the mortgage specify a particular amount as having been advanced. The debenture is so expressed as to secure all moneys from time to time owing to the bank by the company. And the mortgage is couched in like language.

A petition for the winding-up of the company was presented on 11th July, 1983 by an unsecured creditor. Two days later the bank, pursuant to power conferred by the debenture, appointed Messrs C.D. Aidney and M.M. Mar ("the receivers") to be receivers. On 16th September, 1983 a winding-up order, pursuant to which the Official Receiver was appointed the Provisional Liquidator, was made. On 5th January, 1984 at a duly constituted creditors' meeting the Official Receiver was appointed liquidator of the company.

By a notice dated 28th February, 1984 the bank made demand upon the wife for "the whole of the principal sum together with interest thereon and all other moneys owing by you to the said bank totalling $63,441-00 as at 22nd February, 1984 under the said mortgage". ..... and the notice continued :

> " Please take notice that if you do not pay into our office the whole of the aforesaid mortgage debt ..... our said client shall exercise its powers of sale and all other rights powers and remedies conferred on the mortgagee in such cases and by law will thereupon be exercisable without any further notice to you ..... "

On 26th March, 1984 the wife issued a writ against the bank and on the same day filed an ex parte motion for an interlocutory injunction to restrain it

from exercising its power of sale under the mortgage until after the determination of her action. On the same day Kermode J. granted the injunction sought, ex parte, until 3rd April, 1984 and ordered that if an extension thereof was required the proceedings were to be served on the bank. The injunction was from time to time extended by consent of the parties until a defended hearing took place before Kermode J. on 15th June, 1984 when decision was reserved. On 21st August, 1984 in a written decision, Kermode J. dismissed the application. This appeal is from that decision.

Before considering the submissions made in support of the appeal we turn to consider the issues raised in the wife's action.

In paragraph 5 of her statement of claim the wife avers :

> " That subsequent to the execution of the said debenture guarantee documents and the said mortgage, the defendant gave further advances to the said company beyond the said sum of $25,000. Such advances were made without the plaintiff's consent either as guarantor or as mortgagor to the defendant. In this regard the plaintiff pleads section 11 of the Indemnity Guarantee and Bailment Act, Cap. 232. "

And in the prayer of her statement of claim, as relief for that averment, she sought a declaration that she had been "discharged from all her obligations under the said guarantee and the said mortgage executed by her in the defendant's favour on 23rd September, 1981 as aforesaid AND that the defendant be ordered to execute all appropriate documents in registrable form pertaining to the said mortgage forthwith and hand the same to the plaintiff with the said mortgage and guarantee".

Section 11 of the Indemnity Guarantee and Bailment Act provides :

" Any variance made without the surety's consent in terms of the contract between the principal and the creditor discharges the surety as to transactions subsequent to the variance. "

Nowhere in her statement of claim does she aver any contract between the bank and her whereby her liability under the guarantee was to be limited to $25,000. And she, herself, has not deposed as to the existence of any such contract. The guarantee which she executed on 23rd September, 1981 is not in evidence. There is no suggestion that it contained any such limitation of liability. She did depose that "subsequent to the execution of the said debenture guarantee documents and mortgage I verily believe and understand that the defendant gave further advances to the said company beyond the sum of $25,000. Such advances were made without my consent ......".

And her earlier reference to $25,000 appeared in a deposition that "following negotiations, between the said company and the defendant for an overdraft of $25,000 which the defendant had agreed to give the said company .....".

In our view, she does not reach the threshold of a triable issue in this matter. There is no evidence of a contract between the bank and her as to the limitation of her liability to $25,000 and indeed there is no averment to that effect. Even if there was such evidence, it would not support her claim that because of it the guarantee and mortgage are ipso factor discharged or should be discharged. Even if her pleading were established, in terms of the section , she would still be liable for $25,000. Indeed Mr. Koya has so allowed in the written submissions tendered to the court below and to us. And that admission alone makes rejection of the relevant prayer for relief inevitable.

But there is another matter. In its statement

of defence the bank pleaded that what it termed "a fresh unlimited guarantee" was executed by the wife on 9th March, 1982 when the indebtedness was $56,758.76. No guarantee bearing that date is in evidence. However, following service of the statement of defence, the wife deposed by affidavit that on 9th July, 1982 she executed a guarantee as a collateral security to the debenture given by the company and she exhibited a copy of it. Whether the bank made a mistake in averring a guarantee dated 9th March, 1982 we do not know. But we have her evidence that a guarantee dated 9th July, 1982 was given but what the extent of the indebtedness was on that date has not been disclosed. The guarantee of 9th July, 1982 gives rise to two important matters. First, it was not disclosed in the evidence tendered in support of the ex parte application for the interlocutory injunction which was granted on 26th March, 1984. This material did not come to knowledge until after the ex parte order had been made. But it is before us now and in our view, it is warrant for dismissal of the appeal without further ado. In Dalglish v. Jarvie 2 Mac & G. 231, 238 it was held that :

> " It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. "

The statement of the law was cited with approval by Lord Cozens - Hardy M.R. in Rex v. Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac (1917) 1 K.B. 486 at 504.

And in the Republic of Peru v. Dreyfus Bros. & Co. 55 L.T.R. 802, 803 Kay J. stated the law in this way :

> " I have always maintained, and I think it most important to maintain most strictly, the

> rule that, in ex parte applications to this court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this court the importance of dealing in good faith with the court when ex parte applications are made."

That passage was cited with approval by Scrutton L.J. in Rex v. Kensington Income Tax Commissioners (supra) at page 514.

Of course, here, we are not concerned with the discharge of an interim order but nonetheless the taint of the original breach of good faith, in our view, infects the entire proceeding.

We do not, however, dismiss the appeal on this ground. Were we to do so, the appellant could go again to the Court on a fresh application which would involve, after an appreciable passage of time, a consideration anew of issues which have already been canvassed in two courts and adjudicated upon in one.

The second important issue is that having executed a second guarantee on 9th July, 1982, the appellant deliberately chose to structure her case under an earlier guarantee. It is a matter for comment that when the bank's pleading of a second guarantee evoked a disclosure by the appellant of a guarantee dated 9th July, 1982, in the very affidavit where the disclosure was made she persisted, on the basis that the guarantee of 23rd September, 1981 was the operative source of her liability, that the guarantee was discharged by operation of law and as a consequence of its discharge, the mortgage upon which the bank was proceeding was also so discharged.

In our view, this branch of the case does not pose a serious question for trial.

The appellant urged both here and below that there were three other triable issues which arise in her action.

The issues are encompassed by the following pleadings (paragraphs 16 and 17 of the statement of claim).

"16. That the defendant owed duty of care to the plaintiff as guarantor and the said company as principal debtor in the following respect :

(a) to take reasonable care to obtain the best price of the said company's assets and secured under the debenture that the circumstances permit at this relevant time;

(b) to take reasonable care to collect debts due to the said company by third parties by exercising the powers contained under the said debenture and in particular the powers conferred on the defendant to appoint receivers and act as attorney for the said company;

(c) to give account to the said company within reasonable time of the sale of any assets secured by the debenture;

(d) not to carry on the business of the company after filing of the winding-up petition by Timber and Building Supplies Limited on 11th July, 1983;

(e) not to vary the terms of the contract with the said company or to increase its liability to the defendant by making further advances without the plaintiff's express approval.

17. That the defendant has failed to carry out the duties referred to in the preceding paragraphs. "

And the relief sought in respect of the causes of the action embodied in that pleading was a claim :

" (b) For an order (in the alternative) that the defendant take reasonable care to obtain the best price of the said company's assets when exercising its powers of sale under the said debenture dated 23rd September, 1981 given by the said company to the defendant that the circumstances permit at the relevant time and in so doing give adequate notice to all prospective buyers by publishing advertisements in the news media in Fiji well in advance of the date fixed for such sale.

(c) For an order (in the alternative) that the defendant do collect all debts due and owing by third parties to the said company by taking appropriate steps in exercise of its powers contained under the said debenture.

(d) For an order that until the defendant carry out the terms of the aforementioned orders, defendant by itself or by its servants or agents or howsoever be restrained from exercising its powers of sale contained under the said mortgage or take any steps hereunder in that behalf until further order of this Honourable Court.

(e) For an order (in the alternative) that after carrying out the terms of the orders referred to in the preceding paragraphs the defendant do give full and correct account of all such sale to the plaintiff before demanding from plaintiff any moneys if then due and owing under the said guarantee and or the said mortgage. "

It is clear from paragraph 17 of her statement of claim quoted above, that all the matters referred in paragraph 16 of her statement of claim referred to alleged past derelictions of duty by the bank or the receivers appointed by it.

And in her first affidavit, after repeating the allegations contained in paragraph 16 of the statement of claim she goes on to depose :

" That I say that the defendant had failed to carry out the duties referred to in the preceding paragraphs. "

Then, notwithstanding the fact that the allegations relate to past events, the relief sought has reference to the future :

(i) an order that the bank take reasonable care to obtain the best price .....; or

(ii) that the defendant do collect all debts due and owing by third parties ..... by taking appropriate steps; or

(iii) after carrying out the terms of the preceding orders to give her a full and correct account.

Now, the whole purpose of an interlocutory injunction is to protect a plaintiff against injury by a violation of his rights for which he would not be adequately compensated in damages recovered at the trial if the matters in issue were in fact there resolved in his favour (see per Lord Diplock in American Cyanamid v. Ethicon Ltd (1975) A.C. 396 at page 406 D-E). Here the appellant has sought to have the bank restrained from selling her home under its power of sale, but the matters she has sought to put in issue relate not to that issue but to alleged past tortious acts. There is no nexus between the civil wrongs she has alleged and the rights which she fears might be violated if the issue were to be resolved in favour of the respondent. And if she succeeded in establishing the civil wrongs at trial the ensuing judgment in her favour would not stay the act she presently seeks to have preserved in statu quo in the interim. We accordingly accept Mr. Patel's submission that none of the causes of action raises a serious question for determination at trial. And, being as we are, of that view, it follows that the appellant's second ground of appeal - involving as it did a consideration of

the balance of convenience - is now excluded from consideration - see American Cyanamid (supra) page 407 G and page 408 A-B.

The final ground of appeal had to do with the appellant's undertaking as to damages. On the view we have taken of the case, that ground also does not arise for consideration. We note, however, that no evidence was proferred upon which the Judge could decide whether or not the appellant was in a financial position to pay them, should that necessity ultimately arise.

In her pleadings, the appellant referred to several matters affecting the company which had yet to be resolved which when resolved, might result in its total indebtedness to the bank - and consequently her liability under the mortgage and the guarantee - being a great deal less than the amount demanded. The matters were :

(a) that the amount owing by the company to its creditors was approximately $60,000 less than the total amount claimed;

(b) an action instituted by the company against Courts (Fiji) Limited claiming $84,362-12 which was awaiting trial;

(c) an action against the bank and the Receivers in which an unspecified amount in damages are claimed arising from what is alleged to be the unlawful sale of goods, furniture and chattels.

Mr. Koya submitted that the liability to the bank is dependent upon the liability of the principal debtor; that in the present state of affairs the amount of the ultimate liability of the company is uncertain and that accordingly the liability of the appellant is

also uncertain, and that, as a consequence, the sale should be stayed until the extent of her liability is certain. We think that this submission is untenable for two reasons. First, no remedy or relief has been prayed as a consequence of the matters pleaded (see paragraphs (a) (b) and (c) above). Secondly, the submission overlooks and runs counter to the terms and the covenants to which the appellant engaged herself when she executed the mortgage - in particular the following :

> " ..... in further consideration of forebearance on the part of the Bank to immediately demand and sue for payment of any moneys now owing by the customer to the Bank to the intent that this security shall cover all moneys now owing by the customer to the Bank to the intent that this security shall cover all moneys due from time to time by the customer to the Bank on any account whatsoever DOTH HEREBY COVENANT AND AGREE with the Bank ..... as follows :
>
> 1. That the mortgagor will on demand pay to the Bank all and every sums and sum of money loans and advances lent or made by the Bank which may hereafter be lent or made by the Bank to or for the use or accommodation or at the request of the customer ..... "

(The customer in the present case is the company).

The appeal is dismissed. The appellant is ordered to pay the respondent's costs which are to be taxed if not agreed upon.

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Vice President

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Judge of Appeal

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Judge of Appeal