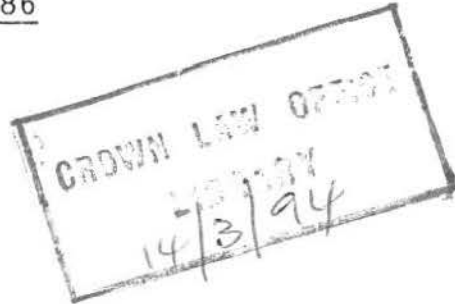


IN THE FIJI COURT OF APPEAL

Civil Appeal No. 76 of 1986



Between:

CHANDRA KANT  
(s/o Bhukhan)

Appellant

- and -

RAMANLAL BROTHERS LIMITED

Respondent

Mr.V.K. Kalyan for the Appellant

Mr.H.M. Patel for the Respondent

Date of Hearing: 10th March, 1987

Date of Delivery: 13th March, 1987

JUDGMENT OF THE COURT

Speight, V.P.

This appeal is against a summary judgment (pursuant to Order 14 of the Supreme Court Rules) given by Rooney J. on 17th October, 1986 for \$31,473.55. That sum was part of a total amount of \$102,337.27 claimed by the Respondent company (in liquidation) from Appellant who had been one of two of its director/shareholders.

The writ claiming the full amount was issued on 27th August 1986 and the Statement of Claim alleged that the Appellant's indebtedness arose from stock in trade, the property of the Company, which had been taken prior to liquidation; company assets; personal drawings from the company's accounts; and interest.

An affidavit in support was filed by the agent for the liquidator, Mr Lal Chartered Accountant, giving details of the Company's accounts, purportedly signed by the Appellant, from which he had constructed the amount of the claim. Similar proceedings were also taken against the other director/shareholder, one Dhiraj Lal, for an identical amount. A judgment was also entered against that Defendant on 12th December, 1986 for \$55,991.10 and an appeal from that judgment was also made to this Court and heard on the same day. The matters were closely inter related, and, as part of the hearings, in their initial stages at least, were held jointly, with counsel supporting each other, it is necessary to read the record in both cases to appreciate just what is in issue in each. Similarly it may be helpful to read the two Judgments of this Court together.

In each case the Respondent issued a Summons for Summary Judgment on 4th September 1986 and both matters came for first call on 19th September. On that day Mr. M.B. Patel for this Appellant made certain procedural objections. Mr. Kapadia for the Defendant in the other case apparently supported his argument.

The principal procedural objection was that the liquidator had not obtained sanction of the Court to bring the proceedings in accordance with Section 242(1) of the Companies Act 1983.

Further, it was submitted that the claim included an allegation of fraud, which excludes the use of the Summary Judgment procedure. There was another minor objection which need not concern us.

The Chandra Kant matter as reserved and a "Judgment" was delivered on 17th October. The other Summons did not come before the Court again until 14th November when submissions were made by Mr Kapadia and on 12th December 1986 a judgment was entered against Dhiraj Lal for \$55,991.10 - that narrative will be resumed in the Court's Judgment shortly to be delivered in the other appeal.

In the present case Rooney J. held that the fetter on the power of the liquidator to sue is a matter between him and the Court and is not available as a matter to which a third party being sued can object - although failure to get leave of Court is a bar to suing a liquidator.

The authority relied upon by the learned Judge was Dublin City Distillery Limited v. Doherty (1914) A.C. 823 - a decision of the House of Lords which still prevails to this day - it is relied upon as authority on this point in the latest edition of Palmer on Company Law, and in the 4th Edition of Halsbury - we need say no more.

The learned Judge also held that there was no allegation of fraud in the Statement of Claim so the other objection also failed.

Now Mr Kalyan does not challenge either of these findings.

He raises a quite different point. He submits that the matters discussed above were preliminary to his challenge to the whole claim.

After giving his ruling on the procedural points on 17th October, however, the learned Judge had gone on to say that he was satisfied, from his examination of Mr Lal's affidavit, that there was uncertainty concerning the exact nature of part of the claim - viz some \$70,863.72. Accordingly he put the liquidator to proof, but did enter judgment, as earlier stated, for \$31,473.55.

Mr Kalyan submits there had been a misunderstanding and that during the month when the matter was reserved the learned Judge had overlooked the fact that his had been a preliminary objection only. He suggests, and there may be merit in this, that the oversight arose in part from the fact that in Dhiraj Lal's case an affidavit of merit had been filed and argument as to the challenge to liability had been heard - and this would easily lead to an assumption that both Defendants had been heard as to the bona fides of their defences - for their potential liabilities and, we apprehend, their defences are the same.

If we turn back to the Chandra Kant record we find that at 19th September hearing (first call) counsel for appellant is shown as having taken the Court sanction point and said:

"Order 14 - does not have to file affidavit."

Now, every one familiar with this area of procedure knows that it is almost fatal for a defendant not to file an affidavit to show cause - as the cases show, he must "descend to particulars".

However, if a preliminary or technical objection is taken "no affidavit is required in support of such an objection" - see Supreme Court Practice 1967 at p. 119

where Bradley v. Chamberlyn (1893) 1 QB 439 is cited. We are sure that that is what Mr M. Patel was referring to. This impression is strengthened by the following note in the record - obviously the Judge's note:

"Reserved ruling on preliminary objection".

As we have said, counsel in the other case was supporting this submission, and as his client did obtain leave and did file an affidavit to show cause it is understandable that the Judge mistook the circumstances for one case as applying to both. This would be easy to do for the grounds of opposition in Dhiraj Lal's affidavit were what one would expect to see in a Chandra Kant affidavit.

However, as the preliminary point had been disposed of and ruled against this appellant is entitled to have the question of Leave to Defend heard - for which purpose doubtless he will, if given leave, file an affidavit and the question of merit can be looked into.

The Court's order of 17th October, insofar as it ruled against the procedural objection will stand, but the Judgment for \$31,473.55 is set aside.

Costs reserved.

  
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Vice President

  
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Judge of Appeal

  
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Judge of Appeal