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IN THE FIJI COURT OF APPEAL
Civil Appeal No. 34 of 1987

Between:

RATU OSEA GAVIDI — Appellant

- and -

1. MOHAMMED AZIZ TAIYAB KHAN
2. FEROZ AHMED KHAN — Respondents

Mr. S. M. Koya for the Appellant
Dr. A. Singh as Amicus Curiae

Date of Hearing: 17th September, 1987

Delivery of Judgment: 25th September, 1987

JUDGMENT OF THE COURT

Speight, V.P.

The appellant was the subject of a receivership order made in the Supreme Court at Lautoka on the 7th of February 1986. The appellant moved to have the order rescinded upon the ground that there had been no proper proof of the existence of the debt at the date of hearing. This application was heard on the 6th of March 1987, again in the Supreme Court at Lautoka, and was dismissed. This appeal is from that dismissal.

Prior to the hearing in this court an affidavit was filed on behalf of the judgment creditors - respondents that they did not wish to be heard on the appeal. However as bankruptcy is a matter which affects the general public the court thought it appropriate to invite the Official Receiver to be represented in some capacity. Accordingly Dr. Singh entered an appearance. Mr. Koya, with due respect, drew our attention to the note in the Supreme Court Practice Order 59 Rule 3 wherein it is questioned whether the Official Receiver ought to appear. We

resolved this minor technical question by listing Dr. Singh as Amicus Curiae.

The history of the proceedings prior to the receivership is clearly set out in the case on appeal and in the very helpful summary supplied by Mr. Koya. The petition was called on three occasions in Chambers at Lautoka, in October 1985, November 1985 and on the 10th January 1986. Both parties were represented. On the last date Kearsley J. was told that "a settlement was likely" and the matter was adjourned to the 7th February 1986 "for mention only". The matter was duly called on that day. Counsel for the creditors appeared before Mr. Justice Dyke in chambers. There was no appearance for the debtor. The court minute reads: "Negotiations fallen through. Order in terms".

On the 21st January 1987 a motion was filed to rescind the receivership (section 100(1) Bankruptcy Act Cap. 48) upon the ground that no evidence had been tendered to the court on the day that the receiving order was made. An affidavit was then sworn and filed on behalf of the creditors claiming that the debt was still owing under the original judgment upon which the petition had been based. The grounds set out in the affidavit for that claim were all stated as being:- "I am informed and I verily believe..." So the material put forward to establish that the debt was then still owing was hearsay.

However we propose to overlook that point for the moment and deal with the matter on its merit accepting for this purpose the creditors claim that the debtor had admitted the debt on several occasions since the receiving order had been made.

The motion to rescind was heard before Dyke J. when counsel for both parties appeared and made submissions and a ruling was issued on the 6th March 1987

dismissing it. It is necessary to note that it was not a fresh receivership order on that debt but a confirmation of the original receiving order - so that the matter complained of and the question which now arises is as to the validity of the original receiving order and/or whether a defective order can be remedied by subsequent proof of debt.

Three principles appeared to be established by reported cases.

First; Section 7 of the Bankruptcy Act of Fiji, Section 5 of the Bankruptcy Act 1915 (U.K.) and equivalent statutes elsewhere all require that a petition when filed shall be verified by affidavit as to the act of bankruptcy and there shall also be proof of debt at the hearing. The purpose of the first affidavit is to justify the Registrar in receiving the petition and sealing a copy for service - Lindsay ex parte Lindsay (1874-75) 19 L.R. Equity 52 at 54.

Second; at the hearing, if there is opposition, it is essential that there should be an affidavit or other evidence establishing that the claimed debt still exists at the time of hearing - In re : A Debtor ex parte Debtor (1935) 1 Ch. D. 353 at 358. All Judges will be familiar with this routine practice.

In the case just referred to the Master of the Rolls said that an admission was not sufficient in bankruptcy proceedings.

Third; a variation from the requirement just mentioned apparently grew up in cases where there was proof of an admission and there had been no notice of intention to dispute and the rule established in the case just cited was said to be directed to cases where there was a notice of intention to dispute.

In delivering the judgment of the Court of Appeal In re : A Debtor (No. 27 of 1943) A Debtor v. The Official Receiver (1943) 2 All E.R. 15 Lord Greene M.R. said that an admission was accepted in uncontested cases but practice required that a confirming affidavit be filed immediately and on the same day as the receiving order but not necessarily prior to hearing. Again we are all familiar with the practice in routine matters of making an order subject to an undertaking concerning the filing of a necessary document. In such cases the Registrar will not seal the order until the required document has come into the Registry. It seems likely that the requirement in bankruptcy cases for same day filing would relate to the consequences of a receiving order on antecedent dispositions - section 44 et seq.

Reference to the sequence of events in this case shows that Dyke J. did not have his attention drawn to the previous appearances before Kearsley J. and in particular may not have known that the adjournment was made for mention only. More importantly he was not then informed of the supposed admissions subsequently referred to in the creditors affidavit. Nor indeed was there any proper admission which would have perhaps enabled the procedure approved in Lord Greene's case to be followed. All that was before the court was advice from counsel for the creditor that a settlement had fallen through. What the proposed terms of that settlement were or what sum the debtor might be stated as owing do not appear from the record. That being so the consequences of section 7 of the Act and the interpretation of equivalent sections in the cases referred to lead us to the conclusion that the receiving order was not validly made. That being so the invalidity could not be remedied by a subsequent confirmatory affidavit. It had not been filed as at the date of hearing so the invalidity remains.

Our attention was drawn to section 128 of the Act which protects proceedings from invalidity by reason of formal defect or irregularity. In our view failure to comply with a requirement which has so often been declared to be fundamental to the exercise of jurisdiction cannot be described as a formal defect or irregularity. Accordingly the appeal is allowed and the receiving order is rescinded. There will be no order for costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal