IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO. 30 OF 1989

Between:

ELIKI BOMANI — Appellant

- and -

ATTORNEY GENERAL OF FIJI & MINISTER FOR JUSTICE — 1st Respondent

- and -

MINISTER FOR PRIMARY INDUSTRIES — 2nd Respondent

Mr. H.M. Patel for the Appellant
Mr. N. Nand with Ms. Manuel for the Respondent

Date of hearing: 12 March, 1990
Delivery of Judgment: 23 March, 1990

JUDGMENT OF THE COURT

This is an appeal against the Judgment of Mr. Justice Byrne dated the 14th day of September, 1989 in which he held that there had been no agreement between the parties for payment to the Appellant of the sum of $65,109.62 which the appellant had claimed represented the balance due on a settlement negotiated by the appellant's Solicitor, Mr. M.I. Khan with the then Attorney-General Mr. Bale.

There are six grounds of appeal as under:-

"1. *The Learned Judge erred in law and in fact in deciding that there was no agreement reached between the Plaintiff and the Defendants to pay the Plaintiff $65,109.62 when there was ample evidence to the contrary.*

2. *The Learned Judge erred in law and in fact in not evaluating the evidence properly concerning the question of liability and therefore totally misdirected himself by not giving sufficient weight to all the documentary evidence involved in the action.*

3. *The learned Judge erred in law and in fact after holding that he was mindful of the fact that as a general rule statements made in Parliament are not admitted, in Courts as evidence of their truth, yet considered the numerous replies given by Mr. Bale on question of credibility.*

4. *The Learned Judge erred in law after finding on facts that the Plaintiff was impressive to be an honest witness did not accept his evidence that $10,000 (Ten Thousand Dollars) was a first instalment payment under the agreement reached.*

5. *The Learned Judge erred in law and in fact in not taking into consideration the whole intent and purpose of even paying the sum of $10,000 (Ten Thousand Dollars) to the Appellant if there was no agreement on the question of settlement amount reached between the parties.*

6. *The Learned Judge erred in not considering the numerous legal issues raised on behalf of the Appellant in the written submissions made at the trial."*

We only find necessary to consider the sixth ground. Having done so it is clear that the learned Judge should have considered not only legal issues raised by the Appellant but also legal issues raised by the Respondent.

Ms. Manuel raised the issue of the Appellant's bankruptcy before the learned Judge. It has also been pleaded in paragraph 9 of the Statement of Defence which is in the following terms:-

"9. That the negotiated settlement effected by the First Defendant with the Plaintiff on or about the 23rd December, 1985 is null and void and of no force or effect in as much as:-

(i) an Order of Adjudication of Bankruptcy had been made against the Plaintiff on 23rd September, 1985 and consequently he was under a legal disability and did not possess the legal capacity to enter into any contractual negotiations and/or settlements;

(ii) there was no disclosure of material particulars on the part of the Plaintiff and/or his legal advisers;

(iii) the Plaintiff and/or his legal advisers misrepresented to the first Defendant certain relevant material particulars during pre-contractual negotiations."

The learned Judge decided not to consider the legal issues but to decide whether on the facts there had been any agreement to pay the Appellant, who had aready been paid $10,000 on account of the amount alleged to be payable, to pay the alleged balance sum of $65,109.62, He decided that issue in favour of the Respondent mainly on his finding that Mr. Bale was an honest witness. Although he found the Appellant was also a honest witness he believed the Appellant was mistaken in his belief that a sum certain had been agreed to be paid to him.

While it might be open to us to decide this appeal by considering only the learned Judge's Judgment there is a fundamental issue of law which would decide the appeal and could have disposed of the action had there been any action by the Respondent to strike out the action.

The issue of liability was not before the learned Judge who was only concerned as to whether there was any agreement reached on the issue of the quantum of damages.

It is not in dispute that an Order of Adjudication in bankruptcy was made against the Appellant by the then Supreme Court on the 23rd September, 1985. He did not obtain his discharge until 22nd August, 1986.

At the time Mr. I. Khan was purporting to negotiate a settlement with Mr. Bale the Appellant was an undischarged bankrupt.

The issue of bankruptcy was very fully argued before the learned Judge. Both Mr. Rabuka, then acting for the Appellant, and Ms. Manuel presented lengthy written submissions on this and other legal issues.

We have considered both submissions and find ourselves in agreement with most of Ms. Manuel's well considered and well presented submissions on the legal issues.

Section 54(1) & (2) of the Bankruptcy Act is as follows:-

> *"54. (1) Until a trustee is appointed, the official receiver shall be the trustee for the purpose of this Act, and, immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.*
>
> *(2) On the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed."*

In the instant case no trustee had been appointed. Property is defined in Section 2 of the Act as including (inter alia) "things in action". A right of action against the government for negligence is a "thing in action. In Curtis v. Wilcox (1948) 2 K B 474 a right of action which a wife had against her husband for negligence before her marriage was held to be "thing in action" under the relevant Act.

The legal position at the time Mr. Khan was purporting to negotiate a settlement of his client's claim for damages for negligence was that his client's right to sue had passed to the Official Receiver.

Halsbury 4th edition Vol. 3 paragraph 559 states the principles on which the trustee in bankruptcy's right to sue is based. It states:-

> *"All rights of action which relate directly to the bankrupt's property and can be turned into assets for payment of debts pass to the trustee."*

The notes to that paragraph refer to a number of cases and mentions Wilson v. United Counties Bank Ltd. (1940) AC 102 H.L. on which Ms. Manuel relied in her submissions to the learned Judge.

That case dealt with negligence by a Bank causing loss to the bankrupt's property. It is clear from the Judgments of the learned law Lords that the right of action of the bankrupt where there was damage or injury to the bankrupt's property passes to the trustees.

In the same paragraph 559 it is stated:

> *"Where the right of action has passed to the trustee, and the bankrupt also brings an action upon it, his action may be dismissed as being frivolous and vexatious."*

Boaler v. Power (1910) 2 K B 229 CA was a case where the trustee refused to continue an action begun by the bankrupt, which the master subsequently dismissed on the defendant's application. It was held that the bankrupt had no locus standi to appeal from the decision.

In the instant case the Appellant then a bankrupt commenced action in his own name. Legally he had no right to sue but he did so and the learned Judge chose not to consider the legal submissions. He held there was no concluded agreement on the facts before him.

We consider on the facts that there was no concluded contract in any event on the grounds (inter alia) that the Appellant could not legally give the Respondent a discharge on payment to him of the alleged agreed settlement sum. Only the Official Receiver could have given a discharge. Nor could the bankrupt agree to accept a lesser sum than he claimed.

Ms. Manuel adopted the arguments she put forward in her submissions. One such argument was that there was a unilateral mistake. She had also alleged, as had been pleaded, that there had been failure by the Appellant to disclose his bankruptcy during the negotiations.

Consideration of those issues would have been necessary if the Appellant had any right to institute the action. He had no locus standi.

Quite apart from that aspect the Appellant could not legally enter into negotiations with Mr. Bale to settle a claim in which he had no legal interest.

The learned Judge appears to have taken the view that the issue of negligence has still to be decided. His order makes that clear. The Respondent has not challenged that part of the Judgment.

Since the Appellant commenced his action he has obtained his discharge. What effect that has on an action he commenced when he appeared to have no locus standi we have not been asked to decide and the issue remains at large.

We are mindful of the fact that the Appellant first made a claim alleging negligence on the 16th day of September, 1983 and his claim could be statute barred if the action was struck out.

Our comments on the legal issues must be considered as being confined to the issue as to whether there was any concluded agreement on the quantum of damages. On the facts before us and viewing only the alleged agreement as to the balance to be paid there was a clear case of unilateral mistake.

Viewed as a contract Mr. Bale was seeking to settle a claim. It is clear he did not know about the Appellant's bankruptcy. This fact was known or should have been known to Mr. Khan. Mr. Bale expected to obtain a settlement of the claim not realising that the Appellant could not legally settle it. Knowledge of that situation must be imputed to the Appellant through his solicitor who knew.

The law is clear that in the case of such a fundamental mistake as to the character of the offer namely an offer by the Appellant to settle his claim for a smaller sum, a claim which he could not legally give a discharge, the apparent contract must be held to be a nullity.

Ignoring once again our view that the issue of the writ could be held to be a nullity, we have treated the alleged settlement as being in two parts. One is the fact that Mr. Bale appeared to admit liability an issue which has not been decided. The second is the alleged agreement as to the quantum of damages which we treat as a separate and distinct agreement.

On that basis the legal position is that no concluded agreement was reached by the parties and the learned Judge was correct although for different reasons in coming to the same conclusion.

We have also perused and considered the learned Judge's findings of fact.

There is a long line of authority to the effect that an Appellate Court will not set aside findings of fact by a trial Judge unless it can be shown on his evaluation of accepted facts that he has erred.

In the instant case his findings of fact were influenced by his assessments of the credibility of Mr. Bale and the Appellant.

Ms. Manuel set out extracts from Caldera v. Gray (1936) 1 All ER 540 at p.541 which bear repeating:-

> *"The appellant is exercising a right of appeal which is his by right and their Lordships recognise that they cannot, merely because the question is one of fact, and because it has been decided in one way by the learned trial judge, abdicate their duty to review his decision, and to reverse*

it, if they deem it to be wrong. None the less, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope. This is familiar law. It has received many illustrations - and, in particular, in the House of Lords - the most recent of these being the case of Powell and Wife v. Streatham Manor Nursing Home. In that case it was held that:

> *"Where the judge at the trial has come to a conclusion upon the question which of the Witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellant tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed."*

"Lord Wright, in the course of his speech at page 265 said:

> *"Two principles are beyond controversy. First, it is clear that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal "must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong." "*

We have not been persuaded or convinced by Mr. Patel that the learned Judge's decision was wrong, if we ignore the legal effect of the Appellant's bankruptcy.

The appeal is dismissed with costs to the Respondents.

T. O. Tuivaga

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(Sir Timoci Tuivaga
President, Fiji Court of Appeal

R. Kermode

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(Sir Ronald Kermode)
Justice of Appeal

Moti Tikaram

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(Sir Moti Tikaram)
Justice of Appeal