IN THE FIJI COURT OF APPEAL

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At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 10 OF 1991
(Civil Action No. 711 of 1986)

BETWEEN:

BA MEAT COMPANY — APPELLANT

-and-

IBRAHIM — RESPONDENT

Mr. G. P. Shankar for the Appellant
Mr. V. M. Mishra for the Respondent

Date of Hearing : 6th August, 1992
Date of Delivery of Judgment : 18th August, 1992

J U D G M E N T

An outline of the facts that give rise to this appeal will explain this Court's decision.

The Ba Meat Company (appellant) is an unincorporated voluntary association with 17 partners, registered as such and trading under that name. It appears that there were two cheques given to the plaintiff (respondent) which were dishonoured. The respondent brought proceedings against the firm; there does not seem to be any doubt that in Fiji a partnership may be sued under its firm name. Judgment in default of appearance was signed on 17th August 1985.

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The respondent then commenced bankruptcy proceedings against two of the partners. This is also a permissible process. Formal notice of demand for part of the judgment debt, $4,806.00, was made by notice dated 26th November, 1986. It was not complied with. A petition to appoint a receiver of the assets of the two persons was then issued, returnable before the Court on 24th February, 1987. It was certainly before the Court on 20th March 1987, when counsel for both sides appeared, and again on 10th April. On 8th May 1987 both counsel were present, but counsel for the judgment debtor, shown as Ba Meat Company, sought and was granted leave to withdraw "as he lacks instructions". A receiving order against the two partners was made on that day, and formally issued on 26th May, 1987.

On 19th June, 1987 two summons were filed. One was a summons headed "Summons Exparte". It sought an order "that the Receiving Order made against him be NOT published". The other was a summons seeking an order that the receiving order made on 8th May, 1987 be rescinded. Both applications appear to have been made on behalf of the "Debtor", shown as Ba Meat Company. They were accompanied by two affidavits, both sworn by the two partners. One asserted that they had fully paid the debt, that they had applied to the Court to rescind the order, and prayed for an order that the receiving order "be not published". The other affidavit asserted as follows:

> *"4. THAT we have made the necessary arrangements with the Solicitors for the Judgment Creditor for the payment of the Judgment Debt and they are satisfied*

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with the said arrangements and therefore have no objection for rescission of the Order made by this Honourable Court on the 8th day of May, 1997.

5. THAT on the grounds aforesaid I pray to this Honourable Court to rescind the Receiving Order made against us."

These were followed by another summons, filed on 24th June 1987. It sought an order "that publication or advertisement for Receiving Order be stayed, and that all further proceedings in this matter be stayed". All three summons were made returnable in Chambers.

They were dealt with, presumably all three, on 14th August 1987. On that day, the Judge's notes indicate that counsel for the judgment debtor sought an adjournment "for 1 wk to enable payment". The matter was adjourned for argument with the notes indicating that an application for rescission and supporting papers was to be served on the judgment creditor within 7 days. After 5 adjournments, a summons, returnable before a Judge in Chambers, was filed on 25th March 1988 making the following application:

"(a) The Receiving Order is irregular, and or nullity and ought not to have been made;

(b) That the said Receiving Order be set aside."

By that stage the Official Receiver stated that he had received $52,000.00 claims. On that day the matter was adjourned and thereafter on another 9 occasions. During the course of those

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adjournments, counsel for the judgment debtor, on 20th May 1988 stated that "some arrangements made for payment", and on 14th October 1988, that by 3rd December 1988 "Debtor could have loan from Westpac". On 2nd February 1989, the Official Receiver reported to the Court that he had received proofs of debt totalling $76,651.42, all of which remained unpaid.

Eventually the matter came on for hearing on 14th April 1989. In the meantime an affidavit had been filed by one of the partners of the appellant stating that "to the best of his knowledge, information and belief the debt claimed is not the debt of Ba Meat Company, a firm", and asking that the receiving order be rescinded. A further affidavit by another partner averred that certain payments had not been deducted from the amount claimed by the respondent. What either of these affidavits had to do with the matter is difficult to perceive.

Judgment was given on 18th January 1991. In the meantime very lengthy written submissions had been filed as required. The judgment was as follows:

> *"This is an application to have the Receiving Order made on 8th May 1987 be "set aside".*
>
> *No hard and fast rules can be established as to when the Court will rescind a receiving order on the ground that it should not have made. The Court's discretion will be exercised taking all relevant considerations into account. There is no doubt the existence of debt. I have given full considerations to the submissions filed and I am not prepared to rescind the order."*

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The application was dismissed.

The appellant appealed. We do not believe that it is necessary to set out the grounds of appeal.

In his submissions to this Court, the respondent immediately raised a preliminary point, namely that the order made in the High Court refusing the application was an interlocutory order. The application referred to appears to be that of 25th March 1988, seeing that was the application to set aside the receiving order, notwithstanding the expressions used by the Judge. Indeed the formal order drawn up and entered on 24th January 1991, from which this appeal is brought, only refers to the summons dated 25th March 1988. Whoever had the task of drawing up and settling the order seems to have been a bit dubious by reason of the wording of the judgment, because it says:

> *"IT IS THIS DAY ORDERED that the Summons dated 25th day of March, 1988 to rescind or set aside the Receiving Order be dismissed with costs."*

However it is clear that the appeal is from the order made on the summons to set aside the receiving order. We doubt if it matters anyway.

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The Court of Appeal Act, Cap 12 s.12 provides:

> *"12.-(1).....*
>
> *(2) No appeal shall lie-*
>
> *.....*
>
> *(f) without the leave of the judge or of the Court of Appeal from any interlocutory order or judgment made or given by a judge of the Supreme Court, except in the following cases, namely:-*
>
> *(i).....*
> *(ii) where an injunction or the appointment of a receiver is granted or refused;"*

The time for filing and serving a notice of appeal from an interlocutory order is 21 days (Court of Appeal Rules, r.16), although the Court has power to extend the time within which an application for leave to appeal may be made.

The order from which this appeal is brought was clearly an interlocutory order. It did not dispose of the proceedings or bring anything to a conclusion. It left the parties exactly where they were, namely with the proceedings on foot and a receiving order in force. The matter can be tested by considering the position had an order setting aside or rescinding the receiving order been made. In such event the proceedings were still on foot; the petition was still in force; another receiving order could have been sought, for example against the firm or all the partners, an amendment sought, and

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so on. So the order made by the Judge on 18th January 1991 was an interlocutory order. No appeal lies without leave; leave has never been sought or given.

It was not argued that the exception in s.12(2)(f)(ii), set out above, applies, but it is desirable to refer to it. The appeal here is not an appeal from an order granting the appointment of a receiver. The order appointing a receiver was made on 8th May, 1987. No appeal against the making of that order has ever been launched. Way down the track, some ten months later, on 25th March, 1988, an application to have the apppointment set aside (or rescinded) was made to the Judge in Chambers. That does not fall within the terms or meaning of the exception.

An application was made at the hearing before us to grant the necessary leave to appeal, and to extend the time accordingly. Apart from the mere lapse of time - over 4 years - and the fact that to grant the appeal would not bring the proceedings to an end anyway, would be quite unjust. Besides, the history as we have outlined it, indicates the complete lack of merit in the application. It is refused.

It is not necessary to deal with the other preliminary point raised as to why this appeal should fail *in limine*, namely that the receiving order was made against 2 persons by name, whereas the application to set aside that order was made by the

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firm, Ba Meat Company. That firm was the entity in respect of which the original judgment was signed; the bankruptcy petition was sought, and the receiving order made, in separate proceedings commenced against the two individuals. The point may have some merit.

The formal order is: appeal dismissed.

Should any of the parties wish to make submissions on the question of costs we will decide that after hearing them.

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Mr Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Sir Mari Kapi
Judge of Appeal