

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 32 OF 1991

(High Court Civil Action No. 34 of 1991)

BETWEEN

R.V. PATEL AND COMPANY (MERCHANTS) LIMITED
SUNRISE PACKAGING LIMITED
PRODOPAC LIMITED
DAWN MILLING COMPANY LIMITED
VINOD KUMAR RAMANLAL PATEL

APPELLANTS

-and-

BANK OF NEW ZEALAND
BRUCE LAURENCE AVENT
SAMUEL DUGALD HENDERSON
DHIRAJLAL HEMRAJ
DIRECTOR OF LANDS
ATTORNEY-GENERAL OF FIJI

RESPONDENTS

Mr. V. Maharaj for the Appellants

Mr. P. Cowey for the 1st, 2nd, 3rd and 4th Respondents

Date and Place of Hearing : 4th August, 1994, Suva
Date of Delivery of Judgment : 11th August, 1994

JUDGMENT OF THE COURT

The Appellants commenced an action against the Respondents for declarations and other remedies arising out of the appointment of receivers of the First, Second, Third and Fourth Appellants. Following the filing of the Statement of Claim, and before a Statement of Defence had been filed, the Appellants issued an application for an interlocutory injunction to restrain certain actions of the receivers. There was an affidavit filed in support of the application and several affidavits filed in opposition to and in support of the application.

The application was heard by Saunders J. who considered that the only matter requiring determination was whether the receivers had been validly appointed. He therefore made an order for the trial of the whole matter upon the affidavit evidence. As there had been no defence filed to the Statement of Claim that order ought not to have been made, but for the reasons we are about to give that fact is no longer material.

Saunders J. held that the receivers had been validly appointed and that accordingly the Appellants' action failed. Judgment was given for all Respondents.

From that decision the Appellants appealed and the matter came before this Court (although differently constituted from the present Court) on 10 November 1992. The Court treated the appeal as from an interlocutory judgment and held that the receivers had been validly appointed. As it appeared that this disposed of the whole matter the Court, in its Judgment at p.13, said :

"While for the reasons which we have given we believe that in this appeal on the interlocutory aspect of the proceedings the appeal could be dismissed, we also believe, as we said earlier, that what we have said may well furnish reasons for finally disposing of all the matters under appeal. In order to enable the parties to consider what should now be done, we have already stood both summons and the proceedings No. 34 of 1991 over to a date to be fixed."

On behalf of the Appellants it is now argued that, notwithstanding the Judgment previously given, there remain matters in the original action which ought to be determined and that accordingly it should be sent back to the High Court for completion of the hearing and so that amended pleadings may be filed.

Saunders J. noted in his judgment that it was conceded by Dr. Sahu Khan for the plaintiffs that the success of the action depended on the plaintiffs establishing that the appointment of the receivers and managers was not lawful. It is clear from the transcript of evidence that this concession was made. It is therefore a matter of surprise that some attempt should now be made to resile from that concession. However, we deal briefly with the argument which has been presented.

The particular issues which the Appellants say are outstanding are expressed in this way :

1. *ON Re-Hearing the Court will hear full evidence on issues relating to estoppel and to determine whether any monies were owing to the Bank of New Zealand under the debenture.*
2. *THE issue as to the legality or otherwise of the transfer of mortgages and or debentures which require the consent of the Director of Land Act which requires that the consent must be "first had and obtained"*

3. *THE* issue as to whether in any event the Mortgagees and or the Debenture Holders acted properly in appointing the receivers. This is particularly when prior to the Receivership the Present Receivers had given a Financial report to the Bank of New Zealand and or ANZ recommending the appointment of Receivers. This is a serious matter that will be necessary for investigation at full Hearing.

4. *THE* actions of the Receivers will be subject to evidence and proper presentation of evidence.

We deal with these in turn :

1. Having regard to the fact that the receivers were validly appointed, we are unable to see how matters of estoppel or the amount which may be owing can arise. Estoppel is generally referred to as a shield rather than a sword and is not to be expected as forming an allegation in a Statement of Claim.

2. The legality of the transfer of mortgages and debentures has already been decided by the Judgment previously given, and in particular by the Decree referred to in that Judgment. The question of the consent of the Director of Lands does not arise.

3. Again, the issue of the appointment of the receivers has been determined and may not now be challenged.

4. The actions of the receivers are not the subject of any allegation in the Statement of Claim beyond the general allegation that they were acting unlawfully because their appointment was invalid. That appointment having now been held to have been valid there remains nothing further in the Statement of Claim for determination.

We are informed that, following the previous Judgment, the receivers have entered upon their task and have filed their accounts pursuant to Sec. 354 of the Companies Act. If the Appellants consider that those accounts are defective, or that the receivers were at fault in the carrying out of their duties, then no doubt the Appellants, in a fresh action, could pursue such remedies as they consider they are entitled to. We can see no basis, however, upon which they ought to be permitted to introduce new causes of action into the original proceedings. Those proceedings are now spent. The Court ought not to have been troubled by this further hearing.

The appeal must accordingly be dismissed with costs to the Respondents. Those costs will, of course, include both Judgments in this matter.

Moti Tikaram

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(Sir Moti Tikaram)
President Fiji Court of Appeal

Peter Quilliam

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(Sir Peter Quilliam)
Judge of Appeal

Peter Hillyer

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(Mr Justice Peter Hillyer)
Judge of Appeal