IN THE COURT OF APPEAL

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 20 of 2012
(High Court HBJ 3 of 2011)

BETWEEN : GENERAL MACHINERY HIRE LIMITED AND OTHERS

Appellants

AND : CHIEF EXECUTIVE OFFICER OF FIJI REVENUE & CUSTOMS AUTHORITY

Respondent

Coram : Calanchini P
Basnayake JA
Amaratunga JA

Counsel : Mr. B C Patel for the Appellants
Mr. Hanif Faizal for the Respondent

Date of Hearing : 25 & 27 November 2013

Date of Judgment : 5 March 2014

J U D G M E N T

Calanchini P

I agree with the reasons outlined by Amaratunga JA for remitting the matter to the High Court.

Basnayake JA

I too agree as to the reason given by Amaratunga JA for remitting the case to High Court.

Amaratunga JA

[1] On 29 November 2013 the Court made orders in this appeal and indicated that written reasons would be delivered at a later date. This judgment now sets out the reasons for the orders made.

[2] The Respondent conducted a Tax Audit of the Appellants and pursuant to that it was discovered that certain Tax liabilities were outstanding. This resulted in assessments being issued by the Respondent and finally the Appellant and Respondent entered into a Deed of Settlement.

[3] According to the Appellants the said Deed of Settlement was varied by the Respondent upon the request of the Appellants to extend the time for full settlement of the sum stated in the Deed of Settlement. In the court below this fact was found in favour of the Appellants, though the application for judicial review was refused. The Respondent denied the alleged variation and also claimed that said the Deed of Settlement was null and void.

[4] The Appellants applied for judicial review seeking:

(a) A Declaration that the Deed of Settlement dated 9 July 2010 as varied was valid and binding on the Respondent;

(b) An Order of Certiorari to quash the three decisions of the Respondent, namely, the decision dated 25 February 2011 taken to terminate the settlement agreement of 9 July 2010; the decision dated 18 May 2011 taken to garnishee bank accounts of the Appellants and the decision dated 24 May 2011 taken to use Departure Prohibition Orders (DPOs) against 2nd, 3rd & 4th Appellants;

(c) Orders or declarations that the Garnishees and the DPOs were unlawful;

(d) Damages for unlawful Garnishees, DPOs and bad faith;

(e) An order for refund of the overpayment of $100,186.57 and

(f) Interest and Costs

[5] On 5 April 2012 the learned judge in the court below dismissed the application for judicial review and the principal grounds of dismissal were:

(a) The Deed of Settlement dated 9 July 2010 although lawfully entered into by the Respondent was not binding on him due to *principles 9 & 10* stated in ***Punjas case*** (unreported ABU0099 of 2005S decided 10 November 2006) and as such the Respondent was free to resile from his position granting the Appellants extension of time to 24 February 2011.

(b) The Orders in respect of Certiorari, Garnishees and DPOs were moot;

(c) Consequently, damages should be claimed in separate proceedings.

[6] The Appellant filed an appeal against that decision on the following grounds:

> *"1. In view of sections 25 and 48 of the Tax Administration Decree 2009 the learned judge erred in law in relying upon* ***Punjas v Commissioner of Inland Revenue [2006] FJCA 66*** *to hold:*
>
> *(i) That the Deed of Settlement dated 9 July 2010 although validly executed was not binding on the Respondent; and*
>
> *(ii) That the variation made on 25 November 2010 extending the time to pay until further review on 24 February 2011 was not binding on the Respondent because the Respondent was free to resile from a position he had previously taken.*
>
> *2. The learned Judge overlooked to consider the undisputed evidence about the crucial meeting of 10 March 2011 between the Appellants and the Respondent when the Respondent asked the Appellants to continue with the monthly payment of $50,000 in terms of the arrangement made with Mr. Nata on 25 November 2010.*
>
> *3. The learned judge was wrong in law to hold that because the Respondent had withdrawn the DPOs before the hearing the issues concerning the Respondent's decision dated 24 May 2011 (to issue DPO) as well as the Respondent's decision dated 18 May 2011 (to issue Garnishee) was moot.*
>
> *4. The learned judge erred in law in not determining the Appellants claims for damages pleaded under Order 53 Rule 7(1) of the High Court Rules 1988.*

> 5. *The learned judge was wrong in law and in fact in refusing to Order the Respondent to pay to the Appellants the agreed overpayment of $100, 187.57 and interest."*

[7] At the outset it is evident that many issues before this court as well as the court below related to the circumstances of the said Deed of Settlement entered into by the parties and whether it was varied by the Respondent and if so, whether he was bound by the alleged variation.

[8] Considering the disputed facts before the court below as well as the application of the Respondent to adduce further evidence in this court, the parties indicated the desire to remit the matter to High Court in terms of the Oder 53 rule 9 (5) of the High Court Rules 1988 for the determination by way of writ of summons. Apart from the application seeking to adduce further evidence, there were many disputed facts before the High Court which this court also could not determine on the basis of affidavit material in the circumstances of the case.

[9] The learned counsel for the Respondent indicated that though he does not have specific instructions on the remittance of the matter to the court below, he as an officer of the court would agree that the issues before this court should proceed by way of writ of summons. Counsel for the Appellant expressed his desire for this court to deal with appeal ground 1 before remittance of the matter to the Court below. I do not think that this Court can disassociate the disputed facts in order to make any determination as to Ground of Appeal No 1(ii). The said issue deals with the Deed of Settlement and Section 25 of the Tax Administration Decree 2009.

[10] According to the Appellant the said Deed of Settlement was entered into pursuant to Section 25 of the Tax Administration Decree 2009.

Sections 25 of the Tax Administration Decree 2009 states as follow;

"<u>Extension of Time to Pay Tax</u>

25.-

(1) ***A taxpayer may apply, in writing, to the CEO for an extension of time to pay tax due under a tax law****.*

(2) If an application has been made under this section, the CEO may, having regard to the circumstances of the case-

(a) grant the taxpayer an extension of time for payment of the tax due; ***or***

(b) require the taxpayer to ***pay the tax due in such installments*** *as the CEO may determine,*

and the CEO must ***serve the taxpayer with written notice of the decision****.*

(3) If a taxpayer permitted to pay tax by installments defaults in the payment of an installment, the whole balance of the tax outstanding, at the time of default, is immediately payable. (emphasis added)

[11] The Appellants do not rely on statutory provision for the alleged variation of Deed of Settlement hence the 'variation' is based on the said contract (Deed of Settlement) and facts surrounding the circumstances and judicial review should necessarily fail, as the alleged variation was outside the realms of public law.

[12] The statutory provision quoted above is clear enough that any decision under the said provision needs to be served on the taxpayer with written notice of the decision allowing the taxpayer to pay the tax due in such installments. If so any variation to such a decision needs to be in writing and also served to the taxpayer. To hold otherwise would create a nonsensical situation, where after the initial decision, if the parties are allowed to vary such a written decision by any other manner. I could not agree with the finding of learned trial judge on this issue without the benefit of considering such evidence. As such the application for judicial review fails on the evidence before us. These are issues that need to be considered after proper discovery procedure, and after cross-examination of the relevant witnesses. This court cannot disassociate itself from these facts to determine the Ground 1(ii) and even if we were to do so it would be an

academic exercise and perhaps amounting to pre-judgment of the issues before court below. Since this matter is remitted to the court below to determine by way of writ of summons, this court refrains from such an academic exercise.

[13] In the circumstances the said request to consider Ground 1 in isolation is refused and the orders of the court below are set aside and the matter is remitted to court below in terms of Order 53 rule 9(5) of the High Court Rules of 1988. There should be no orders as to costs.

[14] **The Orders of the Court were:**

1. *Application to adduce fresh evidence is dismissed.*
2. *Appeal allowed and the orders made by the High Court are set aside.*
3. *Proceedings remitted to the High Court for trial within Order 53 Rule 9(5) of the High Court Rules (with pleadings).*
4. *The Appellants are required to file a Statement of Claim by 3 January 2014.*
5. *Stay in relation to penalties is granted until the completion of proceedings in the High Court. The tax liability is not stayed.*
6. *Each party to pay their own costs.*
7. *Liberty to apply.*

……………………………………………

Hon. Mr. Justice W. Calanchini
PRESIDENT COURT OF APPEAL

……………………………………………

Hon. Mr. Justice E. Basnayake

JUSTICE OF APPEAL

……………………………………………

Hon. Mr. Justice G. Amaratunga

JUSTICE OF APPEAL