THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 105 of 2017

(Suva HBA 12 of 2016)

BETWEEN	:	**1. DIWAKAR LAL**
		2. ASHIKA REKHA
		Appellants
AND	:	**1. SANJAY SINGH VERMA**
		2. BABITA KUMAR VERMA
		Respondents
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Ms. N. Raikaci for the 1st and 2nd Appellants**
	:	**Mr. S. Nandan on 27th January, 2021 and on 18th February, the 1st Respondent in person.**
	:	**Mr. K. Singh for the 2nd Respondent**
Dates of Hearing	:	**27th January and 18th February, 2021**
Date of Ruling	:	**5th March, 2021**

RULING

Prefatory reflections on the background to this matter

[1] The present application before me is one seeking enlargement of time to serve Notice (and Grounds) of Appeal against the High Court Judgment dated 19th July, 2017.

[2] By that judgment the High Court allowed the appeal against the order of the learned Magistrate holding that "the learned Magistrate erred in determining a question of law when he reached the conclusion that 'the Court does not have the jurisdiction to enforce an illegal contract on finding that, the Appellant was an unlicensed money lender and particularly that it is common knowledge that (he) lends money to members of the public', was unwarranted." (vide: paragraph 18 of the High Court Judgment).

[3] That determination by the Magistrate's Court which the High Court considered was (in allowing the Appeal before it) (in effect) making an order against the present Appellants.

[4] To place the issues in perspective it is necessary first to identify the capacities of the opposing parties and the genesis of the litigation that had ensued.

[5] The litigation was initiated in the Small Claims Tribunal (SCT) by the present Respondents before this Court as claimants (I might say, as joint claimants) but in two separately filed actions. The SCT having held with them, the present Appellants appealed against the SCT decision. The Magistrate's Court having reversed the SCT decision, the High Court in its judgment restored the SCT decision.

The Two Principal Issues that Arose for Consideration before this Court at the Hearing

The First Issue – Could two appeals be consolidated and heard?

[6] The Respondents raising this issue (in the nature of a preliminary objection to the present application) submitted that there is no basis in terms of the provisions of the Court of Appeal Act and the Rules made thereunder to consolidate two appeals that presently have been placed before this Court.

[7] On that issue, I took note of the fact that neither before the SCT nor before the Magistrate's Court and indeed before the High Court had that been an issue *viz:*

Consolidating two claims (before the SCT), appeals against the decisions of the said claims by the one party as against the other in the Magistrate's Court and subsequently in the High Court as well.

[8] Consequently, raising the said issue of consolidating two appeals for the first time in this Court on the basis that there is no provisions to do so is an argument that I find myself unable to subscribe to and agree with.

[9] I do find that, there is no specific provision contained in the Court of Appeal Act ("the Act") and Rules providing for consolidation of appeals. However, without having to go to "any concept of inherent jurisdiction" to do that, I felt I could invoke the provisions of Section 20 (1) (k) of "the Act" to assume jurisdiction on that aspect in which regard I also condone the Appellants' contention that, joinder by consolidation of the two appeals is desirable not only to save time but also costs to the Court as well as to the parties.

[10] Accordingly, I reject the Respondents' contention, raised as it were in the nature of a preliminary objection to the hearing of the application before me.

[11] Consequently, I lay down as a proposition that, two appeals, having a common cause, could be consolidated and heard and determined, which I lay down as a proposition within the framework of the jurisdiction vested in a Single Judge under Section 20 (1) (k) of "the Act."

What is not prohibited procedurally must be permitted

[12] Relying as I do on the provisions of Section 20 (1) (k) I also had regard to the aforesaid maxim which I found not to offend the terms of Rules 6 and 7 of the Court of Appeal Act.

The Second Issue – Should the Appellants' application for enlargement of time be allowed?

In that regard what have the Appellants contended both in their written submissions and oral submissions urged at the hearing before this Court?

[13] I summarise the Appellants' arguments in their quest in saying (in effect) that the judgment of the High Court may not bear scrutiny.

[14] The Appellants (in essence) contended that:-

> *"The Respondents' (Claimants) before the (SCT) were "money lenders" within the Money Lending Ordinance of 1991 and not being registered "as licensed money lenders", "the agreement" they had entered into with the Respondents, the monetary limit also (even surmising for argument sake) going beyond the said limit therefore (the agreement) "was illegal and therefore unenforceable."*

[15] On that crucial contention, I looked at the affidavits filed on behalf of parties, the respective written submissions followed by the oral submissions made by respective counsel all of which, having given my mind to, I felt no constraint in reaching the following conclusions *viz:*

(i) That, the Appellants having entered into "the said agreement" having borrowed money from the Respondents, to invoke the provisions of the Money Lending Ordinance (MLO) (in my view) was mala fide conduct.

(ii) That, if someone lends money to another, *per se* such a person would not become a professional money lender.

(iii) That, in such an event, "money lent" by a party (as in this case, by the Respondents) the law cannot be barren to regard such a transaction "as being illegal (as coming within the MLA provisions) and to be regarded as unenforceable, with the resulting

effect that, the person/persons who had lent money are to be left without any remedy to recover that money.

(iv) That, being the effect of the Magistrate's Court view, which His Lordship, in the exercise of his appellate jurisdiction, had exercised and disagreed with, in effect condoning the SCT's initial view.

[16] Section 2 of the Money Lenders Act (Cap. 234) (MLA) defines a money lender.

"*Section 2:*

"moneylender" includes every person whose business is that of money lending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business a principal or as an agent but does not include -

(a) anybody corporate incorporated or empowered by any written law or Imperial enactment to lend money in accordance with such law or enactment; or
(Substituted by 13 of 1997, s. 13.)

(b) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money at a rate of interest not exceeding ten per cent per annum; or

(c) any pawnbroker licensed under the provisions of the Second Hand Dealers Act; or
(Cap. 238)

(d) anybody corporate for the time being exempted by the Minister from the provisions of this Act;
(Amended by 48 of 1940, s. 2.)"

[17] There is no evidence bringing the Respondents under any of the categories envisaged therein.

[18] It is only such categories who are required to register as licensed money lenders. If any of the said categories do lend money without a license, the repayment of the money so lent shall become a contract unenforceable in law. This is the effect of Section 15 of the MLA.

[19] Consequently, if a person does not fall within the definition of "moneylender" then Section 15 would have no application.

[20] I also had regard to the English Case of **Edglow v. MacElwee** (cited by the 1st Respondent) as to who could be regarded as a moneylender [1918] 1KB205.

[21] An examination of the agreement entered into between the parties in the light of the definitions of moneylender contained in the MLA and as explained in **Edgeblow v. MacElwee** (supra) read with the terms of Section 29 of the MLA leaves me with no doubt that "the Agreement" was a legal and enforceable agreement.

Determination

[22] In the result, I determine that:

(a) while the preliminary objection raised on behalf the Respondents shall stand rejected;
(b) for the reasons adduced above in this Ruling, the application of the Appellants to seek enlargement of time to appeal the judgment of the High Court dated 19th July, 2017 is refused and/or dismissed.
(c) I could not see any prospect of success in the appeal if leave for extension of time to appeal were to be granted within the ratio of the decision in **NLTB v. Khan** [2013] FJSC1.

[23] I view of my determination at paragraph 22 (b) above, I did not think it was necessary to consider the arguments of the Respondents on:

(i) the alleged non-service of the Notice of Appeal on the 1st Respondent;

(ii) the alleged non –service of the application for security for costs on the 1st Respondent.

Orders of Court

1. The objection in the nature of a preliminary objection as referred to in paragraph 22 (a) is rejected.
2. The application for extension of time to appeal the judgment of the High Court dated 19th July, 2017 is refused and/or dismissed.
3. Having given consideration to Order 1 as against Order 2 above, in the exercise of this Court's discretion, on a balance, I make order that, the Appellants' pay to the Respondents a sum of $1,500/= within 21 days of notice of this Ruling.
4. The Registrar is directed to take this matter off the Cause list.

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Almeida Guneratne

JUSTICE OF APPEAL