

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 103 of 2020
(Lautoka Civil Action No. HBC 014 of 2015)

BETWEEN : **SAMUEL K RAM**

Appellant

AND : **1. NAINASO I RA HOLDINGS LTD**
2. MATAQALI NAINASO HOLDINGS LTD
3. YASAWA PROJECTS CO. LTD
4. CAPITAL GROUP INVESTMENTS (FIJI) LTB
5. ANWAR KHAN
6. KELEVINABA
7. PATIMIO BACAIVALU
8. WAISEA RATUBUSA
9. RAJNEEL KARAN SINGH

Respondents

Coram : **Almeida Guneratne, JA**

Counsel : **Mr. S. Krishna for the Appellant**
: **Mr. A. Rayawa for the 1st Respondent**
2nd to 9th Respondents did not participate at the hearing

Dates of Hearing : **15th March 2021.**

Date of Ruling : **1st April, 2021**

RULING

[1] The “Applicant (Appellant)” (2nd defendant in the High Court) in this application seeks leave to appeal the interlocutory judgment dated 4th March, 2020. As requisite in law the

Applicant having sought leave to appeal from the High Court, the learned High Court Judge refused the same by His Lordship's Ruling dated 22nd October 2020. Consequently, what is before me is a renewed application for leave to appeal the said interlocutory Judgment of 4th March, 2020.

- [2] By that Judgment the High Court dismissed the 2nd Respondent's (the present applicant's) application for discovery and seeking an amendment of the 1st Respondent's (the plaintiff in the High Court) statement of Claim.

The gist of the 1st Respondent's Statement of Claim

- [3] The Plaintiff had pleaded that:

- (i) The 1st to 10th defendants (in the High Court) had conspired and deprived the plaintiff of 3 Acres of the extent of the leasehold property which it had obtained from the 10th defendant on which the 4th Defendant had conducted unlawful development work which had led to the 10th Defendant demanding \$160,000 for causing permanent damage.
- (ii) Some time prior to the said demand, a petition had been filed by a non-existent company against the plaintiff to wind it up which non-existent company was incorporated only subsequently by the 1st and 2nd defendants on the instructions of the 7th, 8th and 9th defendants through obtaining false documents containing forged signatures.
- (iii) The said initially issued winding-up order being set aside in as much as it had been obtained irregularly (the 10th defendant having agreed not to seize and re-enter the said 3 acres until the Court determines the plaintiff's application to set it aside) nevertheless re-entered the said extent of land.
- (iv) (Bar the details of some factual content – the parenthetical is mine- the plaintiff in its statement of claim) had pleaded and sought):
 - (a) Particulars of fraud inducing the issue of the irregular winding-up order (paragraph 38 of the statement)

- (b) Particulars of fraud via forgery and deception (paragraph 39 of the statement)
- (c) Particulars of fraud, furtherance of unlawful enterprise (paragraph 40 of the statement)
- (d) Particulars of defamation (paragraph 41 of the statement) and;
- (e) Particulars of damages (paragraph 42 and 44 of the statement of claim) including damages for libel, slander and defamation (for) humiliation and loss of standing in the community and substantial damage to reputation and earning capacity.

[4] As I was able to gather from the proceedings on Record the gravamen of the Applicant's contention appeared to have been that, given the nature of the allegations contained in the plaintiff's said statement of claim, the said allegations could not have been met on account of the paucity of the particulars pleaded (as recounted above at paragraph [3]), in consequence of which the Applicants' had sought discovery.

The Decision of the High Court in response thereto

[5] The learned High Court Judge reasoned and concluded thus:-

“[21] The plaintiff's action arises out of the winding-up order (albeit it was subsequently set aside by the court on the basis that it was irregularly obtained in the absence of NiRHL's absence) which was obtained against it by the third defendant (MNHL) before its (third defendant) incorporation. In the winding-up proceedings, the first defendant had filed an affidavit in support on behalf of the third defendant before its incorporation. The plaintiff alleged among other things that they lost their \$20m tourism lease as a result to the winding-up application.

[22] The question then arises whether a winding-up proceeding can be had against a company by another company which is yet to be incorporated. This issue appears to be a legal issue to be decided at the trial. If a legal issue can be raised upon the facts pleaded. In my opinion, the statement of claim at least raises the legal issues whether the third defendant when it was yet to be incorporated could have brought a winding-up proceedings to

wind up the plaintiff's company, and whether the presentation of the winding-up petition amounts to a company being in liquidation.

[23] I find that the following issues are triable issues which need examination and cross-examination:

- 1. Whether the plaintiff lost their \$20m tourism lease as a result of the winding-up application.*
- 2. Whether the plaintiff had a lease in its name.*
- 3. Whether presentation of the petition itself could amount to fraud or misrepresentation leading to the purported re-entry.*

Conclusion

[24] For these reasons, I find that the statement of claim as pleaded discloses a reasonable cause of action against the first defendant and that there are sufficient particulars in the statement of claim as regards to the allegation it makes. I find also that the claim is not frivolous, vexatious, and scandalous or is not otherwise an abuse of process of the court.

[25] The alternative claim that in the event that the claim is not struck out, orders are sought for discovery of the documents (in relation to: the settlement of the claim as between the plaintiff and iTaukei Land Trust Board and the purported cancellation of the lease by the iTLTB in the name of the plaintiff) was not pressed at the hearing. I would, therefore, make no order on the alternative application.

[26] I would make no order as to costs”.

The Contentions of the Applicant's counsel in assailing the Impugned decision of the High Court (in summary)

[6] On the basis of the written submissions and the oral submissions made (in the light of the Supporting affidavit and authorities cited) for the applicant, Mr. Krishna strenuously, argued that:-

“there being allegations of fraud and defamation, there was paucity in that regard in the plaintiff's statement of claim in which respect he submitted that the learned High Court Judge's reasoning at paragraph [15] of the impugned Judgment cannot bear scrutiny.”

Paragraph [15] of the High Court Judgment

“15. I find that the statement of claim as pleaded discloses a reasonable cause of action against the second defendant and that there are sufficient particulars in the statement of claim as regards to the allegation it makes namely, fraud, defamation and damages”.

[7] Mr. Krishna made reference to Ground 2 of his grounds of appeal and page 7 of his written submissions (paragraph 11 thereof) in seeking to assail that finding of the High Court.

[8] In that regard I looked at the reasoning of the High Court:

“Paragraph [16]. The second defendant cannot tell the plaintiff as to how they should submit their statement of claim. It is their claim and they should decide what to plead in their claim. In my opinion, the second defendant is not entitled to seek an order that the plaintiff must amend its statement of claim. The defendant should defend the claim which is against him”.

[9] In so far as the Applicants’ exercise seeking “discovery” is concerned, which is inextricably interwoven with the issue of alleged insufficiency of pleadings in the plaintiff’s Statement of Claim.(vide: Ground 3 of the Appellant’s grounds of appeal), I gave my mind to the relevant statutory provisions impacting thereon.

[10] Order 18 Rule 18 of the High Court Rules states as follows:-

“18. (1) The Court may at any stage of the proceedings order to be struck out or amend any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

- (a) *It disclosed no reasonable cause of action or defence, as the case may be; or*
- (b) *It is scandalous, frivolous or vexatious; or*
- (c) *It may prejudice, embarrass or delay the fair trial of the action; or*
- (d) *It is otherwise an abuse of the process of the court;*
- and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be;*
- (2) *No evidence shall be admissible on an application under paragraph (1) (a).*
- (3) *This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading”.*

Another issue to be addressed in this application

[11] That is, the issue raised by Mr. Krishna that, the 10th Defendant (the ITLTB), apparently having resolved whatever issues it might have had with the plaintiff, had been released from the proceedings in the High Court, notwithstanding the fact that, the plaintiff’s allegations against 1st and 2nd Defendants were very much levelled jointly against the 10th Respondent as well. In what circumstances and at what stage had the 10th Defendant been released as a party? I could not find an answer to that.

[12] In that background of matters I looked at Mr. Krishna’s written submissions which he, in his oral submissions re-iterated thus:

[13] “3. *The Appellant made an application for discovery and for the First Respondent to amend their statement of claim providing the basis on which their claim is made to ensure a fair trial. The Appellant seeks to be informed by material facts and documents of the following:-*

3.1 How the act of presenting a winding up petition on behalf of an unincorporated company led to the loss of the purported tourism lease?

3.2 How the First Respondent determines the value of the lease at \$20 Million?

3.3 *When and how was the lease cancelled?*

3.4 *How and when did the Appellant purportedly collude with the other defendants?*

3.5 *What is the claim against the Appellant after the matter settled with TLTB?*

4. *On the 4th March 2020, the High Court dismissed the Second Defendant's Application holding that:-*

4.1 *Appellate cannot tell the first respondent how to plead their statement of claim (Paragraph 16 of decision).*

4.2 *The settlement between the TLTB and the first Respondent "may" have been on a without prejudice basis, and it had nothing to do with the appellant (Paragraph 13).*

4.3 *There were no letters requesting for further particulars and a full and comprehensive defence to the claim was filed and therefore the court can refuse to order particulars (Paragraph 12 of decision).*

[14] Going beyond that, Mr. Krishna, referring as he did to what the learned High Court Judge said at paragraphs 15 and 17 of his Ruling, when he had said that "sufficient particulars" have been given in regard to the requirement of a pleading on defamation, Mr. Krishna relying on Dr. Ganesh Chand's Case (CBV, [2011], 8th April 2011 contended that, on a pleading on defamation, it must set out verbatim precise words (Re: Ground 1 of Appeal urged)

[15] Next, Mr. Krishna addressed on his Ground 2 of Appeal in relation to his client's application to seek an Amendment of the plaintiff's statement of claim for which he relied on a consistent cursus curiae of the High Court (vide: **Glenmore Ltd v. Global Premium Services Ltd** [2011] FJHC 30; **John Thomas Low & Anor v. NBF, ASB** [2000] HBC 66/005, 11th April, 2000; **Official Receiver v. Tompkins** [1994] FJHC 187; **Dee Cee's Bus Services Ltd v. Credit Corporation (Fiji) Ltd** [2004] FJHC 316.

[16] On the aspect of the allegation of “fraud” learned Counsel stressed on the precedents in **Assets Company Limited v. Mere Roihi** [1905] AC 176, **Kumar v. Wati** [2017] FJCA 126.

[17] If I were to pause at this point, what I could gather from the thinking reflected in the said authorities is that a Court could order amendment of a statement of claim of a plaintiff as a principle of law which appears to be at variance with what the learned Judge in the instant case held when he held that, a defendant cannot ask a plaintiff to amend a statement of claim.

[18] In saying that, I find that, the question arises as to whether the learned Judge had adequately addressed his mind to the Appellant’s application as to the “discovery issue,” connected as it was to his lament that, the plaintiff’s statement of claim needed to be amended for him to meet the averments contained therein to ensure a fair trial.

The 1st Respondent’s Arguments

[19] Learned Counsel for the Respondents relied principally on the decision of the High court supporting the same *in toto* which he supported in his written submissions tendered to Court at the hearing before me relying on the decision in **Reserve Bank of Fiji v. Gallagher** [2006] FJCA.

Assessment of the issues based on the rival contentions

[20] Having given my mind to the rival contentions against the impugned decision of the High Court, I was driven to the view that the Appellant’s exercise to seek leave to appeal in regards to:

- (a) The matter of insufficiency of pleadings; and
- (b) The matter of seeking discovery, had sufficient merit.

[21] At this point I felt it would be necessary to take a look at the scope and content of the principles relating to discovery and interrogatories.

The Key concepts on the Discovery Process

[22] To begin with:-

It is where a party seeks to know the other party's facts and evidence, the three primary objectives being:-

- (a) to understand the other party's case
- (b) to obtain the other party's evidence
- (c) to obtain concessions and admissions.

[23] Thus, if one were to set down the parameters in the discovery process, it is to be noted that:-

- (a) Pleadings only contain allegations about the claim a plaintiff puts forward;
- (b) They do not catalogue the evidence.
- (c) Consequently, when a defendant seeks discovery it is to gather admissions that may be helpful to his case, the primary objective being to narrow the disputed issues.

How do those principles relating to discovery and interrogatories fit into the instant case?

[24] Here is a case, where the Applicant (Appellant) has sought discovery (through in the nature of interrogatories) by seeking an order for Amendment of the plaintiff's statement of claim.

[25] Does Order 24 and the attendant Rules of the High Court Act cater for such a situation? (vis a vis, Order 18 Rule 18?)

[26] In the facts of the instant case, should the matters contended for by the Applicant have been left to be determined at the trial? Without, an order for amendment of the plaintiff's statement of claim and an order for "discovery" which had been sought?

Concluding Reflections on the impugned decision of the High Court

[27] In an application of the nature that is before me, it is not for me as a Single Judge, to arrive at a conclusion that there is an error in the decision of the High Court but rather to see whether there are prospects of success should leave to appeal be granted.

[28] On the averments in the plaintiff's statement of claim as they stood, I cannot say that, the Court erred when it held that it did disclosed a reasonable cause of action in the Court's application of the terms of Order 18 Rule 18 of the High Court.

[29] Prima facie, 'yes', but, the Super-imposition that needed to be placed and considered was to ascertain whether, from the Applicant's perspective, a fair trial could have been ensured for the reasons adduced on behalf of the Applicant in the absence of an Amendment to the said statement of claim.

[30] As a broad proposition I do agree with the High Court when it held that, a defendant cannot tell a plaintiff that he should amend its statement of claim.

[31] But, the concern of the defendant in question being that, given the paucity of the allegations contained in the plaintiff's statement of claim as to "fraud" "defamation" etc. the defendant would not be in a position to, in the absence of a response to the discovery the defendant had sought, to defend the action.

[32] I found merit in Mr. Krishna's submissions in that regard on the criterion of "prospects of success" should leave to appeal be granted.

[33] Viewing the matter in that perspective, I am inclined to the view that there is a basis for the granting of leave so that the Full Court would be in a position to put the law/legal principles in order as regards circumstances when a party defendant:

Could seek an amendment of a plaintiff's statement of claim through the process of discovery and interrogatories.

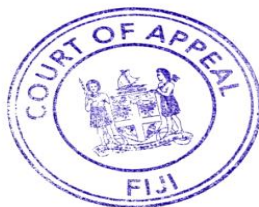
[34] However, I have one reservation on the matter taking it in its full conspectus and that is, the circumstances in which the 10th Defendant (the ILTB) had come to be released from the High Court proceedings given the additional fact that, the said 10th Defendant has not been sought to be added as a Respondent to the Applicant's present application.

[35] Sufficient material not being on Record for me to comment thereon, that is another issue I feel the Full Court (in the exercise of its powers in appeal) may need to give consideration to.

[36] Accordingly, I proceed to make my orders as follows:

Orders of Court

1. Leave to appeal the High Court order of 4th March, 2020 is allowed.
2. The Applicant (Appellant) may advise himself to take steps to prosecute the Appeal in accordance with the law.
3. I make no order as to costs in this application and costs shall be in the final cause and outcome of the Appeal.
4. The Registrar is directed to mention this matter on a call over date to fix this Appeal for Hearing before the Full Court and make appropriate orders.



Almeida Guneratne

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Almeida Guneratne
JUSTICE OF APPEAL