

IN THE HIGH COURT OF FIJI AT LAUTOKA
[CIVIL JURISDICTION]

CIVIL ACTION NO : HBC 89 OF 2011

IN THE MATTER of the Foreign Judgment
(Reciprocal Enforcement) Act Cap.40, Laws
of Fiji.

AND IN THE MATTER of a Judgment of
Local Court of New South Wales obtained in
Case No. 11577 of 2008 by **RAYS HAULAGE
PTY LTD** as Plaintiff and **SAHEED
KHAN** trading as **KHAN'S HAULAGE** as
Defendant dated 18th day of March 2010.

BETWEEN : **RAYS HAULAGE PTY LIMITED** **PLAINTIFF**
AND : **SAHEED KHAN** trading as Khan's Haulage. **DEFENDANT**
AND : **MS FARIYAL ZAHIRA BEGUM** **INTERPLEADER**

Counsel

Mr S F Koya with Ms Tabuakuro for Plaintiff

Mr K Vuataki for the Defendant

Mr K Qoro for Interpleader

Date of Hearing : 18 April 2013
Date of written-submissions : 26 April 2013 (By plaintiff)
Date of Judgment : 30 April 2013

J U D G M E N T

[On Setting-aside of the Registration of Judgment of the Local Court of New South Wales]

1. The plaintiff-Rays Haulage Pty Ltd., by its *ex-parte* Notice of Motion dated 07 June 2011, made an application under the Foreign Judgment [Reciprocal Enforcement] Act Cap. 40, Laws of Fiji, to register a foreign judgment in Fiji.

2. The Motion was accompanied by an affidavit dated 06 June 2011 from Mr SarifulRahman of 17, Ahmet Circuit, Oakhurst, New South Wales 2761 in his capacity as the Managing Director of the plaintiff-company with an annex SR1. SR1 was a photocopycontaining brief details of the Judgmentunder the hand of the Registrar of the Local Court of New South Wales [NSW] dated 19 April 2010, which was sought to be registeredin this High Court for enforcement. The Judgment was against the defendant-Saheed Khan, trading as Khan's Haulage, to the value Australian \$ 13,845.61.
3. Upon filing the *ex-parte* Notice of Motion, solicitors for the plaintiff hurriedly requested a date for hearing preferably on 07 or 08 June 2011 through the Court Officer assigned to the relevant court. Learned Judge, having perused the Notice of Motion and the affidavit, observed thus:

The affidavit does not satisfy whether Section 3(1) (a) (b) [of the] Foreign Judgment [Reciprocal Enforcement] Act is satisfied. The order is not a certified or true copy. There is no confirmation from [New South Wales Court] that the amount has not been discharged. Section 4 (1) (a) (c) to be complied. Matter to be heard inter-partes thereafter.

Sgd.
07/06/'11

Inter-partes [Mention on] 17 June 2011.

Sgd.
09/06/11

4. In the meantime on 09 June 2011, the plaintiff filed a supplementary affidavit from Mr Rahmangiving details of the claimbefore the Local Court of NSW; and, also of bankruptcy proceedings filed againstthe defendant.
5. As the case was mentioned on 17 June 2011, the learned Judge, the Court Clerk and Mr S F Koya, who was appearing for the plaintiff, were making attempts to secure the presence of Mr Saheed Khan on behalf of the defendant in consequence of a letter dated 15 June 2011 of Mr Khan requesting another date on the ground thathe [Mr Khan] had to appear in the Magistrate's Court, Lautoka, on that date. The attempts, however, were unsuccessful as Mr Khan had not responded to the telephone calls.
6. The learned Judge, having taken cognizance of the letter, made a record of the attempts made to contact Mr Khan on 17 June 2011. The learned Judge then recorded the submissions of Mr Koya, a part of which was to the following effect:

... Mr Koya informs me that the defendant is a deceitful person and there is a possibility that he can transfer property today itself...

7. The learned Judge, thereafter, made the following orders:

In view of the letter, I am reluctant to register the Foreign Judgment without giving an opportunity to the defendant...

Registry to issue a NOAH (Notice of Adjourned Hearing) [for] 21 June 2011 for defendant to appear and submit his objections. This order to be carried-out before 2.00 p.m. today. Bailiff to [serve] the defendant and file report.

Mention 21 June 2011 at 9.00 am.

Sgd.

17/06/11

8. The defendant filed a further supplementary affidavit from Mr Rahman dated 20 June 2011 deposing matters under Sections 3 and 4 of the Act, apparently in conformity with the observations made by the learned Judge on 07 June 2011.
9. On 21 June 2011, Mr Faiyaz Koya appeared for the plaintiff and the learned Judge made the following order:

I have been informed that all attempts to serve the defendant have failed. On my instructions, even this morning, my Court Clerk called the defendant twice on the phone number given by him. I am convinced the defendant is avoiding service despite several attempts. I have considered the note of my Court Clerk...'

Mr Koya moves that judgment be registered and enter as per the Motion dated 07 June 2011. Mr Koya to submit to seal the order.

Sgd.

21/06/11

10. The order was sealed on 21 June 2011, which reads as follows:

And upon hearing Mr Faiyaz Siddiq Koya, on instructions of Iqbal Khan and Associates, counsel for the plaintiff, and there being no appearance for the defendant, it is hereby ordered that:

(a) That the judgment/order made by the local court of New South Wales against the defendant herein dated 19 day of April 2010 and renewed on the 08 day of June 2011 be registered and enforced in the local jurisdiction of Fiji.

(b) No order as to costs.

Dated 21 June 2011.

Sgd.
Deputy Registrar

Penal Notice

If you, the above named defendants, disobey this order you will be liable for process of execution for the purposes of compelling you to obey the same.

11. A Writ of *Fieri Facias* was immediately filed on 21 June 2011 by solicitors for the plaintiff moving for the seizure of the goods, chattel and other properties of Mr Khan in pursuance of the purported Order dated 21 June 2011 of this court to satisfy the foreign judgment against the defendant in the sum of Australian \$ 13, 845.31 together with other costs involved. The goods, chattel and other properties were seized in consequence of the *Fieri Facias* on three different occasions on 18 August 2011, 13 September 2011 and 20 September 2011 as reported to court later by the sheriff. The properties are currently lying in court premises under the charge of the Deputy Registrar.
12. The plaintiff, thereupon, caused a newspaper advertisement published in the *Fiji Sun* on 11 October 2011 for the sale of the properties by public auction on 17 October 2011.
13. Mr Khan, having had notice of the public auction, filed interpleader summons dated 12 October 2011 on an apparent authority from Ms Fariyal Zahira Begum. His interpleader summons claimed that most of the properties seized by the sheriff had belonged

to Ms Begum, whom Mr Khan stated to be his wife. The interpleader summons, accordingly, were filed on the basis that Ms Begum had nothing to do with the enforcement of the foreign judgment in issue as intimated to the Deputy Registrar of this court by a letter dated 11 October 2011 marked 'E' and annexed to the summons.

14. Learned Judge, having taken up the inquiry into the interpleader summons on 17 October 2011, stayed the sale of the properties by public auction subject to the payment of \$ 5000.00 by Ms Begum as costs for staying the sale. The sale was stayed; and, it continued to be stayed to-date as the parties since then were filing affidavits and counter-affidavits in respect of the interpleader summons. Hearing into the interpleader summons, however, came to an abrupt end.
15. The defendant was truly awakened to the real gist of the matter only on 07 February 2013 as it [the defendant] filed summons under Section 6 of the Foreign Judgments (Reciprocal Enforcement) Act, Cap.40, to set-aside the sealed order dated 21 June 2011, which purported to have registered the judgment of the Local Court of NSW.
16. By that summons dated 07 February 2013, the defendant moved court for setting-aside of the purported registration of the foreign judgment on the ground that a judgment of the Local Court of NSW was not capable of being registered as it was not a superior court within the meaning of the laws of Fiji in Cap. 39 and Cap. 40. Mr Khan, filing an affidavit in support, deposed that the 'Local Court of NSW' was similar to a 'Magistrate's Court' in Fiji; and, that this court was misled to believe that the 'Local Court of NSW' was a superior court.
17. The plaintiff moved for time to file a response to the summons of the defendant on 20 February 2013. No response, however, was filed as the case was mentioned on 07 March 2013. On 07 March 2013, hearing into the summons was eventually fixed for 18 April 2013; and, the parties were directed to file their submissions on or before 01 April 2013.
18. At the hearing submissions were heard from learned counsel for the defendant, the interpleader-Ms Begum and the plaintiff. Learned counsel for the defendant and for the interpleader relied on the written-submissions filed on 16 April 2013, while learned counsel for the plaintiff, after making lengthy oral submissions, moved for time until 22 April 2013 for filing of written-submissions. The plaintiff, however, filed written-submissions on 26 April 2013, which, too, was considered by me notwithstanding the delay.
19. I have carefully considered the submissions of all learned counsel in light of the statutory provisions of the laws of Fiji in Cap. 39 and 40 and the judicial precedents for registering and setting-aside of a foreign judgment before the High Court.

20. It is pertinent to note at the very outset that there was no affidavit or any pleading opposing the summons of the defendant. Learned counsel for the plaintiff sought to explain the absence of such material on the bases that, what was in issue, were entirely questions of law.
21. Registration of foreign judgments in the High Court for enforcement in Fiji are governed by two Acts namely the Reciprocal Enforcement of Judgments Act [Cap. 39], enacted in 1922; and, the Foreign Judgments (Reciprocal Enforcement) Act [Cap.40], enacted in 1935. The two Acts are to be read together, as concluded by Byrnes J. in **Clement James v Joseph Stewart** (High Court Suva : Civil Action No 190/1989 : 13 October 1989), in setting-aside the registration of a judgment of the District Court of NSW holding that, that court was not a superior court in order to reciprocally recognize its judgments for registration in Fiji.
22. Byrnes J., expounded the meaning of a superior court by referring to Stroud's Judicial Dictionary, as follows:

A court having an inherent jurisdiction to administer justice according to law, descended from the Aula Regia established by William the First, which had universal jurisdiction in all matters of right and wrong throughout the kingdom (the Aula Regia was where the king was present). This [was] compared by the author with the term 'inferior court', which [was] one 'limited as to its jurisdiction and powers to those matters and things, which are expressly deputed to it by its document of foundation.

23. In **Miekle v Stewart** [1994] FJHC 220; [1994] 40 FLR 291, Pathik J., considered the issue whether a judgment of the District Court of Auckland, New Zealand, was capable of being registered under the laws of Fiji. Pathik J., having relied on the Byrnes J.'s decision in **Clement Jones**, held that the District Court of Auckland was not a superior court to allow registration of its judgments in Fiji. Registration of the judgment was, accordingly, set-aside. Conversely, judgments of the High Court of New Zealand have been recognized as capable of being registered for their enforcement in Fiji (**Jones v Mathieson** [1990] FJHC 102; [1990] 36 FLR 116 by this court. Similarly, a judgment of the Supreme Court of NSW was recognized for registration in **Sports Technology International Pty Ltd v B W Holdings Ltd** [2011] FJHC 717 as per the decision of Britto-Mutunayagam J.
24. Reciprocal treatment to the judgments of the Supreme Court (now the High Court) of Fiji and to those of the superior courts of the United Kingdom and other designated countries and territories outside the Commonwealth seems to be the underlying principle in the two Acts. Therefore, the requirement of having a judgment from a superior court of such country or territory for registration before the High Court of Fiji is a *sine qua non*. This

requirement of law is expressly stated under Section 7 of Cap. 39. NSW is recognized as a territory to which the application of Cap. 39 has been extended to, from June 1925. Similarly, some territories of Australia, excluding NSW, have been recognized by Section 3 (1) read with Section 9 (1) of the Foreign Judgments (Reciprocal Enforcement) [Cap. 40], for which Part II of Cap. 40 dealing with registration of foreign judgments has been extended to. Under each Act, the judgment, for which registration is sought, needs to be a judgment from a superior court of the relevant country or territory.

25. The defendant, relying on the above authorities, submitted that the Local Court of NSW was not a superior court to have enabled this court to register the judgment dated 19 April 2010 as contained in SR-1. The interpleader, while supporting the summons for setting-aside of the purported registration, referred to the Local Court Act 2007 (the Act 2007) of the New South Wales Consolidated Acts [of Australia].
26. The Australian court in issue, established by the Act 2007, is designated and known as the Local Court of New South Wales but not as the *High Court Local Court of New South Wales*. The Local Court is presided over by a Magistrate who alone could hear and determine matters before court with limited exceptions under the Act 2007. Section 29 of the Act 2007 clearly states that its jurisdiction is limited to \$ 100,000.00 when it sits in its General Division.
27. The plaintiff, however, did not seek to controvert this position although time was granted to do so.
28. Instead, the plaintiff itself, in my view, was not certain from the very outset as to whether the Local Court of New South Wales was, in fact, a superior court. This was apparent because the plaintiff had wrongfully ventured to describe the judgment in issue as that of a '*High Court of the Local Court of New South Wales*' in the captions of its motions and affidavits as it moved court from 07 June 2011. Such a court was not shown to be in existence; and, possibly could not be in existence at all in the hierarchical structure of the Australian Courts System. I am of the view that the addition of the prefixes 'High Court', although such a title was not there in SR-1, was an insidious and deceitful attempt to mislead court to believe that the judgment was from a superior court. It appears, therefore, that the plaintiff or his advisors had engaged in a deceitful conduct by wrongfully describing the 'Local Court of NSW' as the '*High Court of the Local Court of NSW*', though deceit was imputed to Mr Khan by Mr Koya in his submissions on 17 June 2011.
29. This submission of Mr Koya, which lacked objectivity to appreciate the provisions of Part II of Cap. 40 and those of Cap. 39 relating to registration of a foreign judgment, appears to have clouded the mind of the learned Judge. This is apparent in view of the failure on 21 June 2011 to consider the imperative provisions *inter alia* of Sections 3 (1) and 9 (1) of Cap. 40 in regard to the requirement of having a judgment from a superior court for registration and

enforcement in Fiji, although due notice of their relevance was initially given to the plaintiff on 07 June 2011 by the learned judge.

30. Learned counsel for the plaintiff, in their written-submissions, submit that *the issue of superiority as exclusively used under the Acts has become obstructive to the facilitation of the enforcement of [a] foreign judgment [and urged] court to move away from such colonial notions and adapt the law to the changing times to ensure its relevance* (Paragraph 3.10).
31. I am of the view that the duty of a court is to interpret and apply laws as they are and give effect to the intentions of the parliament or any other law-making body. It is, however, not the duty of a court to make laws as such and make a direct affront to the legislature by disregarding written laws. That would be obnoxious to the doctrine of separation of powers and would result in an anarchical situation. While dismissing the learned counsel's submission as being mischievous and self-serving, I subscribe to the view that the effect of the submission indeed is such that the Local Court of NSW was not a superior court within the meaning of Fijian laws.
32. Be that as it may, there is no written ruling - as admitted by all parties at the hearing - to reflect that the learned Judge was satisfied as to the fulfillment of mandatory provisions under Sections 3 and 9 (1) of Cap. 40; and/or Sections 3 (1) and (2) and 7 (1) of Cap 39 for registration of the foreign judgment. Instead, what is on record is the application of Mr Koya moving *that the judgment be registered and enter as per the motion dated 07 June 2011*; and, the learned Judge directing *Mr Koyato submit to [sic] seal the order* (See the proceedings of 21 June 2011 as reproduced in paragraph 9 above).
33. It is, therefore, not unsafe to conclude that there was no Order from this court at all to register the foreign judgment, as such. Instead, what is deducible from the court record is that the learned Judge has abdicated the power of court to the solicitors for the plaintiff when a direction was given for Mr Koya to *submit to seal the order*, when there was, indeed, no order to seal. The solicitors for the plaintiff grabbed the opportunity and sealed the plaintiff's motion purportedly to read ... *[t]hat the judgment/ order made by the local court of New South Wales against the defendant herein dated 19 day of April 2010 and renewed on the 08 day of June 2011 be registered and enforced in the local jurisdiction of Fiji*.
34. Thus, there is an order in the Record having the character of a registered judgment; and, the plaintiff immediately filed the *Writ of Fieri Facias* and seized the property in pursuance of such purportedly registered judgment.

35. O 71 of the High Court Rules, 1988, declares that the rules made under Reciprocal Enforcement of Judgments Act (Cap. 39) should apply to proceedings under the Foreign Judgments (Reciprocal Enforcement) Act (Cap. 40; See also *HBZ Finance Ltd v ShanthilalHargovind and HasmukhlalHargovind* [1989] HBC 243/88: 27 October 1989) This provision is relevant to be considered in light of the Byrnes J.'s decision in *Clement Jones* that the two Acts need to be read together, with which I respectfully agree (See also *Patel v First Pacific Mortgage Limited* [1993] FJCA 35).
36. Under the Reciprocal Enforcement of Judgments Rules, any order giving leave for registration of a foreign judgment should state the time within which the judgment debtor is entitled to apply for setting-aside of the registration (r 7); and, the notice of registration of the judgment must be served on the judgment-debtor within a reasonable time after registration (r 10). Rule 15 specifically states that *no execution shall issue on a judgment registered under the Act until after the expiration of the time limited by the order giving leave to register after service on the judgment debtor of notice of the registration thereof.*
37. It is clear, as clear could be, that the plaintiff proceeded with the execution of the purported order for registration of the foreign judgment in breach of the above rules. Its solicitors need be faulted for transgressing the rules, which really constituted an abuse of process although they now rely on the very procedure that they completely breached (Paragraph 2.6 of their written-submissions). Verbatim reproduction of the proceedings, as set-out above, was indeed intended to demonstrate the degree of deviation from the law and the rules relevant to registration of a foreign judgment.
38. In view of the above analysis, I agree with the reasoning of Byrnes J. as to the constitution of a superior court. I hold that the judgment, as contained in SR 1, which was purportedly registered before this High Court for enforcement in Fiji, was not a judgment of a superior court. Acting under Section 6, I set-aside the purported registration, as appearing in the document dated 21 June 2011, forthwith as part II of Cap. 40 or any other provision in Cap. 39 did not apply to a judgment of the Local Court of NSW.
39. I further hold that the seizure of the property by the sheriff of this court purportedly in execution of the order for registration of the foreign judgment is invalid and unlawful. The defendant and the interpleader are entitled to the recovery of their properties *ex debitojustitiae*. The Deputy Registrar is directed to release the properties either to the defendant or the interpleader or to both, depending on whose custody they were seized from, forthwith but not later than 12.00 p.m. on 01 May 2013.

40. Costs to be assessed summarily.

41. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka
Republic of Fiji Islands
30 April 2013