

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

DISTRICT REGISTRY

BETWEEN : **REPEKA NABA** (infant by Saimone Veiyala, her father and next friend) of Korovou, Tavua, Fiji.

Plaintiff/Judgement Creditor

AND : **SHAMEEM BUKSH** son of Salim Buksh of Balata, Tavua, Fiji, Car Part Salesman (infant by Salim Buksh's father's name not known of Korovou, Tavua, Taxi Driver).

1st Defendant/1st Judgement Debtor

AND : **RAHIM BUKSH** son of Jan Buksh, of Korovou, Tavua, Fiji, Businessman.

2nd Defendant/2nd Judgement Debtor

AND : **SALIM BUKSH** son of not known of Korovou, Tavua, Fiji, Taxi Driver.

3rd Defendant/3rd Judgement Debtor

AND : **SITARA** daughter of Imam Din of Korovou, Tavua, Fiji, engaged in Domestic Duties.

4th Defendant/4th Judgement Debtor

AND : **THE FIJI SUGAR CORPORATION LIMITED** a duly incorporated company with its Head Office at Lautoka, Fiji.

Garnishee/1st Interested Party

AND : **MANSOOR ALI**

2nd Interested Party

Counsel : Vipul Mishra (Mishra Prakash & Ass) for the Plaintiff/Judgement Creditor
No appearance for 1st, 2nd, 3rd, 4th Defendants/Judgement Debtors
R. Singh (Munro Leys) for the Garnishee/1st Interested Party
Thompson Lee for the Second Interested Party

R U L I N G

INTRODUCTION

[1]. Repeka Naba and Mansoor Ali are fighting over a sum of \$30,000 in cane proceeds being held by the Fiji Sugar Corporation Limited ("FSC"). The cane proceeds are from a certain farm which Mansoor acquired in 2010. But the proceeds in question derive from crop harvested from the farm when one Rahim Buksh, Ali's predecessor in title, was still the owner.

REPEKA'S CLAIM

- [2]. Repeka is interested in the money in order to satisfy, in part, a judgement debt owing to her by Rahim¹. She had a **Charging Order Absolute** registered on the Farm on 10 August 2000 whilst Rahim was still the owner. Rahim emigrated to New Zealand around the same time.
- [3]. Repeka also did obtain a **Garnishee Order Absolute** against FSC on 25 September 2003 for payment to her of all cane proceeds from the Farm.

MANSOOR'S CLAIM

- [4]. Mansoor acquired the Farm in 2010 in spite of the Charging Order. I will leave this issue at that. He appears to have entered into a sale and purchase agreement with Rahim over the Farm pursuant to which he had paid a sum of \$5,000 towards the purchase price. In his affidavit, Mansoor would depose that unbeknownst to him, the leasehold over the Farm had long expired in 1996 at the time he entered into the agreement with Rahim. He would say that he did eventually acquire the Farm because he was issued an entirely new lease by the Director of Lands. Mr. Mishra submits for Repeka that the purported acquisition by Mansoor was a hoax to circumvent the effect of Charging Order Absolute on the Farm.
- [5]. Mansoor is interested in the money because he says he had worked the land long before he became the owner of the Farm. In other words, he appears to assert an equitable lien for unpaid wages. He deposes as follows in his affidavit sworn on 22 June 2013:

5. I deeply sympathise with the Plaintiff's injuries from a car accident. However, I equally enquire as to where is the justice in taking away **my fruits of labour that I have not enjoyed for the 10 years of hard work and toil on the subject sugar cane farm** and giving it away to the Plaintiff. The Plaintiff can enforce its judgement against the 2nd Defendant, Rahim Buksh, in New Zealand instead of trying to take away any fruits of my hard toil that is frozen with FSC, the 2nd Interested Party.
6. In fact the Plaintiff has known that I have been working the farm. The Plaintiff has known this fact since before July 2000 (reference to paragraph 24 of Mr Richard Prakash's email). **Whilst I did not get any notification of these proceedings before any garnishee orders were made and my views were not put to the court then for deliberation, the Court has the opportunity to hear me now.**

¹Repeka was awarded general and special damages totalling \$110,011-00 on 29 May 2000 in this Court against Rahim (as per Judgement of Mr. Justice Madraiwiwi).

7. Despite knowledge of my claim of farming the subject land the Plaintiff failed to make me a party to these proceedings before obtaining an order for garnishee on the farm proceeds.
8. Similarly, in the proceedings in Ba Magistrate's Court Action No 134 of 2002 Rahim Buksh failed to make me a party and got paid out on a settlement without my knowledge.
9. Much has now been made by the Plaintiff that the Sale and Purchase Agreement between Rahim Buksh and I on the 28th of April 2000 was a scam to avoid the Plaintiff's judgment. We will never know what Rahim Buksh's motives were because he has migrated and shown no interest in any of the proceedings after migration. However, there was no scam on my part. **I have toiled hard on this sugar cane farm. The fruit of that toil is mine and not that of Rahim Buksh and I have never had those fruits due to wrongful claims made on those proceeds. The garnishee can only apply if Rahim Buksh is entitled to the proceeds of the cane farm. He has abandoned any claims since migration.**
10. I show the following evidences on why I have no deal or ulterior motives with Rahim Buksh as alleged by the Plaintiff:
 - i) Ex-Parte Summons in action number 378 of 2003 where I obtained an order on 7th November 2003 to refrain Rahim Buksh from leaving Fiji during one of his visits back to Fiji from New Zealand – annexed and marked **MAB1**;
 - ii) Writ Ne Exeat Civitate granted by court – annexed and marked **MAB2**;
 - iii) Letter dated 15th January 2004 from Sahu Khan and Sahu Khan on behalf of Rahim Buksh to me revoking the Power of Attorney after I did the case – annexed and marked **MAB3**
11. I tried to stop Rahim from leaving Fiji. I did not eventually succeed. If I had succeeded even the Plaintiff would have had easier chance of recovery so I could have never acted in any way to defeat the Plaintiff's judgement as alleged by her.
12. I do not have legible copies of other pleadings in 378 of 2003 but understand that they are a matter of court record.
13. I understand that there is no consent on the sale and purchase agreement but that is a matter for Rahim Buksh to assert against me as opposed to running away from my claims against him. It is not a matter for a 3rd party such as the Plaintiff to have a say on to support that Rahim Buksh is entitled to the proceeds of my labour. I repeat that in this instance Rahim Buksh has abandoned all claims and fled.
14. In fact I have been a tenant since around 1996 well before any sale and purchase agreement.
15. All the stakeholders here have known since at least 2000 that I have been farming the land. FSC, Rahim Buksh, the Plaintiff and the President of the Farm Gang. So I ask how can a garnishee succeed arising from a judgment by the Plaintiff against Rahim Buksh when Rahim Buksh is not entitled to the proceeds of the sugar cane delivered to FSC Penang by me?
16. I believe that the most important factor here is for fairness to prevail. All lawyers are stating all types of things somehow or the other to make their client win and get proceeds from my labour.

17. I also believe that an important fact is what the buyer of the cane at Penang mill thinks about where and how the proceeds of this sugar cane farm should be distributed. In his letter to The Solicitor General, Lautoka (perhaps should have been to the Attorney General's Chambers) dated the 4th of April 2011 the mill manager of Penang Sugar Mill, Mr Sailasa Waitawa made (annexed and marked in my earlier affidavit) a simple, fair and equitable observation:
- "A brief summary of the above is as follows:*
- *Rahim Buksh sold the cane farm in 2000 to Mansoor knowing that the lease had already expired in 1996.*
 - *The "deal" at that time was that Mansoor to continue toiling the land and all proceed to be given to Rahim Buksh until the balance of payment was cleared out. We believe that during this time the latter had already moved to Tavua*
 - *From 1996 to 2000, all cane proceeds was still going to Rahim Buksh to off-set the debt owed by Mansoor*
 - *It was after this accident that a court order was produced a "hold and refer" notice to FSC pending the court case mentioned above*
 - *NLTB (sic Land Department) officials visited Mansoor in 2006 and finally Mansoor was given a new lease tile in 2010.'*
18. The above observations by mill manager at Penang mill show from a lay point of view how the buyer, FSC, thinks that the proceeds should be distributed.
19. The Plaintiff for last 13 years has made no visible effort to recover her judgment from Rahim Buksh in New Zealand instead wanting to take away money from my toils. Whilst I have been toiled away for 13 years without getting any benefits the Plaintiff knowingly has sat and watched hoping that the money from my toils is given to her.
20. I pray that monies held by FSC be released to me and order in terms of my Summons dated the 4th of January, 2013.

FSC's POSITION

[6]. FSC had not taken part in the Garnishee Proceedings despite being served. It appears that the reason for that was because FSC had always believed that the money in question was owed to Rahim. However, FSC appears to have changed its position on that point some ten years after the Garnishee Order Absolute was made. In August 2013, FSC was to file an application seeking, amongst other things, an Order that the Garnishee Order Absolute be set aside. Ms Mafi Lord, FSC's in-house solicitor, explains this rather late application as follows in her affidavit sworn on 08 August 2013.

27. In any event, FSC now applies to set aside the Garnishee Order Absolute of 3September 2003 on the ground that on further consideration of the matter and in light of the new information FSC now disputes liability to pay the debt claimed to be due from FSC to Mr Buksh.
28. **When the garnishee orders were made, FSC was not aware of Mr Ali's purported involvement in this matter. Mr Ali's recent application to**

discharge the charging order and for the release of the cane proceeds has shown that there is, at the very least, an argument that Mr Ali not Mr Buksh is entitled to the cane proceeds between 2000 and 2010. If Mr Ali is entitled to the cane proceeds for that 10-year period, then ultimately the garnishee order was not appropriate. FSC was not aware of this claim by Mr Ali in 2000 or 2003 when the garnishee order was made.

29. FSC believes that any rights the Plaintiff may have to the cane proceeds can only be in regard to cane proceeds that were rightly owed to Mr Buksh after the garnishee order was made. **However, the Court needs to determine if Mr Ali rather than Mr Buksh was actually entitled. Certainly, all cane proceeds from 28 September 2010 onwards should go to Mr Ali since he is now the registered grower independent of Mr Buksh.**
30. While this dispute is continuing, FSC seeks to pay all cane proceeds into Court pending the Court's decision as to whom and in what proportions the cane proceeds should be paid.

OBSERVATIONS

- [7]. Mr. Lee cites various New Zealand cases to argue that a charging order is not a charge on the debtor's estate (he cites **Baliekie v Malcomson** (1886) NZLR 4 SC 408 at 409, per Gilles J at page 409 and **Brdjanovic v Ellis Hardie Syminton Ltd** [1974] 2 NZLR 542 as per Qulliam J at page 543). But, I am not here concerned about whether or not and if so, to what extent the Charging Order Absolute will bolster Repeka's status as a secured creditor. In any event, the New Zealand position on the point appears to be shaped by an interplay of various legislative provisions peculiar to that jurisdiction. A reading of **Baliekie** and **Brdjanovic** will confirm that. In Fiji, our courts have embraced the slightly different English approach² in **Roberts Petroleum Ltd v. Bernard Kenny Ltd** [1982] 1 W.L.R. 301, p.307; [1982] 1 All E.R. 685, p.690, C.A.
- [8]. In any event, the Charging Order Absolute is irrelevant to the issue as to who, between Repeka or Mansoor, has a better claim over the money. I say that because the Charging Order Absolute does not bind Rahim's interest

² In Fiji, the Courts prefer the English approach which treats a Charging Order as having the effect of making a creditor a secured creditor. This point was canvassed by Madam Justice Shameem in **Public Employees Union v Leweniqila** [2001] FJHC 78; Hbc0393y.1999s (11 October 2001):

The effect of the order would be to make the creditor a secured creditor who must proceed to enforce the charge to obtain the proceeds of the charge, in order to satisfy the judgment.

See also **Pat Consulting Ltd v Matapo Ltd** [2012] FJHC 1278; HBC237.2009 (8 August 2012) as per Madam Justice Wati.

Both cases cite Lord Brandon in **Roberts Petroleum Ltd v. Bernard Kenny Ltd** [1982] 1 W.L.R. 301, p.307; [1982] 1 All E.R. 685, p.690, C.A.

in the money in question. Rather, it only binds Rahim's interest over the farm³.

[9]. In addition to the above, it is seriously doubtful whether or not the said Charging Order is sustainable still, given that the farm is no longer under Rahim's name. Mr. Mishra would argue that the Charging Order is sustainable still if Mansoor is really holding the farm on trust for Rahim, which he argues, is the case. Is Mansoor really holding the farm on trust for Rahim? This issue is of no immediate concern to me at this time and it is inappropriate for me to offer any further comment on it.

[10]. The immediate issue is whether Mansoor's claim for having expended "**10 years of hard work and toil on the subject sugar cane farm**" must have priority over a Garnishor (judgement creditor), in the distribution of the proceeds being held by FSC? This is a priority issue.

[11]. For Repeka, the Garnishee Order Absolute effectively attaches (and secures in her favour) all debts owing by FSC to Rahim and which entitles her to receive from FSC all those payments/debts that FSC would have paid to Rahim. Moreover, the Order, gives her a right to proceed against FSC if FSC did not comply. And moreover, the Order is still in force and has not been set aside. Mansoor however, appears to assert an equitable-lien type of argument based on his claim that he did work the farm from 1996 to 28 April 2000. His affidavit would be spiked with phrases such as:

".....my fruits of labour that I have not enjoyed...."

And:

"...fruits of my hard toil that is frozen with FSC....."

And:

"....I have toiled hard on this sugar cane farm...."

And:

"....the fruit of that toil is mine and not that of Rahim Buksh and I have never had those fruits due to wrongful claims made on those proceeds...."

And:

"....I have been (sic) toiled away for 13 years without getting any benefits....".

³ The Charging Order Absolute which was granted by Gates J (as the Honourable Chief Justice then was) states as follows:

1. That an absolute charge be placed on the interest of the Second Defendant in Crown/State land known as Farm No. 353 and Lot 353 CT 11693/4/5 Naqalau Vatumanu, Nadevo L.D. Ref 4/13/638-C353 in the name of Second Defendant RAHIM BUKSH covered under Sugarcane Contract No. 353 Malau Sector and the Second Defendant shall not dispose his interest in the property until the Judgement being fully satisfied by the second Defendant.
2. The second Defendant pays the Plaintiff \$400-00 (FOUR HUNDRED DOLLARS) Costs.

- [12]. Mansoor would argue that his equitable lien actually pre-dates Repeka's claim. He does not say whether he worked the farm from 1996 to 2000 as labour, or as sharecropper, as family, as part of his consideration for the purported sale and purchase arrangement that he had entered into with Rahim in 2000, or in whatever other capacity there was.
- [13]. Of the two, Repeka's claim and interest over the money is already established. This is so, firstly, by the judgement debt owing to her by Rahim and, secondly, by the fact that the money is immediately payable to Rahim. She does not need to prove anything further.
- [14]. Mansoor's claim on the other hand is yet unestablished. As **Hepburn (1997)**⁴ notes:
- An equitable lien will automatically arise **where a debt can be proven** and property is specifically identified or related to the performance of the agreement. An equitable lien should be distinguished from possessory lien as it is not necessary for a creditor to have possession of property in order for a lien to arise in equity. To establish an equitable lien or a charge, all that needs to be proven is that it would be unconscientious to allow a debtor to dispose of property without recognising the interests of the creditor (Hewitt v Court (1983)). In such a situation, a court may hold that the creditor has a lien or a charge in the property which may bind bona fide purchasers of the property who take with notice.
- [15]. At this point, I must say that I disagree with Ms. Lord's statement of the issue at paragraph 27 of her affidavit (see paragraph [5] above). That view is either misguided or misleading, or both because the issue is NOT about whether or not Rahim or Mansoor has a better stake on the money. To frame the issue as such is to presuppose that Mansoor has already established his claim, which he has not.
- [16]. Rather, the correct way of looking at the issue is this - the money is payable to Rahim because the money represents cane proceeds earned during the time when the farm was still owned by him (Rahim). The issue however is, whether or not Rahim owes Mansoor money on account of work that he (Mansoor) allegedly did and if so, whether that entitles Mansoor to an equitable lien over the money, and if so, whether his equitable lien gives him a better stake on the money than Repeka?

⁴ Samantha Hepburn, Principles of Equity & Trusts (1987) at page 52 paragraph 5.5.3.

ISSUES

- [17]. In light of all the above, the issues might be narrowed down as follows:
- (i) given that the Garnishee Order Absolute against FSC establishes Repeka's entitlement to any monies owed by FSC to Rahim, is her claim better than Mansoor's yet-unproven equitable claim?
 - (ii) flowing from the above, whether or not an equitable lien such as the one that Mansoor asserts, can actually exist prior to a court determination?
 - (iii) if not, should this court, considering the circumstances, give time to Mansoor to file a claim against Rahim in order to obtain a court determination?
 - (iv) otherwise, assuming Mansoor is able to prove that he did work for Rahim from 1996 to 2000, and for which work he is yet unpaid, would that elevate his stake over the money to a better position than Repeka's?

DISCUSSION

- [18]. Because the money constitutes sale proceeds of crop that was standing when the farm was still owned by Rahim, it is, *prima facie*, payable to Rahim. And because the money is payable to Rahim, it would be bound by the Garnishee Order Absolute. FSC would therefore be obliged to pay out the money to Repeka immediately on account of the said Garnishee Order Absolute. However, Mansoor's position, though yet inchoate until it is established, cannot be ignored. His position is that, before Repeka's Charging Order Absolute was even registered against the farm, and certainly, before Repeka's Garnishee Order Absolute was even placed against FSC, he (Mansoor) had a pre-existing equitable lien over the farm. That lien arose from his having worked the farm from 1996 to 28 April 2000. To be able to establish an equitable lien, Mansoor has to satisfy this Court that the money was due and owing to him, one way or another, by Rahim. The fact that he worked the farm in itself is not sufficient to establish that.

- [19]. In order to first establish his equitable lien claim, the proper course for Mansoor is to file interpleader proceedings against Rahim in this same action in and through which he must stake and prove his claim to the money (e.g. whether it be for unpaid wages or whatever other ground he bases his claim). He has done nothing of the sort. Instead, he has just filed an application to discharge the Charging Order Absolute and also for an Order that monies held by FSC be released to him. Once he obtains a court determination on the claim, then he can properly stake an equitable lien on the money.
- [20]. Because an equitable lien arises in equity, it is subject to all the usual conditions affecting equitable rights. Thus where the conduct of the claimant has been questionable or improper, the relief may be refused. I would rather postpone this issue.

CONCLUSION

- [21]. After considering all, I am of the view that Mansoor's and FSC's application to set aside the Garnishee Order Absolute cannot be entertained. The issue in this case is essentially a priority issue, assuming Mansoor is able to establish his claim. The issues between Repeka and Mansoor must therefore be determined along those lines. The Garnishee Order Absolute can only be set aside if some other claimant is able to establish a better claim than Repeka. To set aside the Garnishee Order Absolute now is to presuppose that Mansoor has already established his claim, which he has not. It also presupposes that Mansoor's purported claim has priority over Repeka's. As to whether or not the money being held by FSC should be deposited into Court, I do not think that is necessary. FSC may still have to account to Repeka for a Magistrate Court settlement it paid out some years back whilst the Garnishee Order Absolute was in place. I adjourn this case to 26 March 2014 at 10.30 a.m.

for mention. Costs to the plaintiff in the sum of \$500.00 (five hundred dollars) to be apportioned equally between FSC and Mansoor.

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Anare TUILEVUKA
JUDGE
12 March 2014