

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 296 of 2005

BETWEEN : **VISHNU DEO SWARUP** of Varadoli, Ba, Fiji, Businessman
Plaintiff/Judgment Creditor/Applicant

AND : **AIRPORT LAND DEVELOPMENT COMPANY LIMITED** a
limited liability company having its registered office at
Nadi, Fiji.
Defendant

TO : **ERONI MAOPA** Legal Practitioner, practising in Nadi, Fiji
and Trustee of Babu Singh & Associates, Trust Account.
First Garnishee

: **RUSTAM ALI** of Ba, Fiji, Businessman
Second Garnishee

: **AUSTRALIA AND NEW ZEALAND BANKING GROUP**
LIMITED having its registered office at Level 2, 100
Queen Street, Melbourne Victoria, Australia.
Third Garnishee

Before : **Acting Master M H Mohamed Ajmeer**

Appearances:

Mr Sharma for the plaintiff/Applicant

First Garnishee appeared in person

Date of Hearing : 25 November 2013

Date of Ruling : 26 March 2014

R U L I N G

Introduction

- [1] This ruling relates to first Garnishee, Mr Eroni Maopa, a Legal Practitioner practising in Nadi, Fiji and Trustee of Babu Singh & Associates' Trust Account.
- [2] By an ex-parte notice of motion filed together with a supporting affidavit on 23 July 2013 by the plaintiff/judgment creditor/applicant (the applicant) sought an order that a Garnishee Order Nisi to be issued and is hereby made against the Garnishees within named and that all debts accruing due or monies outstanding from the Garnishees either jointly or severally to the defendant be attached to answer a judgment recovered by the applicant against the defendant in this action on 7 September 2012.
- [3] Upon hearing the application, Master Anare Tuilevuka on 26 July 2013 made a Garnishee Order Nisi against the Garnishees within named and adjourned the matter to 21 August 2013. That day Mr Eroni Maopa appeared and sought time to file his affidavit in response. He was then granted 21 days to file and serve his affidavit in response with 14 days thereafter to the applicant to file and serve his affidavit in reply.
- [4] On 2 September 2013 Mr Eroni Maopa filed an affidavit of Sandhya Devi sworn on 28 August 2013. That affidavit annexes two documents marked "SD1" & "SD2". It is to be noted that the applicant did not file any affidavit in reply though he was granted time for that purpose.
- [5] The applicant obtained judgment in the High Court at Lautoka against the defendant, AIRPORT LAND DEVELOPMENT COMPANY LIMITED (which is now wound up) on 7 September 2012 in the sum of \$162,349.42 with cost in the sum of \$7,000.00. As the defendant company was wound up, the applicant is unable to recover the judgment sum from the defendant. As a result the applicant seeks to

execute the judgment by way of garnishee proceedings against the trust account for the defendant held by the first garnishee as former solicitor for the defendant.

The Law

[6] Relevant rule in the High Court Rules 1988 (as amended) which relates to garnishee proceedings is O.49, r.1, which provides:

*“(1) Where a person (in this Order referred to as “the judgment creditor”) has obtained a judgment or order for the payment by some other person (in this Order referred to as “the judgment debtor”) of money, not being a judgment or order for the payment of money into court, and any other person within the jurisdiction (in this Order referred to as “the garnishee ”) is **indebted to the judgment debtor**, the Court may, subject to the provisions of this Order and of any enactment, **order the garnishee to pay the judgment creditor the amount of any debt due or accruing to the judgment debtor from the garnishee** , or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.”*

“(2) An order under this rule shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter, and in the meantime attaching such debt as is mentioned in paragraph (1), or so much thereof as may be specified in the order, to answer the judgment or order mentioned in that paragraph and the costs of the garnishee proceedings (Emphasis added)”

[7] Halsbury Volume 17 at para 527 states as follows:

"To be capable of attachment there must be in existence, at the date the attachment becomes operative, something which the law recognizes as a debt, and not merely something which may or may not become a debt. Thus where the existence of a debt depends upon the performance of a condition, there is no attachable debt until the condition has been performed."

Analysis and determination

[8] The court in the first instance made a garnishee nisi order against the first garnishee attaching the trust account held by the first garnishee. Upon the nisi order being served, it is the duty of the first garnishee to show cause as to why the court should not make an order absolute.

- [9] In the supporting affidavit the applicant states that the first garnishee trading as Babu Singh & Associates acted for the defendant and the plaintiff as its Solicitors in the Employment agreement pursuant to which he obtained judgment against the defendant. He further states that he was to get a share of the sale proceeds for the land after full amount was paid. The first garnishee was to keep the money which was his share and pay it out to him when full proceeds were paid by the purchasers under the agreement. He also states that the fund in their Trust Account is held by them pursuant to agreement of 13 May 2005 (Employment agreement) (see paras 6, 7, 9 & 10 of the supporting affidavit).
- [10] In response to this, the first garnishee in the affidavit states that all sale proceeds kept in their trust account from the sale of the lots at Legalega (owned by the defendant) were paid to the defendant upon authority given to do so and only proceeds of sale from the sold lots are stated in the statement of account (“SD1”). The affidavit also states that there is no fund in their trust account for the defendant in favour of the plaintiff (applicant) share, see paras 7, 8 & 9 of the first garnishee’s affidavit.
- [11] It is to be noted that the applicant did not file any affidavit in reply to the first garnishee’s affidavit.
- [12] The applicant in this case obtained a judgment which is not a judgment or order for the payment of money into court. If any other person (the garnishee) within the jurisdiction is indebted to the judgment debtor (in this case the defendant), the court may make order the garnishee to pay the judgment creditor (here the applicant) the amount of any debt due or accruing to the judgment debtor from the garnishee up to the amount to satisfy the judgment (see O.49, r. 1 of the HCR). To be caught under O. 49, r. 1 of the HCR, the garnishee that is within the jurisdiction must be **indebted to the judgment debtor** and there must be **any debt due or accruing to the judgment debtor from the garnishee.**

[13] Pursuant to O.49, r.2 of the HCR, application for a garnishee order must state, inter alia, **the name and last known address of the judgment debtor** identifying the judgment or order to be enforced and stating **amount of such judgment or order and the amount unpaid under it at the time of the application.** The application before me does not contain any of these details in it. The first garnishee did not raise any objection in relation to non-compliance with the Rules of the HCR namely O.49. r. 2. However, the non-compliance with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings, or any document, judgment or order therein, see O.2, r. 1 of the HCR. I therefore treat the omission to state the name and last known address of the judgment debtor and the amount of judgment as an irregularity pursuant to O.2, r.1 of the HCR.

[14] I now return to the issue whether the first garnishee is indebted and any debt due or accruing to the judgment debtor (the defendant) from first garnishee.

[15] The first garnishee is a Solicitor. He held a trust account on behalf of the defendant in this case. He submitted that Messrs Babu Singh & Associates held money in trust for the purchasers and the defendant from 9 May 2005 to 30 November 2008 and from 2008 until to date there is no existing account for the defendant with Messrs Babu Singh & Associates. He cited the case authority of **Webb v Stenton** [1883] 11 QBD 518 [which was cited in **Labasa Town Council v Miriama** [1995] FJHC 200; [1995]41 FLR 517 (21 September 1995)]. In that case it was held at page 526 that:

“Is a trustee a debtor to his cestui que trust? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the cestui que trust: then of course he is a debtor and there is no difficulty in attaching such a debt under this Order.”

- [16] There must be a debt in existence to be attachable under garnishee proceedings. This position was explained by Banks L. J in **O'Driscoll v. Manchester Insurance Committee** (1913) 3 K.B. 499, at page 516 & 517 as follows:

"It is well established that 'debts owing or accruing' include debts debita in praesenti solvenda in futuro. The matter is well put in the Annual Practice 1915 p. 808. 'But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not'. If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt."

- [17] In the case of **Prekookeanska Plovidba v LNT Lines Srl** [1988] 3 All ER 897, it was held that:

"Held – Money held in a solicitor's client account for a client against whom judgment had been given and over which the solicitor had a lien for unpaid costs should not be included within the ambit of an injunction granted in favour of the judgment creditor freezing the client's assets pending satisfaction of the judgment debt. Accordingly, the court would order the release of all the client account funds held by the two firms. However, the defendants would not be ordered to pay the balance of C & Son's costs which would then remain outstanding, since that would conflict with the enforcement of the plaintiffs' judgment".

- [18] It is true the first garnishee held a trust account on behalf the defendant in respect of proceeds of a property sale. The account was closed in 2008 and there is no money standing to the credit of the defendant, a former client of the first garnishee. The applicant did not obtain an injunction freezing the money that was in the trust account held on behalf of the defendant, albeit the plaintiff brought this action in 2005. Now no money held in

that trust account, since the account was closed in 2008. This was not denied by the applicant in these proceedings.

[19] To be capable of attachment there must be in existence, at the date the attachment becomes operative, something which the law recognizes as a debt. In these proceedings the applicant has failed to show that a debt is existing payable to the defendant by the first garnishee at the time when he filed this application.

[20] In all the circumstances I am not satisfied that I should grant the relief sought by the applicant and I set aside the Garnishee Order Nisi made against the first garnishee on 26 July 2013.

[21] As a prevailing party the first garnishee is entitled to costs of these proceedings. He has filed an affidavit together with certain documents and written submissions and has made few appearances. I therefore considering all, summarily assess the costs at \$750.00.

Final Outcome

- 1) The Garnishee Order Nisi made on 26 September 2013 against the first garnishee is vacated and set aside;
- 2) The applicant must pay summarily assessed costs of \$750.00 to the first garnishee within 21 days;
- 3) Order accordingly.

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M H Mohamed Ajmeer
Acting Master of the High Court

At Lautoka

26/03/14