

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 200 of 2012

BETWEEN : **KRISHNA SAMI** of Nalovo, Nadi, Salesman.

PLAINTIFF

AND : **SANT RAJ** of Nalovo Nadi, School Teacher.

DEFENDANT

R U L I N G

INTRODUCTION

- [1]. On 08 March 2005, at some point after the trial of this case had commenced, counsel for the plaintiff (“**Sami**”) and the defendant (“**Sant Raj**”) advised Mr. Justice Finnigan in chambers that they had settled the matter.
- [2]. The following day, on 09 March 2005, the Order was perfected. The said Order is reproduced in full below:

JUDGMENT IS ENTERED FOR THE PLAINTIFF
IN THE FOLLOWING TERMS:

1. Judgment for \$55,000.00 including all damages and costs.
2. Execution of this judgment is suspended for six months and it will become effective on 9 September 2005.
3. The Defendant has the right as between the parties to appeal if he so desires from the ruling of this Court on the issue of the application to the claim of the statute of limitations.
4. The Ex Parte order as to passport etc. made in Chambers on 16 October 2003 by Byrne J. is hereby dissolved with no order as to costs.

(my emphasis)

- [3]. Sami is seeking to enforce the above Consent Judgement.
- [4]. On 01 November 2013, he filed an application in this Court pursuant to Order 29 of the High Court Rules 1988.

[5]. The Orders he seeks are as follows:

- (a) to deliver his passport and travel documents to this Court forthwith unless he (Sant Raj) can provide free and unencumbered assets belonging to him having a total value of not less than \$55,000.00 (**FIFTY FIVE THOUSAND DOLLARS**)
- (b) to, within 14 (fourteen) days after the service of the Order on him, disclose by affidavit the full value of all and each of his assets in Fiji and identify with full particularity the nature and whereabouts of each asset, whether the same be held in his own name or jointly or by nominees such as his wife or children or other solicitors on his behalf and particularly specifying:
 - (i) the identity of all banks, financial institutions including contribution with the Fiji National Provident Fund or other accounts held in his name or names either jointly or by nominees on his behalf and the balance of each such account and the name and the address of the branch at which it is held.
 - (ii) any other asset, monies or goods owned by him and the whereabouts of the same and addresses of all persons having the possession, custody or control or such assets, moneys or goods at the date of service of this order.
- (c) to disclose by affidavit within 14 days after the service of the Order on him, full details of moneys received and/or will receive from his tenants being rental of property located at Mountain View, Nadi comprised in Certificate of Title No. 27650.
- (d) that Raj's portion of the rental being 50% from the property being Certificate of Title No. 27650 situated in Mountain View Nadi being paid to the Trust Account of Messrs Pillai Naidu & Associates, Nadi.

[6]. Sami also seeks an Order that a Writ Ne Exeat Civitate (stop departure Order) be issued and directed to the Sheriff of the High Court of Fiji and his Deputy and all his Constables and other Peace and/or Police Officers and all Customs and Immigration Officers. The Order is to command the above officials that, in the event Raj should seek or attempt to depart from and/or enter Fiji, they should arrest him and bring him before a Judge of the High Court as soon as practicable.

AFFIDAVIT IN SUPPORT

[7]. Sami's application is supported by an affidavit he swore on 31 October 2013.

That affidavit is reproduced in full below:

1. That I am the Plaintiff in the action herein.
2. That on or about 12th July, 1989 I instituted civil action against the Defendant for personal injuries suffered by me in a motor vehicle accident occurred on 12th July, 1986.

3. That the matter was listed for trial on 8th March, 2005 before his Lordship Mr. Justice Daniel Desmond Finnigan and the Defendant agreed to settlement and the consent judgment was entered and sealed on 18th March, 2005. (Annexed herein and marked as annexure "KS1" is a copy of the said consent order).
4. That by consent it was ordered that the Defendant to pay the sum of \$55,000.00 inclusive of all damages and costs to the Plaintiff and the execution was suspended until 9th September, 2005. Further the ex-parte order made by Mr Justice Byrne on 16th October, 2003 was dissolved by consent. (Annexed herein and marked "KS2" is a copy of the order of His Lordship Mr. Justice Byrne).
5. That after 9th September, 2005 the Plaintiff has on numerous occasions requested the Defendant to pay the said sum of \$55,000.00 through his solicitors but the Defendant has either failed and/or neglected to do so and the entire judgment sum still remains due and owing.
6. That the Defendant is living abroad in New Zealand and I believe that he has a permanent resident's status in New Zealand as he has migrated to New Zealand.
7. That right after the consent judgment made on 8th March, 2005 and dissolution of ex-parte of Justice Byrne, the Defendant went to stay in New Zealand with this family.
8. That the Defendant owns a piece of land comprised in Certificate of Title No. 8351 being Lot 2 DP No. 1991 situated at Nalovo in the district of Malomalo and having an area of 3 acres. (Annexed herein and marked as annexure "KS3" is a copy of the Certificate of Title No. 8351).
9. That the Defendant also owns another property as joint tenants with one Urmila Devi father's name Hari Prasad comprised in Certificate of Title No. 27650 being Lot 44 on DP No. 4509 situated in the District of Nadi. (Annexed herein and marked as annexure "KS4" is a copy of the Certificate of Title No. 27650).
10. That the Defendant is either refusing and/or neglecting to pay the judgment sum which he has consented to.
11. That the Defendant also receives rental from his Martintar, Nadi property described in paragraph 9 hereinabove.
12. That since the entry of judgment the Defendant has adopted various means to deprive me of the fruits of the judgment entered in my favour and one of the method used is:
 - (i) placing Caveat No. 569355 over Certificate of Title Nos. 8357 and 27650 to protect the interest of his daughter, **RAJNEETA DEVI RAJ** under an unregistered mortgage given by the Defendant immediately after the consent order was entered into.
13. That the Defendant has on several occasions visited Fiji after the judgment was entered in my favour but has made no attempt to pay the said judgment sum to me despite my solicitors serving him with the Bankruptcy Notice on 19th May 2006.
14. That whenever the Defendant visited Fiji, he normally stays here for one or two weeks and due to his short stay in Fiji I could not institute any proceedings pursuant to the consent judgment.
15. That I verily believe the Defendant has no intention to pay the said judgment sum to me though he has consented to the same.
16. That presently the Defendant is in Fiji and I have been advised by his neighbours that he is scheduled to fly out of the country sometimes next week.
17. That if the Defendant absconds from Fiji this time then I believe I will not be able to enforce the judgment which he has consented as I have been advised by the defendants neighbours and verily believe that he is selling and/or disposing off all his assets in Fiji.

18. That I give my usual undertaking as to damages to the Defendant, should he suffer any loss by reasons or orders prayed for herein being granted and which appears to this Honourable Court at the determination of this action that the Orders ought not to have been made and the Defendant has suffered loss and damages as a result of the same being granted. I am employed with Tappoos Warehouse as a Customs Clerk and own a substantial dwelling worth \$110,000.00 comprised in Certificate of Title No. 28848 on DP 7329 being Lot 1 situated at Nalovo, Nadi. (Annexed herein and marked as annexure "KS5" is a copy of the title).
19. In the premises I pray for order in terms of my application.

COMMENTS

- [8]. When the matter was called before me on 15 November 2013, I refused to grant Order in Terms, having noted that the Consent Order entered by Finnigan J, peculiarly, seemed open ended and appeared to lack finality in so far as it preserved a right of appeal to the defendant on the question as to whether the claim is statute barred.
- [9]. The matter was again called before me on 18 November 2013, but I still refused to make any of the Orders sought.
- [10]. My reluctance stems from what I felt was a need to, first, be clear as to whether or not Raj did in fact file an appeal on the limitation issue, and if he did, whether or not the Fiji Court of Appeal has since made a pronouncement on it.
- [11]. Prompted by the above, the affidavit of one Krishneel Kunal Kumar was filed on 02 December 2013. Kumar, a Clerk in the law firm of Pillay Naidu & Associates, swears that he had been informed by his principal, Mr. DS Naidu that the defendant had not filed any appeal/stay since the consent judgement was entered. I then adjourned the case for ruling on notice.

THE LAW

[12]. Stop Departure Orders are not lightly granted by the Courts in the common law world. And neither are Mareva Injunctions.

[13]. Courts take this stance with regards to stop departure orders because they have always jealously guarded the right to personal freedom (see Williams v R (1986) 161 CLR 278 Mason and Brennan JJ, Attorney General v Guzman [2011] FJHC 423; HBM 8.2011L (5 August 2011) as per Mr. Justice Inoke, Chetty v Director of Immigration [2009] FJHC 356; HBC0185.2009 (12 August 2009) as per Mr. Justice Callanchini (as he then was); and the Fiji Court of Appeal case of Prasad v Carpenters (Fiji) Ltd [2004] FJCA 45; ABU0004.2004S (11 November 2004). This right is now enshrined in almost every constitution the world over and is recognized in many international instruments.

[14]. In Prasad's case, the Fiji Court of Appeal acknowledged that, while the section 34 of the constitution that was then in force in Fiji guaranteed and protected an individual's freedom of movement, that provision did not prevent the Court from ordering a Stop Departure Order (writ ne exeat regno) in an appropriate case.

We turn next to order 4. In that order the Judge has made an order that a writ ne exeat regno do issue in the event of the Appellant attempting to leave or enter the jurisdiction of the High Court of Fiji. Mr. Sahu Khan based his objection to this order on section 34 of the Constitution (as he had done in respect of order 3). Section 34 deals with the freedom of movement. We do not consider that section 34 prevents a court from ordering a writ ne exeat regno in a proper case. Mr. Sahu Khan did not take his argument beyond his broad submission which rested on s.34.

[15]. Section 21 of the 2013 Constitution also guarantees the right to freedom of movement. However, at section 21 (3), 21(6) (i), and 21 (7) (b), it is clearly set out that the right to leave Fiji may be curtailed for the purpose of ensuring

that the person whose right is in question appears before a court for trial or “**other proceedings**” and/or for the purpose of protecting the rights and freedoms of others.

Freedom of movement and residence

21.—(3) Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji.

(4)

(5)

(6) A law, or anything done under the authority of a law, is not inconsistent with the rights granted by this section to the extent that the law—

(a) provides for the detention of the person or enables a restraint to be placed on the person’s movements, whether—

(i) for the purpose of ensuring his or her appearance before a court for trial **or other proceedings**;

(7) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights mentioned in this section—

(b) for the purpose of protecting the rights and freedoms of others;

[16]. In **Seng Mi Commercial Co v John Y Singh & Co Ltd** [1997] FJHC 26; [1997] 43 FLR 66 (6 March 1997), Mr. Justice Fatiaki offered the following:

If I should be wrong however in the issuance of the writ ne exeat regno then there is no doubt in my mind that this Court has the necessary power and jurisdiction to issue an injunction restraining the second defendant from leaving the country and requiring him to deliver up his passport on the ground that they are necessary and reasonable orders which are ancillary to the due performance of the Court’s function of protecting the plaintiff’s rights to a Mareva injunction pending the hearing of the action. [see : Bayer A.C. v. Winter and Others [1986] 1 All E.R. 733]

That this Court has the necessary jurisdiction and power to grant both the Mareva Injunction together with the writ Ne Exeat cannot now be doubted. (see : W.B.C. v. Satish Chandra Civil Action No. 356 of 1991; Robert Rogers v. Pacific Hotels & Development Ltd. Civil Action No. 1132 of 1985; Leslie Redvers Martin v. B.N.Z. and F.D.B. Civil Appeal No. 73 of 1984 ; Girdhar Lal Raniga v. Merchant Bank of Fiji 39 FLR 181 and Al Nahkel for Contracting and Trading Ltd. v. Lowe [1986] 1 All E.R. 729) in which it was

“Held : The court had jurisdiction to issue a writ ne exeat regno in support of a Mareva injunction in order to prevent a defendant from leaving the jurisdiction with assets in order to frustrate a lawful claim before the Court.”

However it is not so much the Court’s jurisdiction which is in doubt, rather counsel raises the established parameters within which the particular jurisdiction is exercised and in particular, counsel drew the Court’s attention to the decision of the High Court of Australia in Jackson v. Sterling Industries Ltd. [1987] HCA 23; (1987) 162 C.L.R. 612 where the Court :

"Held : When an order for the preservation of assets goes beyond simply restraining the defendant from disposing of specific assets until after judgment it must be framed so as to come within the limits set by the purpose for which it can properly be intended to serve.

That purpose is not to create security for the plaintiff or to require a defendant to provide security as a condition of being allowed to defend the action against him, but to prevent a defendant from disposing of his actual assets (including claims and expectancies) so as to frustrate the process of the Court by depriving a plaintiff of the fruits of any judgment obtained in the action. (my emphasis)

It was also held in that case:

"per incuriam ... as a general proposition, it should now be accepted ... that a Mareva injunction can be granted if the circumstances are such that there is a danger of the defendant absconding, or a danger of his assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that a successful plaintiff will not be able to have his judgment satisfied.

The order that was set aside in that case however, differed fundamentally from that which this Court granted ex-parte in so far as it actually required the defendant :

'to provide security in the sum of \$3,000,000 ...'.

No such requirement is imposed in this instance.

Needless to say I cannot accept that the Court's orders offended any of the parameters set out in the above case. The traditional or accepted form of a Mareva order was described by Robert Goff J. in A. v. C. [1981] 1 Q.B. 956 at p.959 as being :

... in a very wide form ; it restrains the defendant from removing from the jurisdiction or otherwise disposing of or dealing with any of his assets within the jurisdiction ... save as in so far as such assets do not exceed in value the sum of the plaintiff's claim.

CONCLUSION

[17]. I am inclined to grant the Orders sought now. From where I sit, it would appear to me that the defendant and his counsel lacked bona fides and had entered into the settlement simply to avoid trial.

[18]. They obviously thought that they would always have the upper hand by reserving their "right to call" on their "right of appeal" on the issue of limitation, whenever the plaintiff seeks to enforce it. Almost 10 years has lapsed since that consent order was passed and the time to exercise that right, indeed if it was exercisable at all, would now have long lapsed. In my view, any doubt about whether or not the judgment was at all enforceable would be removed upon the expiration of the time for filing an appeal. That means that there should now be no doubt that the judgment is enforceable.

[19]. Having said that, at this juncture, I would like to quote from a paper delivered by Mr. justice Nawana at the 2012 Civil Law Workshop for Judges held at the Intercontinental Resort in Natadola of which I take heed whenever an agreement between counsel is placed before me for judicial sanction:

ROLE OF THE COURT

In dealing with a pre-judgment settlement, the judicial role resides at a very high echelon, which cannot be abdicated in favour of parties or counsel.

In *Williams v Powell* [1894] WN¹ 141, it was held that:

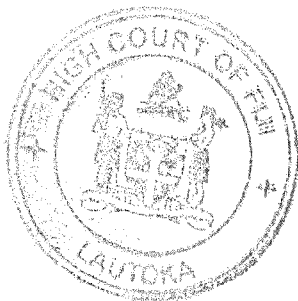
[A] declaration by court is a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court is satisfied by evidence... Where relief is to be granted without trial, whether on admission or by agreement or in default of pleading, and it is necessary to make clear upon what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be upon such and such a footing without any declaration to the effect that the footing in fact reflects the legal situation.

The above dictum emphasizes the need for the Judge or the Magistrate to be appraised of the evidence without being lightly persuaded by admissions or by the consent of the parties or counsel in discharging their judicial role. It also cautions us as to the potential danger in making declarations/orders without specifying their correct bases as they might affect a third party in the process of making a pre-judgment settlement.

Judicial Officers very often fall into the misconception that, whenever parties present their agreement in court for endorsement, their role is simply to rubber-stamp the agreement. This thinking is to be discouraged. While the court should strive at all cost to promote the policy of encouraging parties to settle their cases, the court should retain its discretionary role on whether or not to endorse a settlement. As usually the case is, this discretion should be exercised judicially (my emphasis).

In my view, this means that the court is entitled to ask for more information before it exercises its discretion on whether or not to endorse a pre-judgment settlement. In other words, the court should not be haste in endorsing a pre-judgment settlement just because the parties have agreed to it, if it feels that there has been a lack of full and frank disclosure on the part of, at least, one of them.

[20]. I grant Order in Terms of the plaintiff's application.



A handwritten signature in black ink, appearing to be 'Anare Tuilevuka', written over a horizontal line.

.....
Anare Tuilevuka

JUDGE

30 May 2014