IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBM 02 of 2016

IN THE MATTER of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 40

AND IN THE MATTER of a Judgment of the Federal Circuit Court of Australia at Dandenong obtained in **Barbara Joy Sundram v Nathaniel Bal Sundram** No. (P) DGC 2871 of 2014 dated the 23rd day of March 2015.

BETWEEN : NATHANIEL BALSUNDRAM of c/- Malkin Lawyers, Beaconsfield Vic 3807, Berwick Victoria, Australia

*Plaintiff*

AND : BARBARA JOY SUNDRAM of c/- Berwick Legal Beaconsfield Vic 3807, Berwick Victoria, Australia

*Defendant*

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Ms. V. Lidise for the Applicant

Date of Judgment : 31 March 2017

# JUDGMENT

[1]. By an *Ex-Parte* Summons dated 26 February 2016, the Applicant being the judgment creditor of a Consent Order passed by a Federal Circuit Court in Australia, obtained in the matter of *Barbara Joy Sundram v Nathaniel Bal Sundram* **No. (P) DGC 2871 of 2014** dated 23rd March 2015, seeks for an order from this Court to have the said judgment registered in the High Court of Fiji for the purpose of execution and enforcement against the Respondent.

[2]. The *Ex-Parte* Summons is filed by the Applicant pursuant to Section 4(1) of the *Foreign Judgments (Reciprocal Enforcement) Act Cap.40* [ hereinafter referred to as Cap.40 ], *Order71 of the High Court Rules 1988* [the HCR], *The Reciprocal Enforcement of Judgments Act* (Cap.39) [hereinafter referred to as Cap.39 ], and the Inherent Jurisdiction of the High Court.

[3]. However, *the Reciprocal Enforcement of Judgments Rules (1964) made by the Chief Justice of Fiji under Section 6 of Cap. 39* are also applicable to this Application.

[4]. The Section 4(1) of Cap.40 reads:

> 4.-(1) *A person being a judgment creditor under a judgment to which this Part applies may apply to the Supreme Court* ***[should now be read as the High Court]*** *at any time within six years after the date of the judgment or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the Supreme Court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered:*
> *Provided that a judgment shall not be registered if at the date of the application:-*
>
> *(a)It has been wholly satisfied; or*
>
> *(b)It could not be enforced by execution in the country of the original court.*

[5]. The mode of bringing up an application of this category is found under Rule 2 made by the Chief Justice of Fiji dated 04th December 1964 by virtue of the power vested under Section 6 of Cap.39, where it provides provisions for an application to be made *Ex-Parte* or by *Summons* to the court, which may direct a summons to be issued. In so far as the present application is concerned, the mode of making the present Application to this Court is in accordance with the rules.

[6]. The Court whose Judgment/Order is sought to be registered in Fiji is *the Federal Circuit Court of Australia at Dandenong*, (hereinafter referred to as *"the Foreign Court"*) which is situated within the State of *Victoria*. For the purpose of these proceedings, the provisions of Cap.40 make it clear that *the Foreign Court* should be a ***Superior Court*** within the meaning of Cap. 40.

[7]. The State of *Victoria* in Australia is recognized as a *Territory of the Commonwealth* outside Fiji by a Proclamation made by the Governor and Governor General in exercising the power to make such Proclamations under Sections 3 and 9 of Cap. 40 for the purpose of the application of these rules. I am not ending here but need to get back to the issue of superiority later because; I have few other issues to be elaborated first.

[8]. The Order 71 of the HCR reads as follows:

> *Application of Reciprocal Enforcement of Judgments Rules (O.71, r.1)*
>
> O.71, r.1:- *The Reciprocal Enforcement of Judgments Rules made under the Reciprocal Enforcement of Judgments Act shall apply, with necessary modifications, to proceedings under the Foreign Judgments (Reciprocal Enforcement) Act.*

[9]. The Applicant in this case has obtained the Consent Order from *the Foreign Court* on 23rd March 2015.

[10]. Hence, the Applicant has instituted these proceedings in this Court within the time limit stipulated by Section 4(1) of Cap.40 for bringing up an application of this kind, viz. within 6 years from the date of the order or judgment.

[11]. The Counsel for the Applicant stated that the Order which is subjected to be registered is a Consent Order of a *Family Court* case.

[12]. The Applicant relies upon the affidavit of MIRIAMA LATIANARA of Lautoka, Legal Practitioner employed by Young & Associates, the Solicitors for the Applicant.

[13]. The Applicant has instructed and authorized MIRIAMA LATIANARA to execute the affidavit on behalf of him by his letter of authorization [ML-1].

[14]. The Order of *the Foreign Court* dated 23rd March 2015 is annexed to the affidavit of MIRIAMA LATIANARA [ML-2].

[15]. The ML-2 confirms that it is a Consent Order of a *matrimonial cause* between the Applicant (husband) and the Respondent (wife) in these proceedings.

[16]. The Applicant seeks leave of this Court for the registration of the Consent Order for the purpose of among other things, effecting the transfer of the respondent's undivided half share of the Housing Authority Sub-Lease 373310 [HAS Lease]

(not submitted with this application), comprised in Lot 40 on DP4789, Ba situated in the District of Vuda having a total area of 26.8 perches.

[17]. Part of the terms included in ML-2 in respect of which the registration is sought included the following orders:

> *"3. That within thirty (30) days the Wife shall do all such acts and things and sign all such documents as may be required to transfer to the Husband at the expense of the Husband all of her right, title and interest in the real property situate at 20 Ram Asre Street, Lautoka, Fiji (the 'Fiji Property')*
>
> *4. That the Husband shall retain as his sole property:*
>
> *(a) the funds held in the Husband's Westpac bank account in Fiji (Account 9802756925); and...."*

[18]. The paragraph 3 of the consent order directly relates to the HAS Lease.

[19]. The Applicant and Respondent in the meantime have both signed a *memorandum of transfer* of HAS Lease for the purpose of transferring the Respondent's half share to the Applicant.

[20]. The *memorandum of transfer* has been stamped by the Stamp Duties Office Fiji and it is annexed to the affidavit of MIRIAMA LATIANARA, marked as ML-3.

[21]. The Young & Associates in early 2016 had attempted to lodge the ML-3 for registration at the Registrar of Titles Office which was later refused to do so since the ML-2, the Order of *the Foreign Court* has not been re-sealed by the High Court of Fiji.

[22]. The Summons was then taken up in Court *Ex-Parte* on the request of the Applicant's Solicitors for supporting and the Counsel for Applicant relied on her oral submissions in support of the matter before it was fixed for Ruling.

[23]. Then, during the preparation of the judgment I carefully observed the provisions of Cap.40 and found the special provision in it under Section 2 (2) where it reads as follows:

> *"2 (2)- For the purpose of this Act, the expression "action in personam" shall not be deemed to include any matrimonial cause or any proceedings in*

*connection with any of the following matters, that is to say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or guardianship of infants".*

[24]. The ML-2, the Order of *the Foreign Court* which the applicant is pursuing to register in the High Court of Fiji derives from a *Matrimonial Cause* taken place between these two parties in Australia.

[25]. Thus, in view of the provisions of Section 2(2) of Cap.40, and in so far as the Order of *the Foreign Court* relates to a *Matrimonial Cause* held in a Federal Circuit Court, it shall not be deemed to include for the purpose of Cap.40.

[26]. Having made the oral submissions on the listed date for supporting the Application, the Applicant's Counsel confined on the same for the Court to settle the judgment thereafter. However, on the listed date for the delivery of the judgment in this regard, the Court had come to a conclusion to finalize its determination on the aforesaid findings in view of the relevant statutes that this Court had no option but to refuse this Application.

[27]. Nevertheless, having considered the background of the Applicant's Summons before this Court, the Court then indicated to the Counsel and raised the issues in view of the effect of the provisions in Sections 2(2), 3 and 9(3) of Cap.40. Then, I thought that it is proper to grant an opportunity for the Applicant to tender further submissions for completeness and for academic purpose to discuss the matter in length before passing the ruling only on the basis of the said technical lumps.

[28]. Then the Applicant's Counsel also while extending her gratitude to the Court for the opportunity granted for the Applicant to file submissions, moved for a considerable length of time for her to have a research on the subject and to file written submissions addressing the issues raised by the Court.

[29]. The Counsel in her written submissions so filed also admits that the effect and implications of Section 2(2) of Cap.40 appears to limit the application of Cap.40 for this case in hand for the reason of exclusion of the *"Actions in Personam"* that fall within any of the following categories:

- *Matrimonial matters*
- *Estate matters*
- *Bankruptcy matters*
- *The Winding Up of Companies*
- *Matters relating to lunacy*

- *The guardianship of infants*

[30]. The Counsel asserts that in determining the proper statutory construction and interpretation of Section 2(2) of Cap.40, as a starting point, the Court must have regard to the entire provisions of Cap.40. The only Section within Cap.40 to which the expression *"Action in Personam"* appears and to which Section 2(2) applies, is Section 6.

[31]. Section 6 of Cap.40 has the heading *"cases in which registered judgments **must or may be set aside**"*. It provides as follows:

> *"6 (1):- On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment-*
>
> *(a) **Shall be set aside** if the registering court is satisfied-*
>
> *(i) That the judgment is not a judgment to which this Part applies was registered in contravention of the foregoing provisions of this Act; or*
>
> *(ii) That the courts of the country of the original court had no jurisdiction in the circumstances of the case; or*
>
> *(iii) That the judgment debtor being the defendant in the proceedings in the original court did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear, or*
>
> *(iv) That the judgment was obtained by fraud; or*
>
> *(v) That the enforcement of the judgment would be **contrary to public policy in the country of the registering** court; or*
>
> *(vi) That the **rights under the judgment are not vested in the person by whom the application for registration was made;***
>
> *(b). May be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had, previously to the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.*

(2) *For the purpose of this section the courts of the country of the original court shall subject to the provisions of subsection (3), be deemed to have had jurisdiction-*

*(a) In the case of judgment in action in personam –*

*(i) If the judgment debtor, being a defendant in the original court submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting or obtaining the release of property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of that court ; or*

*(ii) If the judgment debtor was plaintiff in or counter-claimed in the proceedings in the original court; or*

*(iii) if the judgment debtor, being a defendant in the original court had, before the commencement of the proceedings, agreed in respect of the subject matter or the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court; or*

*(iv) If the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted, resident in, or being a body corporate had its principal place of business in, the country of that court; or*

*(v) If the judgment debtor, being a defendant in the original court had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at the office or place;*

*(b) In the case of a judgment given in an action of which the* ***subject matter was immovable property*** *or in an action in rem of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court;*

*(c) in the case of a judgment given in any action other than any such action as is mentioned in paragraph (a) or paragraph (b), if the jurisdiction of the original court is recognized in by the law of the registering court.*

(3) *Notwithstanding anything in subsection (2), the courts of the country of the original court shall not be deemed to have had jurisdiction-*

*(a) if the subject matter of the proceedings was* ***immovable property*** *outside the country of the original court; or*

*(b) except in the cases mentioned in sub-paragraphs (i), (ii) and (iii) of paragraph (a) and in paragraph (c) of subsection (2), if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court; or*

*(c) if the judgment debtor being a defendant in the original proceedings, was a person who, under the rules of public international law, was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court."*

[32]. I accept this view of the Counsel that subsection (1) of Section 6 of Cap.40 sets out the factors which if they exist will either give the Court a mandatory or discretionary power to find that the foreign court did not have jurisdiction.

[33]. The provisions in subsection (2) of Section 6 set out the factors and considerations relevant to determine, if *the Foreign Court* had jurisdiction according to whether the proceedings before *the foreign court* amounted to an *Action in Personam*, or an *Action in Rem* or some other thing.

[34]. Importantly, subsection (3) of Section 6 provides three overriding factors or considerations which if they exist would render the proceedings of *the Foreign Court* as having been conducted without jurisdiction, notwithstanding subsections (2) and (3).

[35]. Thus, even if this Court was persuaded by any argument that the proceedings of *the Foreign Court* did not constitute an *Action in Personam*, the Court would still be bound to consider the implications of Section 6(3) of Cap.40. In particular the Section 6(3) (a) clearly stipulates that foreign court will not have had jurisdiction if the subject matter of the proceedings was ***immovable property*** outside the country of the foreign court.

[36]. It is not disputed that one aspect of the proceedings before *the Foreign Court* was the *"real property situated at 20 Ram Asre Street, Lautoka, Fiji"* which is *immovable property*. However another aspect of the proceedings was the *"funds held in the Husband's Westpac bank account in Fiji (Account 9802756925)"* quite apart from the balance of the matrimonial property situate in Australia.

[37]. The Counsel submits that, had the subject of the proceedings before *the Foreign Court* been **limited solely** to the *real property situated at 20 Ram Asre Street, Lautoka, Fiji,* then the provisions of Section 6(3)(a) would apply. The result would be that *the Foreign Court* for the purposes of Cap.40, would not have had the jurisdiction to make any orders relating to the *Ram Asre property* in Lautoka, Fiji, and therefore any orders of *the Foreign Court* would not be capable of registration in Fiji.

[38]. Given the scope of the orders of *the Foreign Court,* extends to property other than *immovable property,* it is submitted by the Counsel that the provisions of Section 6(3) (a) of Cap.40 do not apply to the application before the Court.

[39]. I am unable to accept this line of argument of the Counsel when she says that the provisions of Section 6(3) (a) of Cap.40 do not apply to the present application before this Court, for two reasons. One is that this application involves of both *movable* and *immovable* properties. (see paragraph 16 and 17 of this Judgment). The other reason is that the Consent Order relates and derives from a *matrimonial cause* in *the Foreign Court* which the Sections 2 (2) and 6 (3) (a) of the Cap.40 impedes this Court from registering such an order issued by a foreign court.

[40]. The Counsel suggests that if this Court is persuaded that Section 6(3) (a) does not apply then, the next issue is whether the proceedings before the foreign court amounts to an *Action in Personam* and in determining this issue, the contents of the Order of *the Foreign Court* are material.

[41]. The Counsel requests this Court to take cognizance of the fact that the Order of *the Foreign Court* is a *consent order* and the Court to observe that there is no penal notice in the said Order which would enable either party to enforce the terms of the Order in the event of a default.

[42]. It is correct to say that the set of terms of settlement in the Order of *the Foreign Court* clearly relates to the distribution of the matrimonial pool of assets between the parties. In other words the substance of the orders relates to the settlement and determination of the property ownership rights between the parties. But, the fundamental issue here is whether *the Foreign Court* had jurisdiction to adjudicate these rights on merits and on evidence at a trial with regard to an immovable property situated in Fiji. The Order is clearly based on the mere terms of settlement suggested by the parties.

[43]. Then, the other genuine question arises as to the existence and the legitimacy of the HAS Lease referred to in paragraph [16] above, which is not submitted to this Court for examination.

[44]. The *Affidavit in Support* of the present application of the Applicant is sworn and submitted by MIRIAMA LATIANARA of Lautoka, *Legal Practitioner employed by Young & Associates the Solicitors for the Applicant*.

[45]. Even though, the Applicant has instructed and authorized MIRIAMA LATIANARA by ML-1 to execute the affidavit on behalf of him, he cannot bypass his own personal knowledge to the deponent of the affidavit to pass it through to the Court which involves maters, facts and evidence with regard to his personal rights attached to his properties and related issues.

[46]. It may be the view of the Applicant's Counsel that this is not a contentious matter so that the affidavit by a Legal Practitioner employed by the Applicant's Solicitors can be accepted in support of the present application.

[47]. Yet, the Court cannot lose the sight of Order 41, Rules 5(1) and 8 of the HCR 1988 as the rules succinctly provide an amplification of the description on execution, the relevancy, who disqualifies of attesting and the contents of affidavit as it more fully and comprehensively explains as follows:

*Contents of affidavit* [O.41, r.5 (1)]

r.5.-*(1). Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*

*Affidavit not to be sworn before barrister and solicitor of party, etc.* (O.41, r.8)

r.8.- *No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.*

[48]. Undoubtedly, this may not be a contentious matter between the two parties to the case but, involves the registration and execution of an order of a foreign court in Fiji which apparently invites the Court's due diligence as if the matter before the Court is contentious.

[49]. The intention of the relevant statutes relevant to the matters discussed above is so clear that, an affidavit of this kind cannot be supplied by a third party taking it just for granted.

[50]. Therefore, at the very out set I cannot rely on the affidavit of MIRIAMA LATIANARA to make a clear decision of the existence of a valid Sub-Lease referred to in this application (and in paragraph 16 of this judgement) which also causes a major impact on the whole of this application in view of the background factors in this application.

[51]. However, my task becomes more difficult since the Applicant has failed to submit the original or a certified copy of the HAS Lease to this Court as well.

[52]. Be that as it may, now the close perusal of annexure ML-3 which is the purported transfer of lease (one of the terms in the consent order of *the Foreign Court*) reveals that the Applicant resides in Fiji at No.20, Ram Street, Lautoka. This fact is stated at two places in ML-3 as follows;

> *"**PURSUANT** to Court Order dated 23 March 2015 in federal Circuit Court dated 23 March 2015 in Federal Circuit Court of Appeal of Australia at Dandenong Case No. (P)DGC2871 OF 2014 **BARBARA JOY BALSUNDRAM** of 2014 **BARBARA JOY SUNDRAM** of 7 Holsteiner Terrace, Clyde North 3978, Australia, Nurse, as Transferor **DOTH HERBY** transfer to **NATHANIEL BALSUNDRAM** of 20 Ram Asre Street, Lautoka Self- Employed all her estate and interest as to one undivided half share in the said land".*

[53]. But, the Applicant's *Ex-Parte* Summons carries an address in Victoria, Australia.

[54]. Those forgoing factors are also central to the present application that the Court needs clarifications for which the deponent MIRIAMA LATIANARA has no answers in her affidavit.

[55]. Leaving aside those issues for a moment, I will now go back to paragraphs [29] and [30] above, whereas the Counsel in her written submissions raised the following;

> "The Oxford Legal Dictionary which defines "***in rem***" as:
>
> *"[Latin: against the thing] 1. Describing a right that should be respected by other people generally, such as ownership of property, as distinct from a right **in personam**. 2. Describing a court action*

*that is directed against an item of property, rather than against a person or group of people. Actions in rem are a feature of the Admiralty Court."*

"***In personam***" is defined as:

*"[Latin: against the person] Describing a court action or a claim made against a specific person or a right affecting a particular person or group of people. The maxim of equity "equity acts **in personam**" refers to the fact that the Court of Chancery issued its decrees against the defendant himself who was liable to imprisonment if he did not enforce them."*

[56]. In the entirety, it is submitted by the Counsel that in applying the definition of *in personam* and taking into account the factors mentioned above, the proceedings before *the Foreign Court* did not constitute an action *in personam* but were an action *in rem*. Accordingly, the Counsel solicits; should this Court agree, the result must be that Section 2(2) of Cap.40 has no bearing on the application before this Court. Unfortunately, I disagree.

[57]. The case of **Kenneth Michael Janson v Frandy Janson HBD 005j 1994S** (decided on 23 February 1995) referred to by the Counsel in her written submissions would put more weight on my view above, even though this case law authority related primarily to the issue of whether the order of the Dissolution of Marriage obtained by the wife in New South Wales was capable of recognition in Fiji, some of the obiter comments assist this Court in its deliberations.

At page 8 Justice Fatiaki (as he then was) stated:

*"Finally counsel urges the Court to consider the potential prejudice to the husband that may arise from the unspecified **"material differences"** in the law of New South Wales and this country relating to the rights and entitlements of a wife to matrimonial property **and** also the absence of any provisions in the law of Fiji for recognizing or enforcing orders of the Australian Courts relating to property situated in Fiji.*

....

*In this regard I accept that the provisions of the **Reciprocal Enforcement of Judgments Act** (Cap 39), which has been extended to New South Wales since 1925 **and** the **Foreign Judgments (Reciprocal Enforcements) Act** (Cap 40) both refer to what might be conveniently called "money*

*judgments" and* ***therefore some of the orders sought by the wife in her application for property settlement in so far as they refer to real estate in Fiji may not be enforceable.*** *Nevertheless, that is a factor which more relevantly concerns the wife and has little (if any) bearing on the questions earlier posed by this Court."*

[58]. In **Mohammed Naseer Khan v Zebeenara Chand Begum ABU 44J of 2004** [decided on 18 March 2005] again it is the obiter comments by the Court of Appeal comprising of Tomkins J.A., Smellie J.A., and Scott J.A. at paragraph 20 stated:

*In the first place, it is clear that in the absence of a statutory system of registration or recognition, orders of foreign courts are not enforceable outside their own territory. In Fiji, owing to the limited scope of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 40)* ***recognition of family orders does not appear to extend beyond recognition of foreign decrees of divorce*** *(see also Matrimonial Causes Act – section 92).*

[59]. On the whole, it seems that both Fatiaki J in **Kenneth Michael Janson** (supra) and the Court of Appeal in **Mohammed Naseer Khan** (supra) were of the opinion that the scope of Cap.40 did not extend to foreign orders relating to matrimonial matters (save for decrees of divorce which was capable of recognition pursuant to the Matrimonial Causes Act). Whilst both decisions do not set out a clear basis of their opinion, it is justifiable to infer that it is related to the effect and implications of section 2(2) and 6(3) (a) of Cap.40.

[60]. Ultimately, the application of Section 2(2) of Cap.40 will depend on whether the Court finds that the proceedings before *the Foreign Court* constituted an action *In Personam*. As stated above, I am of the firm view that they constitute an action *In Personam* and not an action *In Rem*.

[61]. Therefore, in view of the adverse impact of Section 2(2) and 6(3) (a) of Cap.40 and the previous decisions of the Courts on the present Application, the attempt of the Applicant to register the Order of *the Foreign Court* in the High Court of Fiji fails on those grounds.

[62]. Now let me come back to the issue of **superiority** of *the Foreign Court* referred to in paragraph [6] of this judgment above, which is the most imperative factor above all, when it comes to the matter of registration of foreign judgments within the purview of Sections 3 and 9(3) of Cap.40. This issue had not been addressed by the Counsel in her written submissions.

[63]. It is pertinent to note the fact that *the Foreign Court* by which the Consent Order that is in line for the registration in the High Court of Fiji was passed in *the Federal Circuit Court of Australia at Dandenong*, which is situated within the State of *Victoria*. Now it is the duty of the Court to ascertain whether the said *Foreign Court* enjoys the superiority referred to in Cap.40.

[64]. Section 3 of Cap.40 reads;

> *3.-(1) The Governor-General, if he is satisfied that, in the event of the benefits conferred by this Part being extended to* ***judgments given in the superior courts of any foreign country****, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the Supreme Court, may by proclamation direct-*
>
> *(a) that this Part shall extend to that foreign country; and*
>
> *(b) that such courts of that foreign country as are specified in the proclamation shall be deemed* ***superior courts*** *of that country for the purposes of this Part.*
>
> *(2) Any judgment of a* ***superior court*** *of a foreign country to which this Part extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies if-*
>
> *(a) it is final and conclusive as between the parties thereto; and*
>
> *(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and*
>
> *(c) it is given after the coming into operation of the proclamation directing that this shall extend to that foreign country.*
>
> *(3) For the purposes of this section a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the courts of the country of the original court.*

[65]. And, Section 9(3) of Cap.40 reads;

> *9 (3) Where a proclamation is made under subsection (2) extending Part II to any country or territory of the Commonwealth to which the Reciprocal Enforcement of*

*Judgments Act extends, Part II shall, in relation to such country or territory, have effect as if-*

*(a) the expression "judgment" included an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place;*

*(b) the fact that a judgment was given before the coming into operation of the proclamation did not prevent it from being a judgment to which Part II applies, but the time limited for the registration of a judgment were, in the case of a judgment so given, twelve months from the date of the judgment or such longer period as may be allowed by the Supreme Court;*
*(Cap. 39)*

*(c) any judgment registered in the Supreme Court under the Reciprocal Enforcement of Judgments Act before the coming into operation of the proclamation had been registered in that Court under Part II and anything done in relation thereto under the Reciprocal Enforcement of Judgments Act or any rules of court or other provisions applicable to that Act had been done under Part II or the corresponding rules of court or other provisions applicable to Part II.*
*(Cap. 39)*

[66]. Therefore, the most significant part above all is the recognition and constitution of a *Superior Court* as stipulated by Cap.40 and as it defines as follows:

**"SECTIONS 3 AND 9 (3) -APPLICATION OF PART II**
Proclamations by the Governor and Governor-General

Part II of the Act has been applied to the following countries and territories:-

| Proclamations Nos. | Country or territory | Superior Courts |
|---|---|---|
| 8 of 1950 | Her Majesty's dominions outside Fiji | |
| 25 of 1955, 4 of 1973 | Republic of India | *(a)* the Supreme Court;<br>*(b)* all High courts and Judicial Commissioners' Courts;<br>*(c)* all district Courts;<br>*(d)* all other courts whose civil jurisdiction is subject to no pecuniary limit, provided that the judgment sought to be registered under the said |

| | | |
|---|---|---|
| | | Foreign Judgments (Reciprocal Enforcement) Act is sealed with a seal showing that the jurisdiction of the court is subject to no pecuniary limit. |
| 2 of 1957 | Northern Territory of Australia | Supreme Court of the Northern Territory of Australia. |
| **3 of 1957** | **Australia Capital Territory** | **Supreme Court of the Anstralian Capital Territory.** |
| **14 of 1970** | **State of Victoria** | **Supreme Court of the State of Victoria.** |
| 2 of 1971 | State of South Australia | Supreme Court of the State of South Australia. |
| 3 or 1971 | State of Western Australia | Supreme Court of the State of Western Australia. |
| 4 of 1971 | State of Queensland | Supreme Court of the State of Queensland. |
| 3 of 1972 | State of Tasmania | Supreme Court of the State of Tasmania. |
| 4 of 1977 | Kingdom of Tonga | Supreme Court of the Kingdom of Tonga. |
| 7 of 1977 | Papua New Guinea | *(a)* the National Court of Justice; and<br>*(b)* the Supreme Court of Justice. |

[67]. " The *Federal Circuit Court of Australia* was established by the *Federal Circuit Court of Australia Act 1999* formerly the Federal Magistrates Act) and its jurisdiction at inception was conferred by the *Federal Magistrates (Consequential Amendments) Act 1999*. These Acts received royal assent on 23 December 1999.

The Court is an independent federal court under the Australian Constitution. It is a federal court of record and a court of law and equity. Under section 8 of the FCC Act the Court is constituted by the Chief Judge and judges as appointed. Judges are appointed under the Act as justices in accordance with Chapter III of the Australian Constitution. The first applications made in the Federal Circuit Court of Australia were filed on 23 June 2000 and the Court's first sittings were conducted on 3 July 2000 in Adelaide, Brisbane, Canberra, Melbourne, Newcastle, Parramatta and Townsville.

The establishment of the Federal Circuit Court marked a change in direction in the administration of justice at the federal level in Australia. Australia had not previously had a lower level federal court, although a considerable amount of federal law work had been done in state and territory courts of summary jurisdiction under the provisions of the

Judiciary Act. The Court's creation was an exciting development in the federal court structure."

[Source - The Federal Circuit Court of Australia official web- http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/about-fcc/]

[68]. In the case of **Rays Haulage Pty Ltd v Khan [2013] FJHC 207; HBC89.2011 (30 April 2013)** Nawana J. in paragraphs 21, 22. 23, 24 and 31 held that:

> *" 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.*

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 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."*

[69]. Therefore, in view of the above analysis it is strikingly clear that *the Federal Circuit Court of Australia at Dandenong* is not a *Superior Court* within the meaning of Cap. 40 or Cap. 39 in order to reciprocally recognize its orders or judgments for registration in Fiji.

[70]. Nevertheless, the Counsel for Applicant in her extensive submissions though has failed to address the issue of superiority of a foreign court, does not leave her battle field as she submits that in the event that the Court finds the proceedings in *the Foreign Court* amounted to an action *in personam* and / or that the provisions of Section 6(3) (a) apply to the present application, this Court should find and hold that Sections 2(2) and 6(3) of Cap. 40 as being wholly unenforceable on the ground that they are *unconstitutional*.

[71]. The Counsel brings to the attention of the Court the preamble to the Constitution of Fiji (hereinafter referred to as "the Constitution") which provides as follows:

*"We the People of Fiji,*

....

*Declare that we are all Fijians united by common and **equal citizenry".***

(Counsel's emphasis and under-lineation)

And further, Section 1 of the Constitution:

*"The Republic of Fiji is a sovereign democratic State founded on the values of-*

*(a) common and equal citizenry and national unity,"*

[72]. Counsel also submits the importance of Section 26 (1) which states as follows:

*"Every person is equal before the law and has the right to equal protection, treatment and benefit of the law."*

[73]. The above mentioned provisions make it undoubtedly clear that equality is a fundamental right and value of the Constitution. Moreover the right to equality before the law has been specifically provided for under Section 26(1).

[74]. It is the Counsel's submissions that Sections 2(2) and 6(3) (a) of Cap.40 if applied will result in inequality and will contravene the values of the Constitution and Section 26(1).

[75]. It looks to me that the argument of the Counsel is that the potential effect of Section 2(2) of Cap.40 which limits or prohibits the registration of foreign judgments which arise from matrimonial matters if they amount to actions *In Personam*, and Section 6(3) of Cap.40 which prevents the registration of an order of a foreign court on the basis that the order relates to immovable property situated in Fiji contravene the values of the Constitution and its Section 26(1).

[76]. I cannot agree with the Counsel's argument based on the Constitution for few reasons. The simple reason is that the Constitution of a country is the supreme law of that country. The Constitution does not surrender the sovereignty of that country at the jurisdiction of a foreign court. Even though the Constitution of Fiji recognizes the equality as a fundamental right and value of the Constitution as far as the rights of the citizens are concerned, it does not equally recognize the jurisdiction of a foreign court akin to the jurisdiction of courts in Fiji. The meaning of Section 26(1) of the Constitution is drastically different to the background story of the Applicant in the present case in hand. The Constitution does not surrender the supremacy of the judiciary of Fiji at the jurisdiction of foreign courts. This is why Cap.39 and Cap.40 respectively while reciprocally recognizing some foreign courts to have their judgments (with limitations on the nature of their cases) for registration in Fiji; it does not allow the direct and spontaneous enforcement authority over the local courts. For any other cause of action attached to the immovable properties in Fiji and for actions *in personam*, one has to resort to the local jurisdiction to have their issues litigated within the

jurisdiction of Fiji. If I accept the argument of the Counsel, then I am accepting that the foreign courts have the power to pass judgments affecting the independence and the authority of the judiciary and the sovereignty of Fiji, and yet, I do not.

[77]. The argument of the Counsel may be of some value to a given case of a person in Fiji if the principle of equality before the law protected by the Constitution is not considered by legislative or administrative or executive or judicial authority in Fiji in any matter arisen out of a cause within the territorial limits of Fiji. But, this warranty is not envisioned to extend to a person who wishes to enforce a foreign judgment in Fiji. In such a case, the Constitution protects the sovereignty of the Sate by preventing the penetration of such foreign powers into Fiji. It is also the duty and the meaning of Cap.39 and Cap.40 to protect the sovereignty guaranteed by the Constitution.

[78]. The Counsel avers that under the laws of Fiji, apart from Cap.40, the registration of a foreign judgment is also possible pursuant to the provisions of Cap.39. She argues that consideration of the provisions of Cap.39 will reveal that there is no provision similar to Section 2(2) or Section 6(3) (a) of Cap.40.

[79]. Hence, for those applications for registration of foreign judgments brought pursuant to Cap.39, the Counsel submits that there is no provision akin to Section 2(2) of Cap.40 with the effect of limiting the types of foreign judgments that can be registered by excluding matrimonial matters. The Counsel says that there is no provision in Cap.39 in similar terms to Section 6(3) (a) of Cap.40 and in the result, a foreign judgment in respect of a matrimonial matter or in respect of property situated in Fiji is capable of registration under Cap.39, without any apparent limitation, whilst this is not possible under Cap.40.

[80]. It is the argument of the Counsel that a limitation is created under Sections 2(2) and 6(3) (a) of Cap.40 when compared with the provisions of Cap.39 which contain no such limitation, and it leads to create an inequality before the law in direct contravention of Section 26(1) and the values of equality enshrined in the Constitution.

[81]. The Counsel submits Section 2(2) of the Constitution which provides that:

> *"Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency."*

[82]. Further, she avers that the principles of constitutional interpretation, Section 3 provides as follows:

> *"(1) Any person interpreting or applying thus Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.*
>
> *(2) If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution."*

[83]. Finally, on the above basis the Counsel for the Applicant argues that in applying these principles, this Court is bound if possible, to adopt an interpretation that is consistent with the provisions of the Constitution. The only way in which this is possible is if the Court holds in accordance with Section 2(2) of the Constitution that the provisions of Sections 2(2) and 6(3) of Cap.40 are invalid by virtue of their inconsistency with the constitutional right to equality and there is no other way to water down the provisions of Sections 2(2) and 6(3) of Cap.40 so as to achieve an interpretation that would result in the inclusion of foreign judgments in respect of matrimonial matters and those which relate to property situated in Fiji, she further submits.

[84]. The Counsel may be relying on the mere appearance of the said provisions to argue that there is a limitation created under Sections 2(2) and 6(3) (a) of Cap.40 when compared with the provisions of Cap.39 to say that it creates an inequality before the law and is a direct contravention of Section 26(1) and the values of equality enshrined in the Constitution.

[85]. But, it is not so for the simple reason that the provisions of these two Acts, viz. Cap.40 and Cap.39 should be read together before making an application for registration of a foreign judgment and for the local Court to consider the same. These provisions are not optional for an applicant to file an application for registration of a foreign judgment only invoking the provisions of either one of these Acts. One has to follow the provisions and the procedure stipulated by both these Acts in making such an application.

[86]. Therefore, the argument of the Counsel based on the Constitution of Fiji has no weight in it and it fails.

[87]. The Counsel also submitted the following examples to justify her argument:

> - **Dhirendra Nadan & Thomas McCoskar v The State** Criminal Appeal Case Nos. 85 & 86 of 2005, the High Court found that sections 175 and 177 of the Penal Code offended the constitutional guarantee of equality. Accordingly, the Court declared sections 175(a) and 177 invalid to the extent that it criminalized acts constituting the private consensual sexual conduct of adult males and that any prosecutions brought under these provisions were nullity.
>
> - **State v AV HAC 192 of 2008S** (decided on 2 February 2009) the issue before the Court was whether section 10 of the **Juveniles Act** was invalid by virtue of its breach of the constitutional rights to equality before the law. Section 10 required that for child witnesses under the age of 14, an enquiry first had to be made to determine their ability to understand the nature of the oath, upon which if the Court was satisfied that they did, they would be allowed to give evidence under oath. The Court held that section 10 of the Juveniles Act discriminated against children because of their age and deprived them of their right to equality before the law guaranteed by the Constitution and that it must be considered as stricken form the Juveniles Act. The Court went one step further and also held that the common law requirement for corroboration of evidence of children to also be unconstitutional for the same reasons.

[88]. In both those cases referred to by the Counsel, the issues that had been addressed by the Courts are absolutely domestic, whereas the issue in the instance is an international issue involving the jurisdiction of a foreign court. One cannot import issues from a foreign country and beseech equality under the Constitution of Fiji particularly in a matter like the one in hand. The Constitution of Fiji while protecting the sovereignty of the State and the equality before the law as a fundamental right of the citizens of Fiji, it also protects the judicial authority and independence.

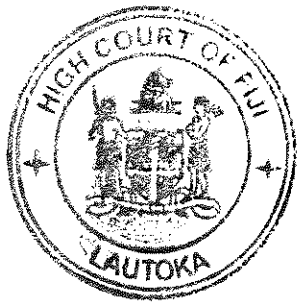
[89]. The power conferred on Cap.39 and Cap.40 to reciprocally recognize the jurisdiction of limited number of identified foreign courts derives from the Constitution. The right to equality before the law cannot be entreated or invoked in an application for registration of a foreign judgment. No application for registration of a foreign judgment is entertained and admitted as of right of an applicant. The mechanism of "Reciprocal Enforcement" of foreign judgments is a mutually arranged method of registration and execution of foreign judgments in Fiji for which Cap.39 and Cap.40 have given effect of by virtue of the power confers by the Constitution.

[90]. Therefore, the constitutional right of equality has no role to play in the present case in hand.

[91]. For all the forgoing reasons discussed, the Application for registration of the Order of the Federal Circuit Court of Australia at Dandenong, obtained in the matter of *Barbara Joy Sundram v Nathaniel Bal Sundram* - No.(P)DGC2871/2014, in the High Court of Fiji, is refused.

[92]. The Applicant's *Ex-Parte* Summons dated 26 February 2016 on the above, is struck out and dismissed.

[93]. No costs.




R.S.S.Sapuvida
**Judge**
High Court of Fiji

31 March 2017 at Lautoka.