

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 81 OF 2004

BETWEEN : **SHIU RAM** of Votualevu, Nadi

PLAINTIFF

AND : **CARPENTERS FIJI LIMITED** a limited liability company
having its registered office at Suva, Fiji

DEFENDANT

Counsel : Mr. Roopesh Singh – Instructed by Messrs. Patel & Sharma
Barristers & Solicitors for the Plaintiff
: Mr. E. Narayan – Instructed by Messrs. Patel Sharma Lawyers
Barristers & Solicitors for the Defendant

Hearing on : 23rd May, 2017

**Written Submissions by
Plaintiff on:** : 20th June, 2017

**Written Submissions by -
Defendant (Reply) on** : 4th July, 2017

**Written Submission by-
Plaintiff (Reply) on** : 27th July, 2017

Judgment made on : 11th September, 2017

J U D G M E N T

[A] **INTRODUCTION**

1. The Plaintiff commenced this action by way of Writ of Summons filed along with the Statement of Claim dated 23rd March, 2004, which now stands amended by the

Amended Statement of Claim(ASC) dated 19th October, 2015. He prayed for following reliefs:

- (a) Damages for defamation and / or libel and/or slander;
- (b) The Defendant do publish a signed apology to the Plaintiff and have the same promptly published prominently in the front page of the Fiji Times, the Fiji Sun and the Daily Post at its own cost;
- (c) Damages for emotional distress ;
- (d) Consequential damages for lost business opportunity and damages to the Plaintiff's business;
- (e) Aggravated and punitive damages;
- (f) Interest;
- (g) Cost;
- (h) Any other relief which the Honourable Court deem just and equitable.

2. The Defendant Company filed its amended Statement of Defence dated 6th November 2015, claiming for the dismissal of the action and cost, for which the Plaintiff filed reply dated 1st December 2015.

[B] **BACKGROUND:**

3. For the purpose of lucidity and better manifestation of the actual circumstances and reason/s that seem to have led to this litigation, I, having perused the records, describe below the chronology of events of certain proceedings that had taken place in the Magistrate's Court of Lautoka, commenced by the institution of a Money recovery action by the herein named Defendant, **Carpenters (FIJI) Ltd (Carpenters)** against the Plaintiff, **SHIU RAM (S/O Ankur)** and others, for the recovery of an arrears of \$8,600.81, allegedly, owed by the Plaintiff, being a Guarantor for a loan of \$ 40,000 granted by the Carpenters to **Maroochy River Trading Company (FIJI) Ltd**, in which Plaintiff was , admittedly, a Director.
- a. Money recovery action bearing No:- 688/91 was instituted by the Carpenters against the Plaintiff Shiu Ram and others in the year 1991 at the Magistrate's Court of Lautoka;

- b. The Magistrate's Court of Lautoka was burnt down in the year 1994 and case record bearing No:- 688/91 was destroyed;
- c. On 27th July 1995 Messrs. Sahu Khan & Sahu Khan, the Solicitors for Carpenters , wrote to the Court Clerk of Lautoka M.C. stating that the matter had been set down for formal proof on 26th January 1994 and requested NOAH to be sent;
- d. On 27th July 1995 the said Senior Court Officer sent reply to Messrs. Sahu Khan & Sahu Khan enclosing the NOAH to be served on the Defendants (Maroochy River Trading Company and the Guarantors including this Plaintiff) with the returnable date of 03.10.1995 and allocating a new file number bearing No:- 259/95;
- e. On 16.05.2000, after an unexplained period of about 5 years of time gap, the Senior Court Officer being asked by the Messrs. Sahu Khans about the progress, once again on 18.05.2000, sent fresh NOAH to be served on the said Defendants with the returnable date of 01.08.2000;
- f. The NOAH was, purportedly, served on Shiu Ram on 20th July 2000;
- g. The matter being called on 1.08.2000, 12.09.2000 and finally on 07.11.2000, and Shiu Ram, as a Defendant being absent on all 3 dates , was fixed for formal proof and on 09.01.2001 the evidence being led Judgment was entered for a sum of \$ 8,519.81, together with the cost of \$ 81.00 in favour of Carpenters;
- h. On 29.05.2002 Carpenters" issued Bankruptcy Notice on Shiu Ram, which was, reportedly, served on 05th June , 2002 by Bailiff one Anver Deen;
- i. Subsequently, the Bankruptcy Petition dated 5th July, 2002 was issued and same too was, reportedly, served by the same Bailiff on 2nd August 2002;
- j. There being no response from Shiu Ram for the Bankruptcy Notice a Receiving Order was issued on 13th July 2002;
- k. The Receiving Order was published in the Government Gazette dated 25th October 2002 and in the Fiji Times on 18th October 2002, which reads as follows;

**IN THE FIRST CLASS MAGISTRATE'S COURT
WESTERN DIVISION AT LATUTOKA**

**IN BANKRUPTCY
(No.30 of 2002)**

**RE: SHIU RAM (f/n Ankur) of Vatualevu
EX parte: A CREDITOR**

Notice is hereby given that on the petition dated the 3rd day of July 2002, a receiving order was made against the above named on the 2nd September 2002, by the First Class Magistrate's Court at Lautoka.

- l. A motion to rescind the Receiving Order was filed on 29th January, 2004 and same was rescinded by **consent** on 17th March, 2004;
- m. On a subsequent application the Receiving Order was set-aside on 6th April, 2004; (not emerged at this trial)
- n. On 16th March, 2004 an application was made to set-aside the formal proof Judgment and same was set aside by the Learned Magistrate on 22.10.2004;
- o. On 27th July, 2005, when the matter was called before the learned Magistrate in the presence of Counsels for both the parties, an application was made to discontinue the claim and same being allowed the action was dismissed.

[C] **PLEADINGS:-**

4. According to the A.S.C the Plaintiff asserts, among other things,
 - a. That the words used in the said notice published in the Fiji Times & Gazette in their natural meaning, mean or are capable of conveying that the Plaintiff has taken Money from creditors, he is unable to repay the outstanding debts, he has cheated the creditors, his assets are to be sold to pay the debts and he is not trust worthy;

- b. That by reason of the said publications he has been defamed and as a result he suffered and continue to suffer damage/injury to his reputation and to that of his business as averred in sub paragraphs (a) to (h) of paragraph 14 of the A.S.C.
5. **The Defendant** by its Statement of Defence, while denying several averments in the claim, has taken up a position that the Plaintiff, being a Guarantor, was in fact indebted to the Defendant in a sum of \$ 8,600.81, as the arrears of the loan granted to his Company, namely, **Maroochy River Trading Company Fiji Ltd**, as per the formal proof Decree stated above and mainly taken up the following as its defence:
- a. That the Receiving Order was published by a third party (Official Receiver) pursuant to his Statutory duties in terms of the Bankruptcy Act (Chap-48) and on the strength of a Judicial Order (Receiving Order) made on 3rd July 2002 in the Magistrate's Court of Lautoka, in the Bankruptcy proceedings bearing no:-30 of 2002;
- b. That the publication is neither fully nor accurately pleaded and it is not defamatory;
- c. That the said publication is a notice of a Judicial Order pronounced in Court and subjected to absolute and/or qualified privilege and the contents thereof are true and thereby the defence of justification applies;

[D] **AGREED FACTS:-**

6. (1) That the Plaintiff is a businessman and a Director of **Maroochy River Trading Company Ltd**;
- (2) That on 5th July, 2002 , the Defendant filed a Bankruptcy Petition against the Plaintiff in the Magistrate's Court, Lautoka claiming that the Plaintiff was justly and truly indebted to the Defendant in a sum of \$ 8,600.81 on a final Judgment, purportedly, obtained in the Magistrate's Court of Suva;
- (3) That on 09th January ,2001 the Defendant formally proved its case against the Plaintiff & other parties and obtained judgment against them, jointly and severally , in a Sum of \$ 8,211.87 , interest of \$307.94 and indorsed cost;

- (4) That on the 2nd day of September, 2002 a Receiving Order was made against the Plaintiff on the basis of Defendant's Bankruptcy Petition and on the failure of the Plaintiff to defend the Bankruptcy proceedings;

[E] **AGREED ISSUES TO BE DETERMINED**

- (5) Whether there was no final Judgment against the Plaintiff in favour of the Defendant in the Magistrate's Court of Suva?
- (6) Whether at the time of the issue of the Bankruptcy Petition, the Plaintiff resided at **Vatualevu, Nadi** and not at Lautoka, not within the Jurisdiction of the Magistrate's Court, Lautoka as claimed in the petition?
- (7) Whether the Defendant misled the Magistrate's Court at Lautoka by filing a Bankruptcy Petition and obtaining the Receiving Order against the Plaintiff by stating in the Petition that the plaintiff was residing at Lautoka within the jurisdiction of this Court?
- (8) Whether the Magistrate's Court at Lautoka would have made a Receiving Order, had it been advised that the plaintiff was permanently residing at Vatualevu, Nadi and not at Lautoka?
- (9) Whether the Magistrate's Court at Lautoka had jurisdiction to make a Receiving Order against the Plaintiff when the plaintiff was permanently resident at Vatualevu, Nadi, at the material time?
- (10) Whether the purported execution of personal Guarantee Agreement at Lautoka entitled the Defendant to obtain a Receiving Order against the Plaintiff when he was permanently residing at Vatualevu, Nadi?
- (11) Whether the Receiving Order obtained by the Defendant against the Plaintiff was advertised in the FIJI Times on the 18th of October, 2002 and in the Fiji Republic Gazette on 16th day of 2002?
- (12) Whether the Receiving Order made by the Magistrate's Court at Lautoka on the 2nd day of September 2002, on the Petition of the Defendant against the Plaintiff, was set aside by the same Court on the 17th day of March, 2004?

- (13) Whether the contents of the said publication are true and the defence of justification applies?
- (14) Whether as a result of obtaining of a Receiving Order by the Defendant against the Plaintiff, the advertisement of the Receiving Order in the Fiji Times and in the Fiji Republic Gazette :
- (a) Has the Plaintiff been defamed, libelled and slandered?
- (b) Has he suffered Public embarrassment and great emotional distress?
- (c) Has he suffered in his business by his associates refusing to deal business with him and refusal to accept his cheques and/or afford him any credit facilities?
- (d) Has he lost any business opportunities?
- (15) Whether as a result of the Receiving Order and publication of the same by the Defendant, has the Plaintiff suffered any damages? If so, the quantum of damages?
- (16) Whether the Plaintiff is entitled to any interest on any award for damages to be made. If so, the rate of interest?

F. **THE TRIAL**

7. Apart from the Plaintiff (**P.W-1**), 4 other witnesses were called to give evidence in support of plaintiff's claim. They were;
- a. **P.W-2**-Mr.Anulesh Ram-Acting Senior Court Officer- Magistrate's Court- Lautoka,
- b. **P.W-3**-Mr. Sanaila- From Official Receivers Office,
- c. **P.W-4**-Mr.Mikaele Rokosua- Admin. Officer- Government Printing Department,
- d. **P.W-5**-Ms. Vandhana Sharma- Pub. Relation Manager- ANZ Bank – Nadi Branch.
8. On behalf of the Defendant only one witness (**D.W-1**) namely, **Jolame Rokoyawa**, who claims to have headed the legal division at Carpenters during the time material to those Court proceedings, was called.

9. The Plaintiff relied upon and tendered following documents marked from PE 1 to PE- 17. They are;
- a. Letter dated 1st October 2003 from Mishra Prakash & Associate to Senior Court Officer M.C. Lautoka-**PE-1**
 - b. Letter dated 22nd .10. 2003 from Sen. Court Officer to Mishra Prakash & Associate -**PE-2**
 - c. Bankruptcy Notice date 29th May 2002-**PE-3**
 - d. Bankruptcy petition dated 3rd July 2002-**PE-4**
 - e. Affidavit verifying debt-**PE-5**
 - f. A letter dated 10th December 2003 from Mishra Prakash & Associate-**PE-6**
 - g. Letter date 11th.12. 2003 from the Ministry of Justice to Mishra Prakash -**PE-7**
 - h. Letter dated 8th.01. 2004 from Min. of Justice to Mishra Prakash & Ass.-**PE-8**
 - i. Receiving Order dated 2nd September 2002 -**PE-9**
 - j. Notice of Motion date 29th January 2004 filed by the Plaintiff's Lawyers-**PE-10**
 - k. Order date 17th March 2004 rescinding the Receiving Order -**PE-11**
 - l. Gazette notice dated 25th October 2002-**PE-12**
 - m. Magistrate Court Case file No:- 259/95 containing the Ruling date 22.10.2004 setting aside the formal proof judgment-**PE-13**
 - n. Bankruptcy file No_30/2002 from Magistrate's Court-**PE-14**
 - o. File from the Official Receiver's Office -**PE-15**
 - p. Gazette Notice dated 25th .10.2002-**PE-16** (marked as PE-12 too)
 - q. Receipt for payment of \$110 to the Official Receiver-**PE-17**

The Defendant marked and tendered following documents; they are;

(a) Affidavit dated 27th .6. 2002 Re. the service of Bankruptcy Notice-**DE-1**

(b) Affidavit dated 12th .8. 2002 Re. the service of Bankruptcy Petition-**DE-2**

(c) Letter dated 16th .10.2002 from Official Receiver to the Plaintiff-**DE-3**

10. In order to avoid prolixity, I do not endeavour to reproduce the evidence of plaintiff and his witnesses here; however, same will be subjected to scrutiny depending on the relevancy and admissibility.

[G] THE LAW OF DEFAMATION:-

11. Undoubtedly, for the Plaintiff to take home the fruits of his litigation on account of the alleged defamatory publication, the burden is squarely on him to prove that the relevant publication, the contents, the words therein, the meaning thereof or the particular act of publication concerned were published of him by the Defendant and it was defamatory and caused damages as averred by him.

12. The defence of any kind that is available in law need not come in to play until the Plaintiff fully discharges the above onus to the satisfaction of the Court. It is finally up to the Court to decide and arrive at a conclusion, whether or not the disputed act of publication and/or the words or the contents therein of the Defendant are capable of having a libellous meaning and defaming the plaintiff as claimed by him.

13. A similar view was succinctly expressed in **Vere v Chairman of Disciplined Services Commission [2001] FJHC 314; [2001] 1 FLR 328 (5 October 2001)**. The Court quoted **Sad grove v Hole (1901) 2 KB 1 A.L.** as **Smith M.R** stated:

"The Plaintiff in order to succeed in the action must prove a publication of and concerning him of the libellous matter, and if he does not satisfy the onus of proof which is on him in this respect, there is no cause of action."

14. **Law of Torts, 1991, Butterworth's** at page 565 states that;

"For the plaintiff to establish his cause of action in defamation he must show that the defamatory words (or other means of communicating ideas), of and concerning him,

have been published or otherwise made known to a third party. The three aspects of this requirement – (1) the nature of the defamatory statement (2) the way in which it may refer to the plaintiff, and (3) the means by which it may be published – are considered in turn.”

15. In **Rabuka v Fiji Daily Post Company Ltd [2005] FJHC 174; HBC0511j.2000s (8 July 2005)** Justice Pathik said as follows.

“To establish a cause of action in defamation it must be shown that the defamatory words of and concerning the plaintiffs have been published. There are three aspects to this requirement, namely, (a) the nature of defamatory statement; this I have already stated here above, (b) the way in which it refers to the plaintiff; this has already been done, and (c) the means by which it was published; here it was through the newspaper as already stated”.

16. Justice **Pathik** also quoted **Lord Reid** in the judgment in **Lewis v Daily Telegraph Ltd [1964] A.C. 234** where Lord Reid stated:

“There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning... Generally the controversy is whether the words are capable of having a libellous meaning at all, and undoubtedly it is the judge’s duty to rule on that.”

[H] ANALYSIS

17. This action, being filed in the year 2004, when came up before me for trial on **23rd May, 2017**, after about 13 years, the learned Counsel for the Plaintiff, at the outset, called upon me to decide on the defence of “Absolute/Qualified Privilege” as a preliminary issue. Though, learned Counsel claimed it to be a legal issue, I decided to answer it along with the other issues, at the end of the trial, for the reason, *inter-alia*, that the defence of Qualified privilege may require evidence to rule out the

presence of malice alleged by the plaintiff and for the defendant to establish that the contents of impugned publication were truth and made in good faith.

18. Turning towards the agreed issues, I find that most of them, particularly, the agreed issues No: - 05 to 10 and 12 (issues are numbered from No:-05 according to PTC minutes) are revolving around the proceedings held before the Magistrate's Court of Lautoka and the answers to which are either fossilized in the agreed facts and/or already found in the Magistrate's Court proceedings or should have been found by that Court and not by this Court.
19. Unless, this Court sits in the exercise of its Appellate or Revisionary jurisdiction over the matters questioned by those issues, this Court cannot be called upon to adjudicate and answer them, particularly, when the resulting answer/s, whether affirmative or negative, cannot throw any light towards the determination of the substantial matter in hand, that is alleged defamation in this action.
20. In other words, when the propriety of the Magistrate's Court proceedings, both in the Money recovery and Bankruptcy matter, are not and cannot be challenged through this action and, particularly, when the plaintiff's complain in this action is only with regard to the propriety of subsequent publication of the Receiving Order, the necessity to answer those issues will not arise before this Court.
21. Strangely, the Plaintiff, by raising those issues (issues 05 to 10 and 12) before this forum, seems to be indirectly disputing the jurisdiction and the validity of proceedings at the Magistrate's Court of Lautoka, by claiming that he was not served with summons for the Money recovery proceedings and notice of Bankruptcy proceedings. But, the fact remains that he, afterward, had appeared in the same Court, submitted himself to the jurisdiction, got the Receiving Order rescinded **by consent** and thereafter took part in the subsequent proceedings without challenging the jurisdiction. Now he cannot be heard to say that Lautoka Magistrate's Court had no jurisdiction or raise any issue on it before this Court.
22. It is also on record that he filed papers for vacation of the formal proof judgment entered by default in the Action No:-259/1995, got it vacated and took part in further proceedings as aforesaid.

23. Though, I do not intend to delve deep in to all those issues and answer them, I believe, for the purpose of clarity, it is not out of context for me to make some observations on a particular issue, which in any event can fall within my domain to decide. It is none other than the agreed issue # 5 for which my answer would, undoubtedly, be an affirmative one. The reason being, obviously, there had been no any proceeding before the Magistrate's Court of SUVA by the Carpenters against the Plaintiff. The only action in respect of the said arrears was, admittedly, the Money recovery proceedings bearing No: - 259/1995 (originally 688/91) at Lautoka M.C.
24. It is easily graspable, when flick through the contents of the impugned Receiving Order, that the word SUVA has been typed instead of the word LAUTOKA which, obviously, should have occurred due to same being, inadvertently, typed in the body of the Bankruptcy Notice and that of the Affidavit annexed to the Bankruptcy petition marked as PE-3 and PE-4 respectively.
25. However, it is observed that in the captions of the said Bankruptcy Notice, Affidavit and in the Receiving Order marked PE-9 the name of the relevant Court is clearly mentioned as Lautoka Magistrate's Court, while the Rubber stamp in PE-3 and PE-9 too clearly shows the name of the Court as Magistrate's Court Lautoka. Also it is noted that the disputed Gazette notice too shows the issuing Court as the Magistrate's Court of Lautoka and not as Suva. Hence, there could not have been any misleading or prejudice caused to the Plaintiff due to this trivial error.
26. With all due respect to the learned Counsel for the Plaintiff, who ought to have appreciated, on perusal of the relevant documents and, particularly, after the trial, this as a genuine error, inadvertently, occurred during the preparation of papers, is in an attempt to make a "Mountain out of a Molehill "by still arguing on this matter in his written submission. This in any event, is not going to assist the resolution of the substantial matter in hand.
27. However, I am immensely thankful to the learned Counsel for his correct stance taken up in paragraph 48 of his written submissions to the effect that what matters in this action is only the publication of the Receiving Order, which he claims to be defamatory.

Paragraph - 48. "It is submitted that it is significant to consider that the Plaintiff is not claiming that the act of granting the receiving order in Court or submitting on the papers before the Court in obtaining the order, it is the publication thereof. It is

conceded that the words published and spoken in Court in the course of the proceedings are privileged, however, not the subsequent public advertisement of the same".
(Emphasis mine)

28. In view of the above paragraph, it is obvious that the learned Counsel has, wittingly or unwittingly, downsized the number of issues to be resolved in this matter, making the issues 05 to 10 and 12 redundant. Thus, the remaining issue that begs adjudication by this court is whether the words in the aforesaid notice published pursuant to the Receiving Order are defamatory, which I will answer along with other issues after scrutinizing the evidence led at the trial, the laws that govern the subject of defamation and Receiving Orders.
29. In view of the foregoing observations, and having answered the issue No:-5 as above, I need not endeavour to discuss or answer the issues No: 6 to 10 and 12. The issue No:-11, which is about the publication of the Bankruptcy notice, answer to which will invariably, be affirmative as the publication is not denied except for taking up the position that same was published by a third party (Official Receiver) as per the authority given to him by the statute.
30. Thus, the issues that could help the adjudication of the matter in hand are the issues No: - 13 to 16, which appear to be on the alleged publication and Plaintiff's claim on it.
31. The next issue that comes up for consideration is the issue number 13, which poses the question "**Whether the contents of the said publication are true and the defence of justification applies?**" To answer this issue the truthfulness of the contents in the impugned notice published has to be ascertained through the evidence led and documents tendered at the trial.
32. Primarily, the Plaintiff has to establish that this publication was in fact by the Defendant and it was defamatory of him, for the Court to consider any defence advanced by the Defendant as already observed by me. However, the Plaintiff need not be called upon to prove that the alleged words are untrue since it is presumed to be untrue. It is a burden on the defendant to prove that those words are true. Hence, this issue No:-13 is reserved to be answered at the end of this judgment.

33. The remaining issues as far as the Plaintiff's case is concerned, are the issues No-14, (a), (b), (c) and (d), answers to which solely depend of the evidence of the Plaintiff and that of the ANZ Bank officer (PW-5), the only witness called to substantiate the Plaintiff's, purported, claim that he was defamed by publishing the Receiving Order.
34. The witnesses PW-2 called by the Plaintiff was an official witnesses, namely, Senior Court Officer , who testified with regard to two proceedings at Lautoka Magistrate's Court involving the parties hereof which, in any event, is a matter of agreed facts. The witnesses, PW-3 was also an Official witness from the Official Receivers Office, who gave evidence with regard to the receipt of the Receiving Order by his office and the steps taken by them to advertise it.
35. Another official witness was the PW-4, an officer from the Government Printing Department, who testified with regard to the publication of the impugned Receiving Order in the Gazette and stated that the same was done as per the legal requirement. His evidence has left the issue No:- 11 answered, affirmatively, as observed in paragraph 29 above.
36. According to leading authorities on the subject, following are the two main questions that primarily, beg answer in a suit of this nature, which could decide the fate of an action for defamation once and for all. Unfortunately, following two issues are not to be found in the agreed issues of the P.T.C minutes. They are;
1. **Whether or not the words in the Receiving Order are capable of conveying defamatory meaning?**
 2. **Whether or not the words in question are in fact defamatory in the given circumstances of the case?**
37. The first one is a question of law and it must be tried first whether or not the publication of the Receiving Order in this case or the contents thereof are capable of conveying defamatory meaning?. If this legal question is answered affirmatively, the next question arises is (the 2nd question above) as to whether or not the contents or words in the notice are in fact defamatory in the particular circumstances of this case?. This is a question of fact.

38. ***In Borron v Fiji Broadcasting Commission* [1982] FJCA 7; ABU0040.1981 (2 April 1982)**, the Fiji Court of Appeal reviewed some authorities as follows:

"The question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law; this question is one for the trial Judge to determine".

39. ***In Hopwood v. Muirson* [1945] 1 K.B. 313** at p.316 Lord Goddard C.J. said:

"Whether or not words are capable of bearing a defamatory meaning is always for the court and is therefore to be regarded as a question of law".

40. Series of decided authorities similar to above in this area of law guide us in deciding whether or not the words thereof are capable of conveying a defamatory meaning and that the Court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation.

41. The primary concern is to find out what those words would convey to the ordinary man. How an "ordinary man" looks at them is very well stated by **Lord Reid** in the classic judgment in ***Lewis V Daily Telegraph Ltd* [1964].A.C.234 at 258-260** as follows.

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning... Generally the controversy is whether the words are capable of having a libellous meaning at all, and undoubtedly it is the judge's duty to rule on that."

42. In ***Capital & Counties Bank v. George Henty & Sons* [1881] 7 App. Cases 741** **Lord Melbourne** at p. 745 said:

"The test, according to the authorities, is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense."

43. In considering this question it is not enough to say that by some person or another word might be understood in a defamatory sense. (**Neville v. Fine Art and General Insurance Co. [1897] A.C. 68.**)

44. **In Gatley on Libel and Slander 7th Edition at paragraph 93** the learned authors state:

"Words are normally construed in their natural and ordinary meaning, i.e. in the meaning in which reasonable men of ordinary intelligence, with the ordinary man's general knowledge and experience of worldly affairs, would be likely to understand them. The natural and ordinary meaning may also include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words."

"Any statement is defamatory if it tends to lower the individual to whom it refers in the estimation of right-thinking persons generally or to bring him into hatred ridicule or contempt. In Tournier v. National Provincial & Union Bank of England [1924] 1 K.B. 461 both Scrutton L.J. and Atkin L.J. considered that this "ancient formula was not sufficient in all cases for words may damage the reputation of a man as a business man which no one would connect with hatred ridicule or contempt."

45. When considering the aforesaid question of law, in the light of the foregoing decisions and the law presently applicable, one cannot arrive at a finding that the publication of the Receiving order and/or the words therein complained of by the Plaintiff in this case are capable of conveying defamatory meanings.

46. My reason for in arriving at the above conclusion on the above question of law is as follows:

- a. The Receiving Order in question and the words therein are products of Court proceedings and published as per the statutory requirement, namely, Bankruptcy Act.

Bankruptcy Act [Chap-48] Section 13 states as follows.

Advertisement of Receiving Order

"Sec-13. Notice of every receiving order, stating the name, address and description of the debtor, the court by which the Order is made, and the date of the petition, shall be gazetted in the prescribed manner"

- b. The Court of law, Receiver's Office or the Government Printer, who have their hands in this matter, will not lend their name or office to an individual or institution to convey a defamatory substance to the public through any activity they engage in;
 - c. A receiving Order and the contents therein cannot be equated with a libellous publication written or printed at the "whims " of a person with malice and with no any basis **or** to any such word/s came out of a " loos tongue" on which generally defamatory actions are found;
 - d. It is not a document made, deliberately, having someone in mind or with the motive of harming or defaming someone; only purpose behind is recovery of debt.
 - e. It is only a statutory notice came into existence as a result of a Judicial Order and published by the Government Printer at the instance of the Official Receiver who had his authority from Court;
 - f. It is only a publication that carries information of a Court proceeding for the people interested in it and if it is perceived as a vehicle for conveyance of defamatory words, Court proceedings, recovery procedure and mechanism in this jurisdiction will be in jeopardy.
 - g. "Where a person does an act by command of one exercising judicial authority, the law will not suppose that he acted from any wrongful or improper motive, because it was his bounden duty to obey "*Actus nemini facit injuriam*" *An act of the law does no one wrong*"
47. With the above observations, and on careful scrutiny the impugned notice, relevant authorities and the provisions of the Bankruptcy Act (Chap-48), **I am not inclined to conclude that** the relevant publication is capable of conveying any defamatory meaning to the right thinking people. Thus, I hereby answer the above legal question (1) in paragraph [36] negatively.
48. Conversely, even if the above issue was to be answered "affirmatively" deciding that the words in the impugned Receiving Order are capable of conveying defamatory meaning, I will still be finding it difficult to answer the subsequent 2nd question, which is a question of fact, in the affirmative due to the following circumstances that surround this action.

- (a) The Plaintiff has tacitly admitted the validity of both the proceedings in the Magistrate's Court, namely Bankruptcy proceeding till the Receiving Order was rescinded by **consent** and until the formal proof Judgment was set aside and the action was discontinued thereafter as evidenced by the case records marked as PE-13 & PE-14 and the individual documents marked from PE-1 to PE-12 which stands confirmed by the PW-2 the Senior Court Officer;
- (b) He has not challenged the propriety of very proceedings and the outcome of them at the relevant forum;
- (c) Plaintiff has taken part in those proceedings, submitted himself for the jurisdiction of that Court, consented to rescind the Receiving Order and did not object for the main matter being discontinued;
- (d) Plaintiff neither challenged the claim of the defendant in that Court that he owed money to the defendant, nor he took up a position that the defendant Company acted maliciously and/ or abused the process of that Court. There was an issue on this aspect;
- (e) Plaintiff, tacitly, admitting the debt by Filing a Notice of Motion on 29th January 2004, marked PE-10, in the Magistrate's Court moving for an Order, among other reliefs, for a declaration to the effect "That the amount stated in the judgment and formal Decree has already been paid.
49. Apart from the above, the evidence has established that there was a valid Judgment (though, subsequently vacated) and a Receiving Order issued on it (**which was rescinded by consent only**) at the time material to the publication of the impugned Receiving Order in the Gazette;
50. The Confirmation by the witness from Receiver's Office (PW-3) that they got the Receiving Order from the Defendant Company, who paid \$110 as lodgement fees and from his evidence it is clear that all what Carpenters had paid was \$110 as lodgement fees to the Official Receiver including the Publishing charges. The witness from the Government Printer too confirmed that they were paid by the Official Receiver and the publication was done as per his request, which is a statutory duty imposed by the Bankruptcy Act.

51. The learned Counsel for the Plaintiff finds fault the Defendant Company for payment of publication charges to the Official Receiver. This cannot be perceived as a wrong on the part of the defendant, simply because it paid it, after all it is the Defendant Company, who wants its Money Decree executed, should pay it and not any third party or parties.
52. Accordingly, it is clear that there had been a valid Receiving Order issued by the Court, which the plaintiff had failed to challenge on merits, except for having it rescinded by consent, and same Receiving Order has been published in the Gazette subsequent to Court order as statutorily required by the Bankruptcy Act [Chp-48] section 13, on payment of prescribed charge paid by the defendant Company in the form of lodgement fees through the Official Receiver.
53. It is my considered view that no blame can be pinned on the impugned Receiving Order, on the publication of same or on the Defendant Company, which had merely exercised its right to recover an amount of money said to be well and truly due to it from the plaintiff, who had not disputed and tacitly admitted same by his subsequent conduct and by aforesaid Notice of motion marked PE-10.

(I) **EVIDENCE OF THE PLAINTIFF (PW-1)&THE BANK MANAGER(PW-5)**

54. Though, the circumstances unfolded above are well and truly sufficient to warrant a negative answer to the 2nd question of fact in paragraph 36 above, which in my view, disposes matter in hand fully and finally, for the sake of completeness in deciding whether the impugned publication and/or contents therein have in fact defamed the plaintiff, I shall scrutinize the evidence of the Plaintiff (PW-1) and that of the Bank witness (PW-5) as follows.
55. His claim that he is a businessman and the Director of the Maroochy River Trading Company is an agreed fact. However, his following claims that as a result of the publication of Bankruptcy Notice in the Gazette and Fiji Times;
 - a. That he was defamed in the eyes of his business associates, lending institutions (banks)and he lost his business opportunities and investments;
 - b. That his reputation was spoiled and people did not want to deal with him; and

- c. That he was mentally and physically affected and had to seek medical treatment overseas, **have not been substantiated and proved by sufficient and convincing evidence.**
56. All what the plaintiff says is that when he went to ANZ bank branch, Nadi, after 14 days of submitting an application for a loan facility, he was informed by the Bank Official concerned that **as per inquiries and search conducted by the Bank with the data Bureau (credit data)**, it was revealed that he was Bankrupt. On the other hand the Bank Officer who gave evidence did not utter a word about doing a search at the Data Bureau or getting any credit information in relation to the Plaintiff from Data Bureau.
57. Further, the Bank witness did not testify at all about reading the impugned Gazette Notification or the Fiji times Newspaper for the Bank to become aware of Plaintiff's Bankruptcy for the Bank to refuse any loan facility in turn.
58. Plaintiff or the Bank witness did not produce any document in proof of applying for loan, acknowledgment or refusal of loan facility or at least some documentary evidence in proof of maintaining an account/s with that Bank Branch. Bank Officer's explanation was that since it is over 7 years no document was available to produce. But, the Plaintiff, claiming to be a businessman owning several Companies cannot have excuses for not to produce any document to substantiate his claim.
59. However, the main contention that he was defamed as a result of the publication of the Receiving order and same had a drastic and adverse effect on his business transactions with other businessmen, Banks has not been substantiated. Further, his alleged ill health condition also has not been proved to any degree by any documentary or supporting evidence.
60. He did not adduce any evidence with facts and figures of his alleged business loss and failed to bring witness/s, to establish that people reacted adversely towards him and his business activities as a result of this publication as claimed by him.

[] **CONCLUSION:**

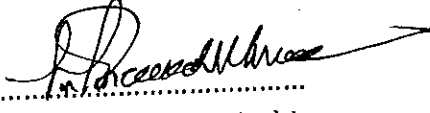
61. In view of the above, I I have no alternative but to arrive at the conclusion that the Court cannot give any affirmative answers to the issue No:-14 – (a) to (d) and thus the Plaintiff's claim has to, inevitably, fail.
62. Since the publication of the Receiving Order in the Gazette on 25th October, 2002 and setting aside of the Receiving Order by consent on 17th March, 2004 are not challenged, the agreed issues No- 11 and 12 can be answered affirmatively, which, in any event is not inimical to the defendant.
63. Further, even if it is assumed, for the sake of argument, that the contents in the impugned Receiving Order are capable of conveying defamatory meaning and it in fact did defame him, the fact that what has been published is a truth resulting from a Court proceedings, will stand as a valid defence of justification to salvage the defendant. Hence, the issue No: - 13 can be conveniently answered in defendant's favour.
64. When considering the defence of privilege, it has been established that the Official Receiver has caused this Receiving Order to be published as a part of his duty imposed by the law. Further, what has been published is truth and done in good faith. Presence of malice has not been established. Therefore, whoever, publishes this notice is entitled to the defence of qualified privilege. The privilege enjoyed by the Official Receiver, should, necessarily, cover the defendant too for any role played by him as long as he has acted in good faith and without malice; contrary of which has not been established.
65. With the attraction of negative answers to the pivotal issues raised by this Court in paragraph 36.(1), (2) above and to the agreed issues 14 (a),(b),(c) &(d), the question of granting damages or interest will also not arise and therefore, the answers to the agreed issues No: - 15 and 16 too should, necessarily, be negative and answered accordingly.

66. Following final Orders are hereby made.

- a. Plaintiff's Action along with the Summons and the Amended Statement of Claim stands dismissed.
- b. Defendant shall be entitled for taxed cost, if not agreed.
- c. Cost shall be paid within 28 days, from the date of taxing or agreement.



At Lautoka
11th September, 2017


.....
A.M.Mohammed Mackie
Judge