

R CHAND'S CURRY CORNER v TRANSTEL LTD (HBC0007 of 2011L)

HIGH COURT — CIVIL JURISDICTION

5 WICKRAMASINGHE J

20 January 2012

10 **Practice And Procedure — parties — substitution of defendant — application made after default judgment — whether debt acknowledged — without prejudice letter — admissibility — evidentiary value — addition of parties — joinder of parties — High Court Rules O 15 rr 5, 6, 6(2)(a), 6(2)(b), O 16 rr 6(2)(b), 6(5), 6(6), 7.**

15 The respondent plaintiff filed an action against Veena's Curry Corner, and default judgment was ordered for non-acknowledgment of service and failure to file a statement of defence. Three years later, the respondent plaintiff sought an order to substitute the appellant as the defendant. The application was made on the basis that the appellant was previously known as Veena's Curry Corner and had undertaken to pay the debt. The master ordered the substitution, and the appellant appealed.

Held –

20 The appellant had not undertaken the payment of the outstanding debt, and therefore cannot be substituted instead of the original defendant. The notice of motion of the applicant only moves for substitution and does not seek to add the appellant or to open the default judgment where further proceedings could be taken. The master erred in law when he considered the application as a joinder and subsequently ordered substitution. He further erred when he concluded that the appellant accepted the payment of the
25 outstanding debt. The respondent plaintiff had not submitted evidence to demonstrate the grounds to make an application for substitution.

Appeal allowed.

Cases referred to

30 *Din v Westpac Banking Corporation* [2004] FJCA 30; *Muller v Linsley & Mortimer* [1996] 1 PNLR 74; *Naigulevu v National Bank of Fiji* [2008] FJHC 141; *Rush & Tompkins v Greater London Council*; *Slaveski v Economakis* [2006] VSC 244; *Vergnet Sa v Commissioner of Inland Revenue* [2010] FJHC 614; *Walker v Wilshire* [1889] 23 QBD 335, cited.

35 *D Gordon* instructed by *Chan Laws* for the Plaintiff.

Anu Patel instructed by *Chandra Singh & Associates* for the Defendant.

Wickramasinghe J.**INTRODUCTION**

40 [1] This is an appeal from the Master's decision dated 30 June 2010, ordering the defendant named as Veena's Curry Corner in HBC case no. 57 of 2007L to be substituted with Rashika Ben and Shandil Sundeswar Chand trading as R Chand's Curry Corner- the appellant /substituted defendant.

45 [2] I stayed the execution of the Masters ruling of 30 June 2010, pending appeal, upon hearing the notice of motion dated 5 August 2010 of the appellant. Thereafter I granted leave on 16 June 2011, upon hearing the oral submissions of Mr Gordon, counsel for the appellant and Mr Krishna who initially appeared for the respondent plaintiff -Transtel Limited.

50 [3] I heard the parties on appeal on 16 November 2011 and reserved judgment on notice. I find that the respondent plaintiff had on 6 December 2011, filed an affidavit of Radrodro Tabualevu dated 23 November 2011, without first obtaining

leave of court and after I reserved my judgment on notice. A reference to affidavit is also made in the written submissions filed by the respondent plaintiff dated 6 December 2011. This is an appeal from the Master's decision and the court could accept new evidence only in very limited circumstances. In any event, parties
5 cannot tender new evidence either orally or by way of affidavits without leave of court. I have therefore disregarded the affidavit and the submissions relating to the said affidavit in the written submissions when considering this appeal.

BACKGROUND FACTS

10 [4] The respondent plaintiff-Transtel Limited, carries on a telecommunication business, asserted that Veena Marolia, who owned the business of Veena's Curry Corner was provided with retail electronic generated PIN receipts (EGPR) and pre-paid electronic telecommunications and products in an electronic format. (Prepaid mobile receipts generated through an EFTPOS machine) to the value of
15 \$47,0044.54 and the said Veena Morolia had defaulted payment. By its writ of summons dated 15 February 2007, action was filed against Veena's Curry Corner, naming as the defendant to recover *inter alia* the outstanding sum.

[5] The affidavit of service dated 20 March 2007, disclosed that the writ of summons was served on the Managing Director of 'Veena's Curry Corner', Jaya
20 Chaudry. In terms of the powers conferred on the Deputy Registrar under the High Court Rules 1988, on 26 April 2007, the Deputy Registrar entered default judgment for non-acknowledgement of service and failure to file a statement of defence.

[6] Approximately three years thereafter, the plaintiff by its motion dated 3
25 March 2010, sought an order for substitution, ie, the defendant Veena's Curry Corner to be substituted with R Chand's Curry Corner- the appellant. The application is made on the basis that it was previously known as Veena's Curry Corner and the appellant had undertaken to pay the debt. The said motion was supported by an affidavit of Latiana Bainimarama dated 6 July 2010, the
30 Commercial Manager of the plaintiff. (supporting affidavit). The supporting affidavit enclosed a letter written by Chandra Singh & Associates dated 9 November 2006, to the plaintiff's solicitors, with an adage 'without prejudice' confirming that arrangements had been made to pay the outstanding debt on monthly instalments. I will consider this 'without prejudice' letter at length when
35 I examine its admissibility, later on in my judgment.

[7] The Master by his ruling ordered the substitution, ie Veena's Curry Corner to be substituted with Rashika Ben and Shandil Chand trading as R Chand's Curry Corner. It is against this ruling of the Master that the appellant/substituted
40 defendant - R Chand's Curry Corner had preferred this appeal.

GROUNDS OF APPEAL

[8] The appellant relies on fifteen grounds of appeal. Having considered the grounds, I find some grounds are overlapping or an expansion of an existing
45 ground. It is my view this appeal could be finally disposed on a consideration of the following grounds of appeal. For purpose of nomenclature, I will follow the same numbering system used by the applicant in his ground of appeal.

- (i) *THAT the Master erred in law and/or fact when he did not consider that the Appellant was not a party to the action when the default judgment was entered.*
- 50 (ii) *THAT the Master erred in law and/or fact when he did not place emphasis and weight on the fact that the Respondent /Plaintiff sued and took default*

judgment against “Veena’s Curry Corner” and then after judgment was obtained proceeded to remove the defendant against which judgment was entered and to substitute a wholly new party (the Appellant) to the action to bear the burden of the default judgment.

- 5 (iii) THAT the Master erred in law and/or fact in not placing emphasis on the fact that the Respondent/Plaintiff knew as at 9th November 2006 that the owner of the Defendant was not longer in the jurisdiction of the Courts yet proceeded to file its action against the Defendant in 2007.
- 10 (iv) THAT the Master erred in law and /or fact in permitting the Respondent/Plaintiff to rely on a “Without Prejudice” letter of 9th November 2006 written by the Defendants’ solicitor in support of its application for substitution.
- 15 (v) THAT the Master erred in law and/or fact in failing to consider that the Sale and Purchase Agreement between the Defendant and the Appellant made on 1st April 2007 only purchased furniture, fittings and stock of the Defendant and that the said agreement in no way had the effect of transferring the debt of the Defendant onto the Appellant.
- 20 (vi) THAT the Master erred in law and or/fact in not applying the practice in the Supreme Court White Book, Volume 1, Chapter 16/6 at page 213, s 15/6/14 which states that joinder post judgment should not be permitted unless there is something remaining to be done in the action.

Without Prejudice Letter

25 [9] The application for substitution was premised on the sole letter of Chandra Singh & Associates dated 9 November 2006 and the Master’s decision is primarily based on the said letter. The letter had the adage ‘without prejudice’ and Mr Gordon, for the appellant strongly objects to its admissibility and findings in it by the Master.

30 [10] The “without prejudice” rule is an implied agreement between the parties. It is founded on the public policy of encouraging parties to settle their differences rather than litigating on them. The object of this rule is to protect a party from being embarrassed by any admission made purely in an attempt to achieve a settlement. The rule permits the parties to freely negotiate a dispute without fearing the communications subsequently adduced in evidence if the dispute was not settled. Therefore, the rule applies to exclude ‘without prejudice’ documents from being adduced in evidence. In other words, ‘without prejudice’ documents effectively have ‘privileged’ status for both parties, and therefore, needs both parties to waive their rights to non-disclosure, if the document is to be disclosed. Parties are not obliged to disclose ‘privileged’ documents during the disclosure and inspection process and therefore the ‘without prejudice’ correspondence enjoys the same privileged status such as communications between a party and its legal advisors.

45 [11] However, the cardinal principle of this rule is that the negotiations should be genuinely aimed at a settlement between the parties. If the negotiating process is genuine all correspondence with or without the adage ‘without prejudice’ attracts the rule and is considered privileged. Therefore, unless there is genuine attempt of settlement, merely because documents are marked ‘without prejudice’ they will not enjoy ‘privileged’ status and thus will not be protected from disclosure between the parties. The court is therefore required to consider the documents in its context and decide for itself whether privilege could be applied.

50 Moreover, if the parties have disclosed the ‘without prejudice’ correspondence during disclosure and inspection process then the parties are precluded claiming

privilege on such correspondence. In such situations, the court could admit such documents in evidence and would not be required to determine whether the parties made a genuine attempt to settle the dispute. *Walker v Wilshire* [1889] (23 QBD 335); *Rush & Tompkins v Greater London Council* (Court of Appeal) 21 December 1987); *Muller v Linsley & Mortimer* [1996] 1 PNLR 74; *Din v Westpac Banking Corporation* [2004] FJCA 30; *Slaveski v Economakis* [2006] VSC 244 (21 June 2006); *Naigulevu v National Bank of Fiji* [2008] FJHC 141; Civil Action 598.2007 (15 February 2008); *Vergnet Sa v Commissioner of Inland Revenue* [2010] FJHC 614; HBC221.2008 (16 July 2010)

10 [12] Let me now consider whether the Master had erred in concluding that the appellant acknowledged the debt of Veena Marolia. The 'without prejudice' letter of Chandra Singh & Associates dated 9 November 2006 reads as follows¹:

15 "9th November, 2006
Messrs M Chan Law
Barristers & Solicitors
P O Box 2452
Government Buildings
Suva
WITHOUT PREJUDICE

20 Dear Madam
RE: TRANSTEL FIJI LIMITED v VEENA MAROLIA

We refer to your letter dated the 10th day of October, 2006 in respect of above mentioned.

We advice that the business namely Veena's Curry Corner had been sold and the previous proprietor has migrated overseas.

25 However, arrangement has been made for the payment of \$500.00 (Five Hundred Dollars) monthly and the customer is complying with that.

In light of the arrangement and payment reasonably made, we ask that no legal action be taken in this matter.

30 Yours faithfully
Sgd
CHANDRA SINGH & ASSOCIATES"

35 [13] It appears to me that this poorly drafted letter attempts to disclose that Veena Marolia, as stated in the heading of the letter had an outstanding debt to Transtel, where the amount is not disclosed and she had sold the business and had migrated. It further states that the customer had agreed to pay \$500.00 monthly to honour the debt. The supporting affidavit of Latiana Bainimarama dated 6 January 2010 at paragraph 3 deposes that the Respondent plaintiff- Transtel Limited had not received a single payment as per the undertaking given in the above letter. The letter does not refer to the appellant- R Chand's Curry Corner-at
40 any point. In this scenario, the customer referred to in the letter should be none other than Veena Marolia as the plaintiff's customer who owed the debt or another on her behalf.

45 [14] Manifestly, the fact that the letter has no reference to the appellant- R Chand's Curry Corner, is a salient issue, which needs be evidently proved in the supporting affidavit when considering an application for substitution.

[15] On a careful consideration of the above letter, it is clear that it has no reference whatsoever to R Chand's Curry Corner. In the circumstances the customer referred to in the said letter cannot be the appellant- R Chand's Curry

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1. Annexed **LB 1** to the supporting affidavit.

Corner or that the appellant had undertaken the debt stated therein. Indeed the correspondence appears to be a settlement between the respondent plaintiff and Veena's Curry Corner and not with the appellant. Mr Gordon tenaciously submitted that the contents of the letter do not give rise to a cause of action
5 against the appellant, and I agree. It appears to me that the letter is a bolster to prevent action being filed against Veena's Curry Corner. It is clearly not a correspondence of a settlement between the parties to this appeal. Nor had the respondent plaintiff substantiated whether the document attracts privilege. It is therefore irrelevant for me to determine whether the letter would attract 'without
10 prejudice' privilege. Even if the letter is admissible in evidence, it has no evidentiary value to support the application for substitution.

Legal Effect of Substitution of Parties vis a vis adding parties

[16] Substitution of parties is a statutory right, which occurs when the substituted party -that is a non-party to the litigation process, takes over the
15 rights, interests and obligations of the original party by taking his place thereof, in the remaining part of the proceeding. With the substitution, the original party is released from the case. When the substituted party succeeds the original party in the lawsuit, the latter's procedural behaviours, such as statement, defense,
20 admission and waiver of rights, continue to be effective and binding on the substituted party. In other words, the status of the original party, the object and the nature of the existing case are kept intact and the substituted party merely steps in to the shoes of the original party.

[17] Substitution of the parties often occurs in situations such as: (1) death of a person, who will be substituted by the heir or administrator; (2) dissolution of
25 a legal relationship, whereas the litigation will be assumed by whoever assumes its rights and obligations; (3) transfer of substantive rights and obligations during litigation; (4) death of a public officer, separation of an office, resignation etc. where the successor in office is substituted.

[18] In contrast, when a party is added as a joinder to proceedings the legal effect of such addition differs. Either the plaintiff or a defendant could obtain
30 leave to add a party to the proceedings if they could satisfy that (i) there is some common question of fact or law which arises in the action; and (ii) there is to be some right of relief asserted by a party, which either on behalf or against the
35 respective party relating to or arising out of a single transaction or occurrences. The purpose of joinder of parties is to expedite litigation, proper use of resources and prevent multiple lawsuits. The party who is added to the litigation is responsible for its own case and does not replace any of the original parties due to joinder.

40 LEGAL MATRIX

[19] Order 15 r 6 of the High Court Rules 1988, deals with removal, addition and substitution of parties. Whilst rule 6(2) (a) stipulates the instances where parties could be removed, rule 6(2) (b) provides for adding of parties to a suit. Order 16 r 7 provides for substitution of parties when a party is deceased and
45 r 6(5) and r 6(6) stipulates the conditions a court must consider before permitting parties to be added or substituted in a proceeding. It is noteworthy that O 16 r 6 (2) (b) only applies to situations where a party has to be added and does not apply for substitution. Nor is similar provision available in the High Court Rules, 1988 relating to substitution.

[20] For clarity let me set out O 15 r (5) and (6) which deals with substitution
50 and addition of parties:

(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either-

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- (a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or
 - (b) the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1) (d) of the Limitation Act and the Court directs that those provisions should not apply to the action by or against the new party.

10 In this paragraph, 'any relevant period of limitation' means a time limit under the Limitation Act.

(6) The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5) (a) if, and **only if**, the Court is satisfied that-

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- (a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or
 - (b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or
 - (c) the new party is the Attorney-General and the proceedings should have been brought by relator proceedings in his name, or
 - (d) the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company, or
 - (e) the new party is sued jointly with the defendant and is not also liable severally with him and failure to join the new party might render the claim unenforceable.

25 (Emphasis added)

[21] In the instant case, the application for substitution was made after default judgment was entered. I have already determined that the appellant had not undertaken the payment of the outstanding debt, therefore cannot be substituted instead of the original defendant. The conditions stipulated in O 15, r 6 do not permit an assignee of a judgment debtor to be substituted as the judgment creditor in a judgment already drawn up and entered into litigation. The notice of motion of the applicant only moves for substitution and does not seek to add the appellant or to open the default judgment where further proceedings could be taken. The instant case is clearly a situation where the applicant is seeking assignment of the judgment debt on the substituted party- R Chand's Curry Corner without being further heard.

[22] Since the application for substitution was ordered post judgement and after its execution some three years later, the appellant would not have an opportunity to defend the action even if it was added as a party. It is a fundamental principle of law that a party must be permitted to litigate and defend the action. The evidence before me discloses that R Chand's Curry Corner was registered as a business on 20 March 2007; the sale and purchase agreement discloses that the business was bought from Prabha Wati; paragraph 6 of the said agreement contains a clause, which in any event excludes debts, liabilities and outstanding obligations by the buyers prior to the settlement date. The appellant had not demonstrated the nexus between Veena's Curry Corner and R Chand's Curry Corner, which is a fundamental requirement for justifying substitution.

[23] Upon careful consideration of the ruling in issue of the Master, it is apparent that he had considered the law relating to addition of a party and not substitution and erroneously ordered substitution.

[24] Mr Gordon- counsel for the appellant in both his oral and written submissions submits that, the respondent plaintiff's actions are calculated to obtain a default judgment and then assign the judgement debt to the appellant by making an application for substitution. He argues that the writ of summons of the plaintiff was dated 15 February 2007. When the 'without prejudice' letter of Chandra Singh & Associates dated 9 November 2006, was received both the respondent plaintiff and its counsel ought to have known that Veena Marolia had migrated. Yet, action was subsequently filed against Veena's Curry Corner with full knowledge that she will not be able to file a statement of defence within the time frame stipulated under the High Court Rules, thereby knowing that a default judgement would be entered by operation of law. It appears that the respondent plaintiff was fully aware that the business that was carried out at the premises was not Veena's Curry Corner. He also argues despite full knowledge that Veena Marolia had sold the business and migrated, the respondent plaintiff did not obtain leave of court to serve summons out of jurisdiction. Evidently, the respondent plaintiff had not made an application to serve summons out of jurisdiction, which would have been a requirement under the given circumstances. I agree with Mr Gordon's arguments on these points.

[25] It is apparent that the Master had erred in law when he considered the application as a joinder and subsequently ordered substitution. He further erred when he concluded that the appellant accepted the payment of the outstanding debt. I find that there is no merit in the Master's conclusions and I find that the respondent plaintiff had not submitted evidence to demonstrate the grounds to make an application for substitution. Accordingly, I allow the appeal.

25 **ORDERS OF THE COURT**

- (1) Appeal of the appellant is allowed. The Master's order dated is set aside.
- (1) That the respondent plaintiff shall pay the appellant the costs of this appeal, which I summarily assess at \$1500.00.
- 30 (1) That the respondent plaintiff shall pay costs of hearing of HBC 57 of 2007 before the Master, which I summarily assess as \$1000.00.
- (1) All costs to be paid within 21 days hereof.

Appeal allowed.

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