



IN THE SUPREME COURT OF NAURU
YAREN JURISDICTION

Civil Case No. 22/2012 and 31/2012

BETWEEN

Kwangseong Kim and Jong Su Lee

Judgement Creditors/Plaintiffs

And:

Juseak Park

Judgement Debtor /First Defendant

And:

John Adumur (Trading as Gold- Bug of Denigomodu District)

Garnishee

Before: Khan, J
Date of Hearing: 24 April 2019
Submissions by the Garnishee: 6 May 2019
Submissions by Judgement Creditor: 7 June 2019
Date of Ruling: 17 September 2019

Case may be cited as: *Kim and Lee v Park and Adumur*

CATCHWORDS:

Garnishee hearing – Whether there was an order of the Court for enforcement proceedings– Whether the judgement creditor can claim over property jointly owned by the garnishee and the judgement debtor.

HELD - That no order was made against the judgement debtor and that the garnishee orders cannot be made against properties jointly owned by the garnishee and the judgement debtor.

APPEARANCES:

Counsel for the Judgement Creditor: V Clodumar
Counsel for the Garnishee: D Aingemea

RULING

INTRODUCTION

1. The judgement creditors filed garnishee proceedings against the garnishee who was trading as Gold-Bug.
2. The garnishee John Adumur and the judgement debtor had set up a business under the name of 'Gold-Bug' to operate a retail and trading scrap metal. A business license was issued with effect from 14 December 2015 to 13 December 2016.
3. There were various proceedings between the judgement creditor and the judgement debtor filed in the Courte in Korea and in this Court and the parties reached a compromise. On 5 December 2014 Madraiwiwi CJ made consent orders. The orders state as follows:

“Upon hearing counsel for the plaintiffs and upon hearing counsel for the first defendant in relation to the above matter on 4 December 2014, I hereby make the following orders by consent:

- 1) Both the plaintiffs and defendants have or are taking civil and criminal litigations in Korea as listed below:
 - a) Case 2013 Gaden 5413 Stipulated money: plaintiff – Kim Kwangseok (681118 – 1481919), Defendant – 1) KS Logistics Company Limited; 2) Park Juseak (670911 – 1914228) and 3) Lee Kyunghwa.

Intent of Claim; Defendants KS Logistics Co. Ltd and defendant Park Juseak and Lee Kwunghwa shall pay plaintiff won 62, 500, 000 and Won 80,000,000 respectively in the above amount at the rate of 20% per annum for a period from the next day of service of the written complaint to the complete repayment.

Decision (2014.4.18); All claims of the plaintiff against the defendants shall be dismissed; 2. The law suit charge shall be borne by the plaintiff.

- b) Receipt certificate of official complaint issue No. 2 – 420 – 2013 – 869 date received Mar.11, 2013

Accuser: Juseauk Park: Accused: Kwangseok Kim

Charge: a) blackmail
b) coercion
c) robbery and bodily harm
d) theft

- c) Case; Claims for damages 2014 Ga Hap 5622, Jeonju District Court Plaintiff Park Juseauk,

Defendants; Kim Kwangseok; 2) Lee Jeong Su

Date Filed; 25 August 2014

- 2) The set amount of outstanding debts, if any, are to be made from the earnings from scrap metal sold by MK Steel, Nauru and from the sale of assets.
- 3) Thirteen (13) containers have been shipped by the plaintiff in 2013 netting a sum of approximately \$50,000. The parties will make best effort to determine the actual net proceeds from the sale of the 13 containers.
- 4) Also assets of MK Steel have been sold under power of attorney to avoid destruction and theft as several attacks on the property were made during 2013. The sale assets netted \$10,500.
- 5) The total of sale mentioned above amounts to approximately \$60,500.
- 6) The parties acknowledge and accept that the debt to Kwangseok Kim has been settled by the decision of the Court in Korea which was not appealed.
- 7) The debt to Jong Su Lee remains outstanding but who is prepared to settle for \$30,000. The payment of the debt shall be by instalment and on condition that the power of attorney is discharged forthwith.
- 8) **NOW THEREFORE**, the parties by consent agree to withdraw Civil Cases 22/2012 and 31/2012 and discharge the power of attorney under the following terms and conditions:
 - (8) Mr Juseak Park operating as MK Steel do all things necessary in respect of the collection, packing in containers and delivery to the wharf of containers loaded with scrap metal for export;
 - (9) The remaining 6 containers are to be sold by MK Steel. Proceeds from such sale shall be paid to the representative of the plaintiffs for the purpose of settling any outstanding debt owing by the plaintiff to persons employed by the plaintiff on Nauru first, and the remainder, if any, will go towards the payment of debt owing to the plaintiff Jong Su Lee.

Dated 5 December 2014

Chief Justice Joni Madraiwiwi
Supreme Court Nauru

4. On 15 August 2017 the judgement creditors filed a Judgement Debtor Summons (JDS) against the debtor in which the judgement creditors claimed \$30,000 against the judgement debtor. In the Judgement Debtor Summons it was stated that the judgement debtor was '**ordered to pay to the plaintiff Jeong Su Lee the sum of \$30,000.**'
5. The judgement debtor attended Court on 15 August 2017 with his counsel Miss Hartman. The Judgement Debtor Summons was dealt with Acting Registrar Mr Lomaloma (Acting Registrar). He explained the procedure under the Judgement

Debtor Summons and Miss Hartman stated that the judgement debtor has agreed to pay off \$30,000 by monthly instalments of \$5,000 per month with effect from 15 September 2017. An order was made for payment in the sum of \$5000 per month and in default of any one payment it was ordered that the judgement debtor be sentenced to imprisonment for 6 months. The judgement debtor was not examined as to his means to pay and the orders were made by the Acting Registrar upon Miss Hartman agreeing to the orders being made.

6. Subsequent to the orders being made by the Acting Registrar the judgement debtor was deported from Nauru and after deportation his wife was also deported.
7. After the deportation of the judgement debtor and his wife the judgement creditors made an application for garnishee proceedings against John Adumur trading as Gold-Bug. In his ruling granting order nisi against John Adumar the Acting Registrar Mr Lomaloma stated as follows:
 - 1) The judgement creditor/plaintiff in this matter attempted to file garnishee order nisi pursuant to order 36, r.11 of the CPR seeking attachment of debts of the judgement debtor who, it is claimed has been deported from Nauru.
 - 2) The debts are **not in doubt as they were consented** to by the parties herein as evidence by the recital of the orders in the settlement agreement dated 15 August 2017. (emphasis added by me)
 - 3) Order 36, r.1 of CPR requires that the decree holder make application ex parte by summons. Every summons or motion before the Court must be supported by an affidavit so the Court can reach a decision whether to grant the application or not.
 - 4) The garnishee order nisi is directed to John Adumur, trading as Gold-Bug of Denigomodu District which is alleged in the recitals to the said decree to be jointly owned by the judgement debtor and John Adumur, that the latter is holding income from the said business on trust for the judgement debtor to be sent to him wherever he is. The recitals further allege the sources of income for Gold-Bug is the hire of wheeled excavator, a flat truck, sale of scrap metal contained in numbered container trucks and sale of goods from a store opposite RON Hospital in Denigomodu District.
 - 5) The decree nisi will be sealed and signed by the Registrar it is satisfied on evidence presented before it that it supports the allegations.
8. The order nisi as issued by the judgement creditor states as follows:

“Whereas it is alleged that Gold-Bug, a business registered in Nauru under License No. 420/2016 (herein called ‘the garnishee’) to operate a store and scrap metal business is **jointly owned by the first defendant and John Adumur** of Denigomodu District with the latter receiving and holding income from the business for and on behalf of the first defendant, Juseak Park. (emphasis added)

HEARING OF GARNISHEE SUMMONS

9. The garnishee summons was heard on 24 April 2019 and the judgement creditor called 2 witnesses on their behalf in an attempt to establish that the excavator, and flat truck was the property of the judgement debtor which the garnishee, John Adumur, transferred it in his name.
10. At the completion of the evidence of the 2 witnesses, Mr Aingemea made a submission that the garnishee had no case to answer and also questioned the validity of the orders made by Madraiwiwi CJ on 5 December 2014.

CONSIDERATION

DECREE HOLDER

11. Order 36 provides for enforcement of judgements and orders made and Order 36, r.1 states that a '**decree holder wishing to enforce the judgement or order** of the Court shall make an application ex parte by summons'. So, before the judgement creditor can apply for enforcement either by judgement debtor summons or garnishee proceedings summons as was the case here, the requirement is for the judgement creditor to '**have a judgement or order (emphasis added)** of the court against the judgement debtor'. Paragraph 7 of the orders made by Madraiwiwi CJ states:

“[7] The debt to Jeong Su Lee remains outstanding but who is now prepared to settle for \$30,000. The payment of the debt shall be by instalment and on condition that the power of attorney is discharged forthwith.”

12. Paragraph 7 was used to have the judgement debtor summons issued as well as these proceedings. That paragraph in my respectful opinion is not an order of the Court at most it is just a bare statement.

GARNISHEE TO BE INDEBTED TO THE DEBTOR

13. A further requirement of the garnishee summons is that the garnishee is indebted to the judgement debtor. This was discussed in *Vishnu Deo swarup v Airport Land Development Company Limited and others*¹ and he stated at [12] and [16] as follows:

[12] The applicant in this case obtained a judgement which is not a judgement or order for payment of money into Court. If any other person (the garnishee) within the jurisdiction is indebted to the judgement debtor (in this case the defendant), the Court may make order the garnishee to pay judgement creditor (here the applicant) the amount of any debt due or accruing to the debtor from the garnishee up to the amount to satisfy the judgement (see o.49, r.1 of the HCR). To be caught under o.49, r.1 of the HCR the garnishee is within jurisdiction must be indebted to the judgement debtor and there must be any debt due or accruing to the judgement debtor from the garnishee.

¹ Civil Action No. HBC296 of 2005 by Acting Master Ajmeer

- [16] There must be a debt in existence to be attached under the garnishee proceedings. This position was explained by Banks LJ in *O'Driscoll v Manchester Insurance Committee* (1915) 3KB 499, at pages 516 and 517 as follows:

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

JOINTLY OWNED

14. The judgement creditor in the order nisi states that Gold Bug ... is a business jointly owned by the first defendant and John Adumur.
15. Properties jointly owned cannot be subject to a garnishee order and this is the position in the Commonwealth countries. In *One Investment and Consultancy Limited v Cham Pong Mang and others*² a decision of the High Court of the Republic of Singapore (Kannan Ramesh JC) stated as follows at [8] and [11] as follows:

“[8] The position in England is well established, having set out in *Macdonald v The Tacquah Gold Mines Company Limited* (1884) 13 QBD 535 (‘Macdonald’), which was subsequently endorsed in *Hirschhorn v Evans* [1938] 3 All England 491 (‘Hirschhorn’) and *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] QB759. In *Macdonald* the English Court of Appeal held that the debt owing from the defendant company to the judgement debtor and other jointly owned could not be subject of a garnishee order. Fry LJ stated that to hold otherwise ‘would be to enable a judgement creditor to attach a debt due to two persons in order to answer for the debt due to him from the judgement debtor alone, which would be altogether contrary to justice’: at 539. This reasoning was adopted in this specific context of the joint bank account in *Hirschhorn*, in which the majority of the English Court of Appeal held that the joint account in that case could not be subject of a garnishee order in respect of the debt of only one of the account holders as the bank was liable to account holders jointly and not severally.

- [11] *Hirschhorn* was followed in *DJ Colburt & Sons Pty Ltd v Ansen: Commercial Banking Company of Sydney Ltd (Garnishee)* [1996] 2NSWR 289, a decision of the Court of Appeal of New South Wales in which Wallace P opined that the correctness of the decision in *Hirschhorn* was ‘so obvious as not to require any further attention’.

² (2016) SCHE 208

CONCLUSION

16. For the reasons given above I uphold that the garnishee's submission that he has no case to answer and the garnishee summons is dismissed. I make no orders as to cost as I believe that this is the first case of this nature before this Court.

DATED this 17 day of September 2019



Mohammed Shafiullah Khan
Judge

