IN THE COURT OF APPEAL , FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0056 of 2008
(High Court Civil Action No.: HBC. 79/2008)

BETWEEN: SIRISENA TENNAKOON

Appellant

AND: NARENDRA REDDY

Respondent

Coram:	Khan Izaz,	JA
	Marshall William	JA
	Chitrasiri Kankani T	JA

Hearing: Wednesday, 8th September 2010

Counsel: Mr.Nilesh Lajendra for the Appellant
Mr.Selvin Singh for the Respondent

Date of Judgment: Friday 17th September 2010

JUDGMENT

Introduction

1) The Appellant, who is the Defendant in the Action bearing No. HBC 79 of 2008 instituted in the High Court of the Fiji sitting at Suva, filed this notice of appeal seeking to set aside the interlocutory judgment dated 4th July 2008 made by His Lordship Justice Jitoko.

2) In the original notice of appeal filed on the 12th September 2008 there were four grounds of appeal and subsequently Solicitors for the appellant namely Lajendra Law, amended the said notice and filed an amended notice of appeal on the 7th June 2010 where the said grounds of appeal had been extended to five.

3) Learned High Court Judge, having considered the merits of the leave to appeal application, allowed the same on 22nd August 2008 and held that serious issues of law had been raised on behalf of the appellant which needs to be argued before this Court.

4) Accordingly, the matter was taken up for argument in this Court subsequent to filing submissions by the respective parties on the issues raised in the amended notice of appeal.

Background [Chronology]

5) Respondent who is the plaintiff in the original action filed in the High Court had moved for Writ of Summons in order to obtain an absconding debtor warrant on the Appellant.

6) Having filed the said writ of summons, Respondent filed his statement of claim as well, on the 15th April 2008. In that statement of claim it is stated that the appellant being a lecturer at the University of the South Pacific had written a letter causing serious injury to the character, credit and reputation of the Respondent. This letter was dated 19th April 2007 and was addressed to the Respondent and had been circulated among many others including a Professor and some members of the staff in the University. Respondent was an associate professor at the said University of the South Pacific at the time the letter was written. In the statement of claim, many paragraphs of the aforesaid letter written by the Appellant had been quoted and had explained the way that would lead to cause injury to the Respondent's character by writing the letter in question. Accordingly, the Respondent had claimed damages in a sum of $1,000,000.00 and also the costs of the action for causing injury to his character.

7) Respondent subsequently amended his statement of claim on the 4th June 2008. By that amendment, he had deleted the aforesaid amount of $1,000,000.00 referred to in the prayer to the statement of claim and had

claimed damages without nominating an amount leaving it to be decided at the end of the main trial.

8) The appellant filed his statements of defence both to the original and amended statements of claim. However, no change is seen in both the statements of defence and they are identical in verbatim. In the statement of defence, Respondent had admitted paragraphs 1, 2 and 3 of the statement of claim whereby the fact;

- that the Respondent is an Associate Professor at the University of the South Pacific (USP) and is the Head of the School of Management and Public Administration,
- that the Respondent had been serving U S P since 1984. and
- that the Appeallant had been employed by USP as a lecturer,

had been accepted by both parties. The Appellant in his statement of defence, whilst denying the contents of paragraphs 7 to 13 of the statement of claim had set out his defence with reasons.

9) Upon reading the *ex-parte* summons issued on 23rd June 2008 and having considered the matters contained in the affidavit of Narendra Reddy; the Respondent and also on the submissions made by the learned Counsel for the Respondent, Justice Jitoko issued an absconding debtor warrant on the appellant in terms of the prayer (d) of the writ of summons.

The aforesaid prayer (d) reads thus:

"(d) that an absconding Debtors warrant be issued and be directed to the Sheriff of the High Court of Fiji and his deputy and all his Constables and other peace and/or police officers and all customs and immigration officers commanding them that in the event the Defendant should seek or attempt to depart from the jurisdiction of the High Court, they should arrest him and bring him before a judge of the High Court as soon as possible."

10) The case was then adjourned for the 3rd of July 2008. On that date, Appellant filed an Affidavit deposed to on the same date namely 3rd July 2008 in reply and the matter was then taken up for inquiry on the following day i e 4th July 2008. On that date, both parties were represented by their respective Counsel and made their submissions before the learned Judge in support of their respective cases.

11) Consequent upon, His Lordship, Judge Jitoko upon hearing submissions of both parties discharged the absconding debtor warrant on the following conditions:

1. That the defendant (Appealant) transfers the ownership with immediate effect of motor vehicle Honda Civil Registration No. BC391, to the Plaintiff (Respondent) without condition;

2. That a sum of one thousand dollars ($1,000.00) be deposited into the trust account of the solicitor for the plaintiff before the end of the working day today, and

3. That a formal letter of apology be tendered to the plaintiff by the defendant before mid day today and copy circulated to all the recipients of the defendant's letter dated 19 April, 2007.

Cost of $500 to the plaintiff.

Being aggrieved by the imposition of the aforesaid conditions, the appellant, moved leave of Court to have the said order be appealed against. Learned High Court Judge allowed the application for leave for the reasons set out herein before in this judgment.

Grounds of Appeal:

1. **THAT** the learned trial Judge erred in law and fact in granting Absconding Debtor Warrant in this case under section 6 of the Debtors Act. Cap 32.

2. **THE** learned Judge erred in law and fact when he ordered that the Appellant forthwith transfer the vehicle registration No. BO391 to the Respondent without condition;

3. **THE** learned Judge erred in law and fact when he ordered that a formal apology be tendered to the Respondent by the Appellant before midday (4 July 200), and a copy circulated to all the recipients of the Appellant's letter dated 19 April 2007;

4. **THE** learned Judge erred in law and fact when he ordered the sum of One Thousand Dollars ($1,000.00) be deposited into the trust account of the solicitor for the Respondent before the end of the working day (4 July 2008);

5. **THE** learned Judge erred in law when he ordered the sum of $500.00 as cost against the Appellant and in favor of the Respondent.

Merits of the Appeal:

12) At the outset, it must be noted that the appellant has not challenged the power given to the judges by the statute in order to issue absconding debtor warrants. Basically, the complaint of the Appellant is that the conditions that had been imposed on the appellant at the time the warrant was discharged had been set out and issued in a wrongful manner.

Be that as it may, the argument of the learned Counsel for the Appellant on the aforesaid first two grounds of appeal is that the learned trial judge has awarded the final releifs sought by the Respondent by way of an interlocutory

order without affording an opportunity for the parties to present their cases in a judicial manner.

13) However, the learned Counsel for the Respondent, in this regard, seems to have taken up the position that this appeal would become nugatory, as the appellant had already complied with the aforesaid conditions imposed on the Appellant. He therefore has argued that determining of this appeal would only be of academic interests.

14) At this stage, it is necessary to consider the circumstances that drove the Appellant to comply with those conditions. Had he decided to challenge the order without complying with the conditions imposed on him, he would then have been exposed to another offence being committed since his permission to stay within the country was coming to an end. If the Appellant was unable to act according to the orders of the learned Trial Judge, he would have been trapped into another offence by being staying in the country without a valid visa. Moreover, the Appellant had already arranged with the air line for him to leave the country on the day the impugned order was made.

15) Therefore, it is seen that the compliance of the conditions by the Appellant had been due to the reasons that were beyond his control. Therefore, it is evident that the Appellant at that point of time had no option than to comply with the conditions imposed on him. The appellant was compelled to do so especially to avoid severe consequences. In such a

situation, it is unfair to decide that this appeal should be disallowed on the basis that the conditions imposed by the Court had been complied with.

16) On the other hand, no person is prevented from making a complaint against a decision made adverse to him even after complying with the same. The rule commonly known as "**comply and complain**" is not unfamiliar to the common law system.

Furthermore, in the event this Court declines to examine the issue before Court, on the basis that it is merely an academic exercise, it would cause great prejudice to the party affected by such a decision.

17) Furthermore, one of the orders made in this instance namely to transfer the vehicle in the name of the Respondent, cannot be treated as an order that cannot be reversed. Such an order could easily be reversed by re-transferring the vehicle back to the appellant. Therefore, such an order cannot be considered as a non-reversal order.

18) Learned Counsel for the Respondent also has stated that it could cause prejudice to the respondent if the conditions are varied or amended. However, in the event an order is made regardless of the law, such an order should not be allowed to stand as it is, even though such a reversal of the order is prejudicial to the person on whose favor the order had been made.

19) Violation of these norms may cause adverse effect on the doctrine of the Rule of Law as well. Moreover, if the contention of the learned Counsel for

the Respondent is acceded to, then the prejudice that may cause to the Appellant may be greater than the prejudice that may cause to the Respondent.

20) In the circumstances, we are not inclined to accept the submissions made by the learned Counsel for the respondent as to the prejudice that may cause to the Respondent by allowing this appeal.

21) We will now turn to examine the law relating to the grounds of appeal urged on behalf of the Appellant. Admittedly, learned High Court Judge had made order directing the Appellant to tender an apology in writing addressed to the Respondent with copies to all the recipients of the Appellant's letter by which the alleged Defamation has been caused. Also, to effect a transfer of the ownership of the vehicle Honda Civic bearing number BC391 in favour of the Respondent.

22) On the face of those two directives, it is clear that those orders are of a final nature as far as the circumstances of the action filed by the Respondent are considered. Learned Counsel for the Respondent also does not dispute this position. Hence, it can safely be decided that the learned High Court Judge had afforded the respondent, major part of the final reliefs that had been prayed for, by way of an interlocutory order without a proper trial being held.

23) It is trite law that no final decision is made without giving an adequate opportunity for the parties to present their cases ensuring the right to cross

examine the witnesses. This being an accepted norm in any judicial proceeding, we cannot allow that be overlooked. Basically, such an attitude namely making decisions without affording a proper opportunity to the parties to properly present their cases would amount to breach of "*audi altera patem*": a significant branch of Natural Justice.

24) In the circumstances, the aforementioned two orders of the learned High Court Judge, being orders amount to a final decision of the issue and also those being made without giving an opportunity for the parties to bring evidence, are not sustainable. Hence, it is our considered view that the learned Judge has erred in Law, in deciding that the Appellant should make an apology in writing to the respondent and also by directing the appellant to transfer the ownership of the vehicle in the name of the respondent.

25) We will now consider the legality of the other order by which the learned High Court judge had directed the appellant to deposit a sum of one thousand dollars into the Trust Account of the Solicitors for the Respondent.

26) Section 6 of the Debtors Act empowers the Court to discharge a warrant issued under this section in the manner stated therein. This Section 6 stipulates:

"6. *If it is shown to the satisfaction of the court that the defendant in any action for the recovery of sum exceeding ten dollars is about to abscond, the court may, in its discretion, issue a warrant to arrest the defendant and commit him to prison, there to be kept until he shall have given bail or*

security in such sum, to be expressed in the warrant, as the court thinks fit, not exceeding the probable amount of debt or damages and cost, for his appearance at any time when called upon while the action is pending and until execution or satisfaction of any judgment that may be made against him in the action; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against him in the action with costs:

Provided that the court may at any time, upon reasonable cause being shown, release the defendant from such arrest. (Rule 381 of Civil Procedure Rules of 1876 incorporated under 7 of 1886, s.6)."

27) In terms of the aforesaid section, it is necessary to satisfy Court that the defendant, in an action which is for the recovery of a sum exceeding ten dollars, is about to abscond. Consequent upon establishing such a situation, Court at its discretion can issue a warrant in order to arrest the defendant and to commit him to a prison.

28) However, when issuing a warrant under this Section, a duty is cast upon the Court to adhere to the way in which such a warrant is issued by giving effect to the contents of the Section. Accordingly, Section 6 of the Debtors Act requires the Court to make order committing the defendant to prison until and unless, the defendant keeps security in the manner stated in that Section. Also, the Security so ordered should not exceed the sum of money that could be adequate to satisfy the amount that may be adjudged against

the defendant in the end, with costs. Moreover, it is the duty of the learned trial Judge to make order as to the security specifying a sum of money that is adequate to honour a possible judgment. Section further allows the defendant to have a surety or sureties on his or her behalf to furnish the security so ordered.

29) More importantly, Section 6 further envisages to mention, specifically in the warrant itself, the amount of security so ordered so that the defendant or his sureties could comply with the order to furnish security in order to obtain a discharge from the prison.

30) According to the manner in which this Section is drafted, it is seen that the purpose and the intention of having such a provision is that to ensure the recovery of the amount that may be determined at the end of the trial in the event the plaintiff succeeds in the case he has instituted. Accordingly, it is clear that in the event an order is made as stipulated in Section 6, a plaintiff who has a judgment in his favour would easily be able to have the judgment enforced by recovering the sum due, from the security that had been deposited.

31) In the light of the above, it is clear that the plain reading of Section 6 of the Debtors Act is clear and unambiguous as to the way in which an absconding debtor warrant should be issued by a Judge.

32) The issue at hand does not specify any security that is to be deposited by the Appellant. Nor any communication to the appellant had been made as to the security that he should furnish. Therefore, it is crystal clear that the learned High Court judge has erred in law in this instance and therefore the order he had made is not sustainable.

33) We have also carefully considered the substance of the two judgments referred to by the learned Counsel for the appellant. Unfortunately no authorities have been cited by the learned Counsel for the Respondent in this connection.

34) The two cases namely **Sundarjee Bros Ltd v Geoffrey John Coulter** (1987/33FLR 74) and **Aruna Devi (f/n Ram Dass) v. Abdul Raizwan (f/n Abdul Hakim)** (High Court Miscellaneous Action No 29 of 2009) cited by the learned Counsel for the Appellant basically refers to the matters of inconsistency between the Constitutional Provisions as to right of movement and the Section 6 of the Debtors Act, which has no bearing on the issue at hand.

35) One other aspect that had been discussed in the latter case is that the issuance of a Debtor warrant without having proper jurisdiction. However in this instance, learned Judge had the jurisdiction to issue the Debtors warrant under Section 6 of the Debtors Act and therefore the law referred to in that decision also is not applicable to the issue.

36) We also have addressed our minds to the question whether the issue here is of merely technical in nature. As explained herein before in this judgment,

Section 6 of the Debtors Act focuses to ensure satisfactory execution of a judgment having afforded a fair trial to a defendant who is to evade appearance in Court to a claim made by another. Therefore, the object of this provision of the law is of two fold namely:

- to have a fair trial for the persons who come before Court; and
- to ensure a person to take the fruits of a possible judgment that may be decided in favour of the plaintiff despite the person against whom the action is filed, is to abscond.

37) Those being important criteria in adjudication disputes in a Court of law, the failure to observe the steps referred to in the said Section cannot and should not be considered as technicalities. Therefore, it is decided that those steps are mandatory and should not be disregarded.

38) It is now necessary to make a suitable order as to the costs of this application. It is seen that the Appellant had been put into various difficulties and was made to spend unnecessarily by making this application by the Respondent. However, on a perusal of the application it is clear that the Respondent has not made an application to obtain orders in the manner that it had been ordered. By paragraph (c) of the writ of summons filed by the Respondent, he had moved:

"that the Defendant deliver his passport and all passenger tickets and travel documents held by him to his Honorable Court save and unless the Defendant can provide free and unencumbered assets belonging to him having a total value of a sum determined by this

Court and/or in the alternative the Defendant only be permitted to travel on either payment of the said sum and costs to this Honorable Court immediately or by giving security to the satisfaction of the Plaintiff and this Honorable Court that any Judgment debt would be satisfied."

39) Therefore, the loss suffered by the Appellant due to this application is not purely due to the conduct of the Respondent. Hence, no order as to the costs of this application is made.

ORDER

40) For the foregoing reasons, following orders are made:

1. Judgment of the learned High Court Judge dated 4th July 2008 is set aside.

2. Ownership of the motor vehicle namely Honda Civic Registration No. BC 391 be re-transferred to the Appellant in the event the Appellant returns to Fiji before the proceedings in the action filed in the High Court is terminated.

3. Sum of one thousand dollars ($1,000) deposited in the trust account of the Solicitor for the plaintiff be converted to a security and that be deposited in the High Court Registry enabling the Respondent to withdraw the same in the event the action filed by him is decided in favour of the Respondent. If the said action is dismissed the appellant is entitled to the money he has paid.

4. The Solicitors of the Respondent/Registrar of the Court of Appeal to inform this order to the Respondent and to all others who have received the letter of apology written by the Appellant in terms of the order of the learned High Court Judge.

5. Costs of $500 deposited as costs also be converted as security enabling the Respondent to withdraw the same in the event he obtains judgment in his favour in the action filed in the High Court. If the respondent loses the case, the trial judge is to make an appropriate order as to the costs of the action and that amount is to be set off from this money.

DATED at Suva this Seventeenth day of September, 2010.

Hon. Justice Izaz Khan

Justice of Appeal

COURT OF APPEAL FIJI ISLANDS

Hon. Justice William Marshall

Justice of Appeal

Hon.Justice Kankani Chitrasiri

Justice of Appeal