

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

**CIVIL APPEAL NO.ABU 129 of 2017**  
High Court Civil Action No. HBC 081 of 2004/L

**BETWEEN** : **SHIU RAM**

***Appellant***

**AND** : **CARPENTERS FIJI LIMITED**

***Respondent***

**Coram** : **Lecamwasam , JA**  
**Almeida Guneratne, JA**  
**Jameel, JA**

**Counsel** : **Ms R Singh for the Appellant**  
**Mr E Narayan for the Respondent**

**Date of Hearing** : **05 February, 2020**

**Date of Judgment** : **28 February, 2020**

## **JUDGMENT**

### **Lecamwasam, JA**

[1] I agree with the reasons and conclusions of Almeida Guneratne, JA.

### **Almeida Guneratne, JA**

[2] This is an appeal against a Judgment of the High Court Lautoka dismissing the Appellant's action for defamation against the Respondent. The impugned judgment is at pages 6 - 27 of Volume 1 of the Copy Record and the Notice and Grounds of Appeal are at pages 1-4 thereof.

### **Chronological Record of the Undisputed Facts or Events that formed the basis for the Appellant's Action**

[3] The Respondent had instituted proceedings by Writ of Summons in the Magistrate's Court claiming that the Appellant owed the Respondent a debt in monetary terms. The Court made order in favour of the Respondent in that regard which was in the Receiving Order and which the Respondent lodged with the Official Receiver in terms of Section 13 of the Bankruptcy Act (Cap. 48).

[4] In consequence, Fiji Times (a daily national newspaper) published the said receiving order. That was in the year 2002.

[5] Thereafter, the Appellant moved Court on the ground that, the said writ of summons was not served on him which had resulted in the Court setting aside its initial order referred to at paragraph [3] above, by consent of parties.

### **The contention advanced by the Appellant in the this Appeal**

[6] Based on those facts, learned Counsel for the Appellant contended before this Court that, (a) the manner in which the said Receiving Order was obtained itself was defamatory, that is, in going to the wrong Court and (b) obtaining a Receiving Order that had led to the

Advertisement published by the Fiji Times (the Newspaper). Thus, learned Counsel submitted that, the Respondent being responsible for causing the said advertisement to be published amounted to defaming him.

[7] Counsel in assailing the Judgment of the High Court submitted further that given those facts, the learned Judge erred regarding the defence of privilege as being an answer to the Appellant's action, the learned Judge basing as he did on two cases he went on as reflected in pages 17 and 21 of his judgment.

### **The Counter Arguments of the Respondent**

[8] Re-iterating what has been submitted in his written submissions, learned Counsel submitted in his brief oral submissions which I proceed to summarise as follows:

- (a) It is a statutory duty imposed on the official receiver to advertise a receiving order of Court in which context Counsel adverted to what is reflected at page 9 of Vol. 1 of the Copy Record.
- (b) As reflected at pages 10 and 11 of the Copy Record in regard to the Agreed Facts and the issues to be determined respectively, the learned High Court Judge responded to the same correctly in holding that, in regard to grounds 1, 2, 3, 5, 6 and 7 urged in Appeal, the said matters had already been dealt with in the impugned Magistrate's Court proceedings (vide: Paragraphs 18 and 19 of the High Court Judgment).
- (c) On the grounds of appeal 4 and 8, as page 9 of the Copy Record reveals, it only shows a Receiving Order and not a bankruptcy order (in which context counsel referred to a case cited at page 753 (Volume 3 of the Copy Record) viz: **Ganesh Chand v. Fiji Times & Margaret Wise.**
- (d) Drawing attention of this Court to page 906 of the Copy Record, Counsel submitted that, a Receiving Order only means putting on notice for an alleged debtor to pay the debt stated and it is only if such alleged debtor fails to comply with such notice that he is liable to be declared and / or treated as a bankrupt.

### **Re : the Appellant's Arguments in Reply**

- [9] Adverting to the Appellant's re-examination at page 906 of the Copy Record, Counsel submitted (in effect) that, the Receiving Order is one immediately antecedent to a bankruptcy Order and although the advertising of the Receiving Order was in 2002 and the steps the Appellant had taken to have the same set aside of consent was in 2004, it was when he had become aware of the said Receiving Order that had been advertised. This contention Counsel supported by reference to the correspondence contained at pages 605 to 609 of the Copy Record.

### **Determination of the Appeal**

- [10] In the light of the aforesaid rival contentions advanced by the respective counsel and judicial precedents, I shall now proceed to make my determination in this appeal, *prima facie*, the reason for saying *prima facie* I shall allude to later in my final determination and conclusion.

### **Could a statement published by a third party but caused to be so published by a defendant make the defendant liable for defamation?**

- [11] This is the appellant's case in brief to which the appellant seeks an affirmative answer.
- [12] Indeed, there is no escape from the fact that, it was the Respondent who caused the said Receiving Order to be published. Such a person though not through a direct statement but by "Other means", that is causing it to be published, could be liable for defamation. (vide: page 582 – John Fleming on The Law of Torts (9<sup>th</sup> ed. 1998, LBIS). I derived further support for that in **Parkes v Prescott** [1869] LR 4 Exch, 169, 179 and I lay down as a proposition that, where a man who makes a request to another to publish defamatory matter for which purpose he gives him a statement and the same is published the man making the request is liable to an action as the publisher. The Appellant at that stage, being a member of the community and engaged in commercial activities, his reputation stood affected, particularly in the light of the evidence as revealed from the Copy Record that in fact he was not indebted. The Respondent had withdrawn the Receiving Order which it had lodged

initially and had obtained from Court by wrongful means (filing in the wrong Court and the summons not being served on the Appellant). Accordingly I found reason in not responding favourably to the decisions relied upon by the High Court Judge as well as the authorities cited by counsel for the Respondent.

[13] Viewing the matter from that perspective I am inclined to agree with the Appellant's contentions as recapped above and hold that the Appellant had made out a case for defamation and therefore the learned High Court Judge had erred and / or misdirected himself in dismissing the Appellant's action with taxed cost.

[14] Having done so, I turned my attention to the reliefs sought by the Appellant in his statement of claim (at pages 31 to 32 of Vol. 1 of the Copy Record). The said reliefs have been spelt out in (a) to (h) therein which I shall deal with *seriatim* as follows:

**Damages for defamation**

[15] Having perused the Copy Record I was unable to see any evidence where the Appellant could be seen to have shown as to how his reputation in the community had got prejudicially affected on account of the publication of the said initial Receiving Order and the withdrawal of the same in that spacio-temporal context. For instance, loss of employment **Coward v. Wellington** (1836) 7C & P 531; the refusal of persons to enter into contracts with the plaintiff **Storey v. Challands** (1837) 8 C & P 234; the loss of hospitality from friends proved to have provided food or drink on former occasions **Davies v. Solomon** (1871) LR 7 QB 112; A threat of material loss is insufficient **Michael v. Spiers and Pond Ltd** (1909) 101 LT 352.

[16] For that reason I could not find a basis to award any substantial damages for the defamation *per se*.

[17] However I saw a basis to award Nominal Damages as known to the law contained in the following principles.

### **Principles upon which Nominal Damages may be awarded**

[18] I have already held that in the light of all the facts and evidence that his cause of action had been established. Thus although there was no evidence available that the Appellant had sustained damage, that fact permitted the Court to award nominal damages the function of which is to mark the vindication of a right that has been infringed constituting an actionable tort *per se*.

[19] Those principles I was able to gather from the following decisions. **The Mediana** [1900] AC 113 at 116, **Neville v. London Express Newspaper Ltd** [1919] AC 368 at 392 and **Embrey v. Owen** [1851] 6 Exch 353 at 368 per Parke, B.

[20] As **Street** (on *Torts*, 8<sup>th</sup> ed, 1988 Butterworths) warns, nominal damages are not to be confused with a small of substantial damages (at p.464). The principle behind that is while nominal damages are awarded for the vindication of a right on the adjunct principle that where there is a right there must follow a remedy, substantial damages even in a small measure cannot be awarded in the absence of acceptable evidence for a court to make an assessment.

### **The Impact of the Defamation Act, 1971 (Cap. 34)**

[21] In the aforesaid background I looked at the Defamation Act of Fiji which is modelled on the English Defamation Act of 1952. I saw nothing in the provisions of that Act which required any change.

### **Jameel, JA**

[22] I agree with the orders proposed by His Lordship Almeida Guneratne, JA.

## Conclusion

For the aforesaid reasons I propose the following orders.

### Orders of Court

1. *The appeal is allowed and the Judgment of the High Court is set aside.*
2. *The Respondent shall pay \$1,000 to the Appellant as nominal damages with interest in terms of Section 3 read with Section 4 of the Law Reform. (Miscellaneous Provisions) (Death and Interest) Act (as amended by Decree No. 46 of 2011).*
3. *The Respondent is also ordered to pay as Costs of the action in the High Court and this appeal a sum of \$3,500.*
4. *The Respondent shall pay to the Appellant the above sums within 28 days of this Judgment.*



Hon. Justice S. Lecamwasam  
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne  
JUSTICE OF APPEAL



Hon. Justice F. Jameel  
JUSTICE OF APPEAL