IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0011 OF 2020
[Lautoka High Court HBC 192 of 2004]

BETWEEN : **NITENDRA JAGDISHWAR SINGH**

Appellant

AND : **CARPENTERS FIJI LIMITED**

Respondent

Coram : **Dr. Almeida Guneratne, P**
Jitoko, VP
Basnayake, JA

Counsel : **Mr C Young for the Appellant**
Mr Lateef for the Respondent

Date of Hearing : **5th May, 2023**

Date of Judgment : **26th May, 2023**

JUDGMENT

Almeida Guneratne, P

[1] This is an appeal against the judgment of the High Court dated 7th February, 2020.

Establishing Background facts

[2] The case was concerned with a contract of guarantee (the Contract). The Respondent was the creditor. There were three guarantors Jagdishwar (hereafter referred to as '*J*') Anil Chandra (hereinafter referred to as '*A*') and the Appellant. The "*contract*" was a credit facility account for a debtor (JSL). '*A*' and the Appellant were brothers and directors of JSL and '*J'* was their father, the other director of JCL.

[3] *'J'* was ordered in Labasa High Court Civil Action No. HBC 41/2004 to pay $20,000, for whatever reasons contained in that decision. *'A'* settled (out of Court) with CFL on the basis of a settlement and paid $39,462.48.

[4] In the result an outstanding amount of $58,924.98 remained on "*the initial contract of guarantee"* which CFL sought to recover from the Appellant.

[5] In the ensuing judgment the High Court gave judgment in favour of CFL against the Appellant in that said sum of $58,924.98.

[6] This Appeal is against that judgment (which is at pages 4 to 10 of the Copy Record)

The Grounds of Appeal urged in the Notice of Appeal

[7] The Appellant urged two grounds of appeal

viz: (i) That, the High Court failed to consider and deal with the written submissions tendered on behalf of the Appellant (at the trial) and therefore there was a denial of natural justice.

(ii) That, there was a delay of about 4 years and 9 months in delivering the impugned judgment and therefore there had resulted in a miscarriage of justice to the Appellant.

A further ground of appeal urged at the hearing before this Court

[8] That is, the guarantee contract being on the basis of "*joint and several liability*," whether the said outstanding amount of $58,924.98 (referred to in paragraph [4] above) could have been recovered from the Appellant.

[9] That being *"a question of law*" I had no problem in entertaining and dealing with it finding further jurisdiction for doing so having regard to Rule 15 of the Court of Appeal Act.

[10] Within that compass of the issues the parties were at variance, in the light of the written submissions filed by parties and oral submissions made at the hearing before us by the respective Counsel I shall proceed to discuss and deal with the same *seriatim* before I proceed to make my determination and proposed orders.

On the delay of more than 4 years and 9 months in delivering the Judgment

- **miscarriage of Justice**

[11] I do acknowledge that, such as an inordinate delay is unacceptable. However, the Judge concerned not being on inquiry for that delay, it is not my task to pass scriptures on the same, given the fact that, the said delay would have no impact in my final judgment.

On the Appellant's argument that, "*natural justice*" was denied in the High Court not considering the written submissions tendered on behalf of the Appellant (at the trial)

[12] This again was a matter I felt no necessity to go into *per se* but which I shall refer to later on in my final determination.

[13] Consequently, what remained to be addressed was the construction to be placed on the phrase "*jointly and several*" liability contained in "*the contract."*

The law (legal principles) on the construction to be placed on the phrase "*jointly and severally"*

[14] So many moons ago, **Alderson B**. had said:

"the plain, grammatical meaning of the words is we jointly promise, and we severally promise; that is to say, we personally promise."

(see: **Healey v. Storey** 3 E x 3)

[15] If I were to pause at this point reflecting on that Baron Alderson's expressed view, which to date I confess I could not find any view to the contrary going through the history and the sands of judicial time which, while I fully fall in line with. I also took my mind to a submission made by Mr Young, which struck me as a submission, taken in effect, of the words of the Oxford Dictionary of Law, the phrase "*joint and several*" as meaning "*Together and in separation. If two or more people enter into an obligation that is said to be joint and several, their liability for its breach can be enforced against them all by a joint action or against any of them by individual action."*

(page 376, Oxford Dictionary of Law, 9th ed. (2018) Oxford University Press

Application of the said legal principles to the instant case and Assessment thereon

[16] '*Jagdish'* (J), (the father referred to above at paragraph [2] above) having paid $20,000, the same being accepted stood removed from the "*joint and several liability."* Then '*A'*, (brother of the Appellant) also stood removed from that "*joint and several liability*" by entering into an agreement with the creditor (CFL) the impugned (settlement)?

[17] Given the total debt on the guarantee contract was in a sum of $118,387.46, taking off $20,000 which '*J'* had paid off, there remained a balance of $98,387.46.

[18] On the principle of "*joint and several liability*" '*A'* as well as the Appellant therefore were personally liable for the said sum, that is, for a sum of $98,387.46.

The effect of the settlement between '*A*' and the Respondent (CFL)

- **on an interpretation of "*discharge of performance*"**

[19] CFL (Respondent) by entering into that settlement with 'A' in accepting $39,462.48, in the light of the legal principles applicable to "joint liability contracts" (obligations) and *"joint and several liability contracts*," what struck me eventually as the decisive criterion is the principle relating to "*discharge by performance."*

What constitutes "*discharge by performance*?"

[20] That is, payment of the debt by anyone of a number of joint or joint and several debts (which logically) would have operated as a discharge of all for in neither case could the obligation have been regarded as being cumulative. (*vide*: **Chitty on The Law of Contracts**, Vol.1 (1989) London (Sweet & Maxwell) page 808.

[21] However, what was "*the debt*" that stood outstanding after the initial third guarantor (Jagdish) was released in a sum of $20,000 in the Labasa High Court case referred to in this Judgment above?

[22] It was a sum of $98,387.46.

[23] When that happened, the surviving contract was as between "*Anil*" (A) and the Appellant not any more as a joint contract or as a joint and several contract but as a joint and/or several contract.

[24] From that perspective, on a consideration and application of the principles I have made an attempt to assimilate (supra), out of the outstanding sum of $98,387.46, I cannot comprehend how the Respondent (CFL) having accepted a sum of $39,462.48 from '*A*' (Anil), how it could have claimed a sum of $58,924.98 from the Appellant.

[25] The Respondent (CFL) was entitled to claim not 1/3rd but ½ of the sum of $98,387.46 (if at all) on the principle of "*joint severability*." Having accepted 1/3rd of that liability sum from '*Anil'* that amounted to "a waiver" or discharge to have claimed a ½ (having settled for a 1/3).

[26] Consequently, the outstanding debt being $98,387.46, although the appellant might have stood liable for that amount on the principle of "*several liability*," when Jagdish ('*J'*) (the third guarantor was released) the liability became "*joint*" as between Anil ('*A'*) and the Appellant to that sum of $98,387.46 (each). But when CFL (the Respondent) accepted $39,462.48 from Anil ('*A'*), the Appellant stood completely discharged on the principles of "*joint liability*" or "*joint and several liability*."

[27] As has been pointed out by Chitty on the Law of Contracts (supra).

> *"Joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation, and consequently, performance by one discharges the others. Joint and several liability arises when two or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors. It is like joint liability in that the co-promisors are not cumulatively liable, so that performance by one discharges all; _ _ _"*

[28] I also took note of the written submissions tendered on behalf of the Appellant at paragraph 37 thereof re-iterated by Mr Young in his oral submissions which I reproduce below.

> *"37. Furthermore, it is clear that His Lordship had failed to even consider the effect of what the discharging of one guarantor who had signed a common guarantee with another guarantor and how the discharge of one guarantor automatically discharges the other guarantor from that liability. See para. 12.1 to 12.3 at p.176 and 177 of the Court Record where the Appellant in the Court below submitted:*
>
> *12.1 However, for the sake of completeness and on the basis that the Court was to hold there was such "a joint and/or several" guarantee executed*

by the 1st and 2nd Defendants the following submissions are made. The Plaintiff has pleaded that the Plaintiff's claim from the "Defendants (ie. both the 1st and 2nd Defendants) jointly and/or severally the sum of $118,387.45 due and owing by the Defendants pursuant to an unlimited guarantee executed by the Defendants ……." The Plaintiff has since informed the Court that after the proceedings were filed by the Plaintiff the Plaintiff has released the 1st Defendant because there was a settlement between the Plaintiff and the 1st Defendant (for the sum of $39,462.48) pursuant to a deed dated 22 April 2008.

12.2 The allegation that the Defendants "jointly and/or severally" liable means the guarantee they signed together made them so. Firstly, we know there was no such guarantee. Supposedly if there was, such a guarantee (if it existed) could not be the basis of the 2nd Defendant's liability if the other guarantor, Anil Chandra was discharged. (See Bolton v Salmon [1891] 2 Ch. 48 at 53) In Ward v National Bank of New Zealand (1883) 2 AC 755 at 764-765 the principle was stated that if the liability of the guarantors is stated to be "joint" or "joint and several" this will be construed as making the guarantor dependent on the execution of the guarantee by all those named as "joint" or "joint and several" guarantors and also as making the guarantors dependent on those co-guarantors remaining parties to the agreement. (See also Walker v Bowry (1924) 35 CLR 48 at 57). As a separate rule, courts have recognized the principle that a release of one joint or joint and several promisor discharges the others (Walker v Bowry (supra) at 57 – 58).

12.3 The 1st Defendant was released from his obligation under (as per pleadings) based on a guarantee (dated 12 June 2002) signed by the 1st and 2nd Defendants "jointly and severally" when the Plaintiff settled with him. Therefore in line with Ward v National Bank of New Zealand (supra) and Walker v Bowry (supra) the 2nd Defendant must be released."

[29] That is what Mr Young demonstrated as establishing the link with the grounds of appeal he had urged in his grounds of appeal (1 and 2) on which I totally agree.

[30] In the result, while I am inclined to allow this appeal before I part with this judgement I would be failing in my duty not to acknowledge the assistance given to Court by Mr Young for the Appellant and Mr Lateef for the Respondent.

[31] For the aforesaid reasons I propose the following Orders for the Court.

1) The Appeal is allowed.
2) The judgment of the learned Judge dated 7 February 2020 is set aside.
3) The Respondent shall pay to the Appellant as costs of this Appeal $5,000.00 within 28 days of notice of this Judgment.

Jitoko, VP

[32] I concur with Almeida Guneratne P's reasons and conclusions in this appeal.

Basnayake, JA

[33] I agree with the reasons and conclusions of Almeida Guneratne, P.

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Solicitors:

Young & Associates for the Appellant

Lateef & Lateef for the Respondent