

In the High Court of Fiji at Suva
Civil Jurisdiction
Appeal No.2 of 2017
Babita Kumar Verma
Appellant
AND
Diwakar Lal and Asika Rekha
Respondents

COUNSEL: Mr Kunal Singh for the appellant
Ms N.Raikaci for the respondents
Date of hearing: 25th April, 2017
Date of Judgment: 19th July, 2017

Judgment

1. The appellant had filed a claim in the Small Claims Tribunal (SCT) against the respondents to recover a sum of \$5000. The particulars of claim filed in the SCT stated that an agreement was entered into by both parties. The claim attached the written agreement dated 25th February, 2014, between the appellant and the first respondent, which stated that the first respondent borrowed a sum of \$ 1725.00 from the appellant to purchase a car; the sum will be repaid within 30 days and failure to comply will result in a surcharge of \$ 10.00 per day. The Referee had ordered both respondents to pay the principal sum borrowed and the penalty for default of \$ 5000.
2. The respondents appealed to the Magistrates' Court on the following grounds:
 - (i) ***THAT*** the Tribunal has no jurisdiction to entertain and/or adjudicate on the claim filed by the Claimant herein, in that, the agreement which forms the basis of the claim is unenforceable in any Court; and/or alternately.
 - (ii) ***THAT*** the Tribunal has no jurisdiction to make the award against my wife, the 2nd named Respondent who has never a party to the loan agreement of 13th July 2013.
3. The lower court allowed the appeal. The Learned Magistrate stated that it was “not disputed that the (appellant) is an unlicensed money lender..in holding himself out to be a money lender (he) was in clear breach of section 5 of the Money Lenders Act ,he has breached the provisions of the Act (and)it is common knowledge that (he) lends money to members of the public”.

4. The Learned Magistrate concluded that:

..the Respondent in putting forward his claim in the Small Claims Tribunal was relying on his illegal actions. This Court does not have the jurisdiction to enforce an illegal contract.”

5. On the issue of jurisdiction, it was held:

Irrespective of whether this issue was raised or that the Tribunal was not aware of the legal principles to be applied in cases of illegal contracts, the Court holds that the jurisdiction to deal with illegal contracts does not exist. To put the same pithily, litigants cannot submit to a jurisdiction that does not exist.

6. The appellant appeals from the judgment of the Magistrates Court on the following grounds :

- i. *the Learned Resident Magistrate erred in law and in fact by allowing the Respondents here in to appeal without properly addressing the two specific grounds under which the Small Claims Tribunal Act 1991 under section 33.*
- ii. *the Learned Resident Magistrate erred in law and in fact by coming to the conclusion that the Appellant was an unlicensed money lender.*
- iii. *the Learned Resident Magistrate erred in law when he failed to analyze the fact that the Appellant is an employee at the University of the South Pacific.*
- iv. *the Learned Resident Magistrate erred in law and in fact in declaring that he agreement between the Appellant and the Respondent was invalid/illegal and not enforceable at law.*
- v. *the Learned Resident Magistrate erred in law and in fact when he assumed rights/duties/power under section 33 (1) (b) of the Small Claims Tribunal Act 1991 and not allowing the parties to call witnesses to determine the issue. This is a constitutional breach also.*
- vi. *the Learned Resident Magistrate erred in law and in fact when he did not direct himself in regards to the principles of appeal from the Small Claims Tribunal Act 1999 in the case of Sheet Metal and Plumbing (Fiji) Ltd v. Deo, HBA 07 of 1999.*
- vii. *the Learned Resident Magistrate erred in law when he took notice that the Appellant was well known unlicensed money lender.*

7. The issue at the heart of this appeal is whether the Learned Magistrate erred in coming to the conclusion that the appellant was an unlicensed money lender and as a result the agreement was unenforceable in law, as contended in the second, third, fourth and seventh grounds of appeal.

8. The other grounds of appeal take issue with the lower court failing to address the limited grounds of appeal laid down in the Small Claims Tribunal Decree,(Decree) as enunciated in *Sheet Metal and Plumbing(Fiji) Ltd v Uday Narayan Deo*, (Civil Appeal No.0007 of 1999) and the procedure to be followed by the SCT.
9. Mr Singh, counsel for the appellant submitted that the lower court came to an incorrect finding that the appellant was an unlicensed money lender. The Learned Magistrate was not entitled to take judicial notice that he was an unlicensed money lender. The appellant sought to recover his loan lent on an ad hoc basis to the respondents. Finally, he submitted that the SCT is not governed by strict legal principles.
10. Ms N.Raikaci, counsel for the respondents submitted that the SCT did not have jurisdiction to determine this matter, since the appellant failed to refute the assertion that he was an unlicensed money lender. She submitted that section 3 of the Money Lending Ordinance presumes a person who lends money is a money lender. It was common knowledge that he was a money lender, as correctly held by the Learned Magistrate. The decision of the SCT was ultra vires.
11. Section 33(1) of the Decree provides a “*right of appeal*” against an order of the SCT on the following two grounds:
 - a) *the proceedings were conducted by the referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or*
 - b) *the Tribunal exceeded its jurisdiction.*
12. The first ground lays down that the proceedings must be conducted fairly and not prejudicially affect the result. The second that the Tribunal must not exceed its jurisdiction.
13. In *Sheet Metal and Plumbing(Fiji) Ltd v Uday Narayan Deo*, (*supra*) Fatiaki J(as he then was) referred to a decision of Thorp J. in *N.Z.I. Insurance N.Z. Ltd. v. Auckland District Court*,(1993) 3 N.Z.L.R. 453 at p.458 interpreting a right granted in the Disputes Tribunals Act, 1988, (New Zealand), in identical terms as section 33(1)(a) of the Decree:

The essential matter (in the words used).. is its specification of the basis for appeal against a referee's determination as being the conduct of proceedings in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings. This formulation is both specific and unusual. On its ordinary grammatical construction it provides only a limited right of appeal, and requires any intending appellant to direct the (Court) to some unfairness in the form, and not simply the result, of the tribunal's hearing.'

..read on (its) own, and on the basis of (its) ordinary grammatical meaning, (the section) would not leave any careful interpreter in much doubt that the right of appeal (it) created was a special type of appeal, limited to cases of procedural unfairness (and does not extend to the correction of errors of law). (emphasis added)'

14. Greig J. in *Hertz New Zealand Ltd. v. Disputes Tribunal* (1994) 8 PRNZ in rejecting the appeal in that case, as also referred to by Fatiaki J (as he then was) said at p.151:

... there is no appeal on the merits even if there is a clear and fundamental error of law in the conclusion of the Tribunal.'

15. The authorities I have referred to clearly enunciate that section 33(1) of the Decree does not contemplate an appeal on the merits or a matter of law.

16. The SCT is not bound to give effect to strict legal rights, as expressly provided in section 15(4) of the Decree:

*The Tribunal shall determine the dispute according to the substantial merits and justice of the case and in **doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to actual forms or technicalities.** (emphasis added)*

17. Fatiaki J(as he then was) in *Sheet Metal and Plumbing(Fiji) Ltd v Uday Narayan Deo*, (*supra*) said:

.As to the 'manner' or procedure required to be followed by the referee in conducting a proceeding under the Decree these are principally to be found in Sections 24 to 29 (inclusive) under the heading 'HEARINGS'. A cursory examination of these provisions serves to highlight the informal, non-adversarial nature of the proceedings before the Small Claims Tribunal and militates against a general appeal on the merits or for errors of law.(emphasis added)

18. In my view, the Learned Magistrate erred in determining a question of law. The conclusion he reached that the “*Court does not have the jurisdiction to enforce an illegal contract*” on finding that the appellant was “*an unlicensed money lender*” and particularly that “*it is common knowledge that (he) lends money to members of the public*”, was unwarranted.

19. The appeal succeeds.

20. **Orders**

- (a) The appeal is allowed.
- (b) The respondents shall pay the appellant costs summarily assessed in a sum of \$ 350.



A.L.B. Brito-Mutunayagam
A.L.B. Brito-Mutunayagam
Judge

19th July, 2017