

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 01 of 2014

BETWEEN : **MERCHANT FINANCE & INVESTMENT COMPANY LIMITED** a limited liability company having its registered office at Level 1, Ra Marama House, 91 Gordon Street. Suva, Fiji.

PLAINTIFF

AND : **EXTREME BUSINESS SOLUTIONS (FIJI) LIMITED** a limited liability company having its registered office at 34 Knolly Street, Suva, Fiji.

FIRST DEFENDANT

AND : **CLARITI (SOUTH PACIFIC) LIMITED** a limited liability company having its registered office at 7th Floor, Ra Marama House, 91 Gordon Street. Suva, Fiji.

SECOND DEFENDANT

AND : **YOGENDRA RAVINDRA SHARMA** a Company Director of 47 Howell Road. Suva.

THIRD DEFENDANT

AND : **GYAN MATI** a Company Director of Auckland, New Zealand.

FOURTH DEFENDANT

Counsel : **Plaintiff: Mr. S. Nandan**
Defendant: Mr. P. Sharma

Date of Hearing : **23.10.2020 (9.30am)**

Date of Judgment : **23.10.2020 (3.30pm)**

JUDGMENT

INTRODUCTION

1. This matter was referred from Master for determination pursuant to summons filed in terms of Order 33 rule 3 of the High Court Rules 1988(HCR). Plaintiff filed action against four Defendants for recovery of debt granted to first Defendant (in liquidation). After institution of this action a winding up order was made against first Defendant on 27.10.2015 and by virtue of Companies Act 2015 the action against first Defendant cannot be proceeded with,¹ unless the leave is granted, and no leave was sought and or obtained. So the action against first Defendant by virtue of statutory provisions, cannot proceed. Second third and fourth Defendants are seeking an order of the court as to whether Plaintiff can proceed the respective causes of action against them without proceeding against first Defendant. This will depend on the relevant causes of action and or how they are pleaded in the pleadings. Plaintiff had pleaded separate causes of actions arising from two instruments of guarantees against second third and fourth Defendants. They had agreed to be sued jointly and severally and claims had arisen from the respective notices issued to settle the remaining debts in terms of the said instruments. So there was no preliminary issue to be determined as Defendants had consented to be sued: separately from debtor (First Defendant) for the debt they guaranteed. The next issue was if the Plaintiff has filed Proof of Debt with Official Receiver, whether action can continue. This cannot be raised as preliminary issue as it is hypothetical in its nature and in the manner it was raised, doomed to fail. Even if I am wrong on that counsel was unable to show any legal impediment in such a scenario.

FACTS AND ANALYSIS

2. In the summons filed following orders were sought as preliminary issues in terms of Order 33 rule 3 of HCR and they are:

1. *“... Whether the Plaintiff can continue to pursue its Action against the Second, Third and Fourth Defendants since the Action against the First Defendant was stayed on 16.8.2019 by High Court.*

¹ See Transitional Provision of Section 749 of Companies Act 2015 which came in to operation on 1.1.2016 states **'749. If an Existing Company which is in the process of being wound up at the commencement date, is wound up in accordance with a Repealed Act within one year after the commencement date, the provisions of this Act are taken to have been complied with.'** So all existed winding up actions as at 1.1.2016 by virtue of law are wound up under the Repealed law if wound up within one year from 1.1.2016.

As the winding up order was made before commencement of Companies Act 2015, Section 229 of Repealed Law (Companies Act, Cap applied and it stated **'229. When a winding-up order has been made or an interim liquidator has been appointed under section 236, no action or proceeding shall be proceeded with or commenced against the company, except by leave of the court and subject to such terms as the court may impose.'**

2. *Whether the Plaintiff can pursue the debt against the Second, Third and Fourth Defendants if it has filed, with the office of the official Receiver, its Proof of Debt and General Proxy against the First Defendant.*

That in the event the court rules that the said issues constitute a bar to the Plaintiff's action, then the within action against the Second, Third and Fourth Defendants be struck out and dismissed with Costs". (emphasis is mine)

3. At the outset it should be noted Order 33 rule 3 of HCR does not grant a party a right to seek preliminary orders from court. It is the discretion of the court and Master has jurisdiction to determine such application (see Order 2 HCR interpretation of word 'court' includes Master). If not any reluctant party can abuse the process through filing of summons in terms of Order 33 rule 3 of HCR in order to delay and or abuse the process.
4. Order 33 rule 3 of the High Court Rules of 1988 states as follows:

'The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.' (Emphasis is added).

5. In page 325 at 18/11/2 in the Supreme Court Rules (UK) White Book 1999 stated under the heading **Application for trial of preliminary issue on a point of law** as follows:

'The application should be made to the Master by summons or on the summons for directions or notice thereunder. The Master, as a rule, will only make the order when he sees that the objection raises a serious question of law, which if decided in favor of the party objecting, would dispense with any further trial, or at any rate with the trial of some substantial issue in the action dispense with any further trial, or at any rate with the trial of some substantial issue in the action.' (Emphasis is mine).

6. There is no determination by Master that there were serious questions of law to be determined, without such determination summons filed in terms Order 33 rule 3 of HCR lacks *locus standi*.
7. Such a determination by court is necessary to prevent Order 33 rule 3 of HCR being abused to delay or prolong an action by reluctant party.

8. The manner in which second issue under 'A' in the summons filed on 28.2.2020 was hypothetical hence should have been struck off *in limine* by Master. I have dealt this issue later in this judgment. (see *A & P Birkenhead Properties Ltd v North Westerners Shiprepaires & Shipbuilders Ltd* [2006] All Eq (D) 402.
9. There is no right for Defendants to raise "preliminary issues" in terms of Order 33 rule 3 of HCR specially a hypothetical issue that had not arisen from pleadings. The issues raised in the summons are not preliminary issues and should be struck off in limine. Without prejudice to what I have stated above the issues are dealt here for completeness.
10. What are the causes of action against the Defendants and whether they are independent of the first Defendant's cause of action is the first issue to be determined.
11. First Defendant (in liquidation) is the principle debtor and this action was filed to recover the debt in terms of the loan agreement/s between the parties. At the time of institution of this action first Defendant was not in liquidation hence cause of action against first Defendant and other Defendants were included in the same statement of claim.
12. Amended statement of claim is contained in the amended writ of summons filed on 9.3.2016. It contained three causes of action. First cause of action was against the first Defendant (in liquidation) regarding a loan and interest for \$2,259,967.68. This cannot proceed without leave, due to statutory restrictions stated earlier.
13. Second cause of action was against second Defendant was pursuant to corporate guarantee dated 14.12.2010. A request was made for payment in terms of that guaranteed sum by the solicitors on 20.11.2010. By virtue of its failure to pay under guarantee an alleged cause of action had arisen for recovery of the sum.
14. Third cause of action was against the third and fourth Defendants for their personal guarantees dated 14.12.2014. They were also requested to pay the debt by letter of the Plaintiff's solicitors on or around 20.11.2013.
15. The three causes of action had arisen from first Defendant's alleged default, but they are distinct and pleaded separately and can be dealt mutually exclusive manner. One or more of the said causes of action stated above are not dependent on each other, but the Plaintiff can recover only the sum advanced and the interest agreed in terms of the agreement/s.
16. The Guarantee that was submitted to court by second Defendant *inter alia* contained following clauses:

“1. The Guarantor hereby guaranteed the due and punctual payment by the customer of all sums of money whatsoever under Mortgage Debendute, various Mortgages and Joint/several Demand Promissory Note and Letter of continuing security on which (illegible) for the time being be owing or unpaid by the Customer to the Mortgagee upon service upon the Guarantor of the Mortgagee’s written request for payment under the hand of any of the officers of the Mortgagee or by the Solicitors of the Mortgagee delivered personally to the Guarantor of any one or more of them or left or sent through the Post Office addressed to the Guarantor or any one or more of them at their place of abode or business or the place of abode or business or any of their last recorded in the books of the Mortgagee’

17. In the clause 4 of the said ‘Guarantee’ second Defendant had agreed that it shall be jointly and severally be liable to the Mortgagee. So there is no merits in the application that they cannot proceed under Guarantee without proceeding with the claim against first Defendant.
18. The ‘Guarantee’ that was submitted to court by counsel for third and fourth Defendants dated 14.12.2010 contained respective Defendants as guarantors for a debt not exceeding \$1,025,747.33. In Clause 8 both said Defendants had agreed that they shall be ‘jointly and severally liable to the Creditor’. In the light of this there is no merit in this application seeking strike out of them from this action.
19. Subjected to the limitation of the amount stated in the personal ‘guarantee’ of the parties Plaintiff can sue third and fourth Defendants, and sue them for recovery in terms of guarantee.
20. In the amended statement of claim causes of actions against them were pleaded separately and there was no need for amendment of the pleading and action can proceed to hearing in its present form.
21. The second issue raised in the summons again was not a preliminary issue and hypothetical. Plaintiff cannot recover more than what was stated in the loan agreement/s. The fact that principal debtor is in liquidation is not a bar to seek recovery from the guarantors. By the same token, Plaintiff being the creditor can seek most efficient method in its recovery of debt. Hence it is not precluded from seeking to recover all or part of debt from first Defendant (in liquidation) from procedure laid down in the recovery of debt after winding up order was made by the court.
22. Counsel for the Defendant did not show any law that precludes Plaintiff from continuing causes of action against remaining Defendant. As guarantors under respective instruments of guarantees second, third and fourth Defendants had agreed that they can be sued either

jointly and or severally. In the amended statement of claim causes of action are distinct and pleaded separately so as to enable any cause of action to be abandoned due to operation of law or otherwise. In this instance by operation of law cause of action against first Defendant cannot proceed without leave. Obtaining leave is not the rule but the exception. Plaintiff had filed this action hence it was at liberty to abandon any claim or cause of action as the causes of action were pleaded separately.

23. The causes of action against second, third and fourth Defendants had arisen from their respective failure to comply with the notices to repay Plaintiff in terms of the respective instruments of guarantees. So the character of the said causes of action had not changed due to the fact that first Defendant was in liquidation.

CONCLUSION

24. The summons filed on 28.2.2020 had not raised preliminary issues that needs determination in terms of Order 33 rule 3 of HCR hence struck off in limine. Even if I am wrong on that according to amended statement of claim causes of action are pleaded separately against Defendants. So legal impediment to proceed action against without first Defendant without leave of the court in terms of Companies Act 2015, *ipso facto* not a bar for Plaintiff to continue this action against second, third and fourth Defendants. Plaintiff will only be entitled to recover sum advanced and interest in terms of the loan. The purported preliminary issue A (2) of the summons by nature hypothetical and struck off. The summons in terms of Order 33 rule 3 is struck off. Second, third and fourth Defendants are ordered to pay a cost of \$1,500 assessed summarily within 21 days. Matter is to be listed before Master for directions.

FINAL ORDERS

- a. Summons filed on 28.2.2020 in terms of Order 33 rule 3 of HCR is struck off.
- b. Second, third and fourth Defendants are ordered (jointly and or severally) to pay a cost of \$1,500 to Plaintiff, within 21 days.
- c. This matter to be listed before Master for directions.

Dated at Suva this 23rd day of October, 2020.



Justice Deepthi Amaratunga
High Court, Suva