

IN THE FIJI COURT OF APPEAL

APPELLATE JURISDICTION

CIVIL APPEAL NO. 43 OF 1987

(High Court Civil Action No. 214 of 1982)

Between

AMBIKA NAND alias BABU RAM
s/o Kalidin

Appellant

- and -

BRIJ MOHAN s/o Kalidin

Respondent

Dr M.S. Sahu Khan for the Appellant
Mr V.P. Mishra for the Respondent

Date of Hearing: 15th March 1990
Delivery of Judgment: 18th May 1990

JUDGMENT OF THE COURT

At the hearing of this appeal the Respondent raised a preliminary issue which, if resolved in his favour, would result in the appeal being dismissed.

The issue related to a claim by the Respondent that he has paid in full to the Appellant the sum of \$1278 awarded the Appellant in the Judgment of the learned Mr Justice Cullinan

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dated the 20th February, 1987 and he claims the Appellant cannot now appeal against the said Judgment seeking further damages.

Affidavits were filed by each of the parties annexing correspondence and documents relevant to the issue and both counsel addressed the Court.

We will first state the facts.

The Appellant was the plaintiff in the Court below. The action was heard on the 30th July, 1984 and the 7th September, 1984 but it was not until the 20th January, 1987 that the learned Judge delivered his Judgment awarding the sum of \$1278 to the Appellant. There was no order as to costs.

The order was drawn up and sealed on the 22nd April, 1987. The notice of appeal was filed six days later on the 28th April, 1987.

On the 2nd March, 1987 Messrs R.D. Patel & Co., then acting for the Respondent, wrote to the Appellant's Solicitors Messrs Sahu Khan & Sahu Khan enclosing their cheque for \$1278 in full payment of the Judgment debt.

There was no reply to that letter by the 10th March, 1987 when Messrs R.D. Patel & Co. wrote again referring to their earlier letter in the following terms:

"10th March, 1987

Messrs Sahu Khan & Sahu Khan,
Solicitors,
Ba.

Dear Sirs,

Re: Ambika Nand v. Brij Mohan

We refer to our letter of 2nd March, 1987 enclosing our cheque for \$1278.00 (Twelve hundred and seventy eight dollars) in, payment of judgment amount in C/A No. 214 of 1982.

We regret that our typist erred in not typing your name at the top of the letter.

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We enclose herewith four copies of a Deed to be executed by Ambika Nand upon payment of \$1278.00 (Twelve hundred and seventy eight dollars). If he refuses to execute the deed you are to return the sum of \$1278.00 (Twelve hundred and seventy eight dollars) to us.

Yours faithfully,
R.D. PATEL & COMPANY"

There was again no reply to that letter by the 6th April, 1987 when Messrs R.D. Patel & Co. received from Messrs Stuart Reddy & Co. a letter notifying them that the writer was then acting for the Appellant instead of Messrs Sahu Khan & Sahu Khan and informing Messrs R.D. Patel & Co. that the writer had received instructions to appeal.

No reply having been received from Messrs Sahu Khan & Sahu Khan to their prior two letters Messrs R.D. Patel & Co. wrote a third letter to Messrs Sahu Khan & Sahu Khan in the following terms:

"13th April, 1987

Messrs Sahu Khan & Sahu Khan,
Solicitors,
Ba.

Dear Sirs,

Re: C/A 214/1982

Ambika Nand v. Brij Mohan

We refer to you to our letters of 2nd and 10th March, 1987 in this matter.

With the first of these letters we sent you our cheque for \$1278.00 (Twelve hundred and seventy eight dollars) in payment of the amount payable to Ambika Nand as per judgment of Mr Justice Cullinan. We sent four copies of deed to be executed by Ambika Nand upon receiving the sum of \$1278.00 (Twelve hundred and seventy eight dollars) from you. You have neither sent us the receipt for \$1278.00 (Twelve hundred and seventy eight dollars) nor any reply to either of our letters nor the Deed signed by your client, though we find from our Bank Statement that you have cashed and thus accepted the amount in terms of the judgment.

We were therefore surprised to receive a letter from

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Messrs Stuart Reddy & Co. dated the 6th April, 1987, a copy of which is enclosed herewith.

Yours faithfully,
R.D. PATEL & COMPANY

c.c. to:-

Messrs Stuart Reddy & Co.,
Solicitors,
LAUTOKA"

Of particular interest is the fact that Messrs R.D. Patel & Co.'s cheque for \$1278 was paid by their bank on the 11th March, 1987 to which we will refer later.

Finally on the 13th April, 1987 Messrs Sahu Khan & Sahu Khan replied to Messrs R.D. Patel & Co.'s third letter of the same date in the following terms:

"13th April, 1987

Our Ref: 9/14

Your Ref: RDP/rs

Messrs R.D. Patel & Company,
Barristers & Solicitors,
BA.

Dear Sir,

Re: Ambika Nand -vs- Brij Mohan - Supreme Court Action
Number 214 of 1982

We acknowledge the receipt of your letter dated the 13th day of April, 1987.

We hereby confirm and acknowledge the receipt of your cheque for \$1278.00 (ONE THOUSAND TWO HUNDRED AND SEVENTY EIGHT DOLLARS). The said cheque is being held in our Trust Account and was received without prejudice to our client's rights to appeal against the Judgment of Mr Justice Cullinan. Our client in view of his instructions to us to appeal in the matter naturally does not wish to sign the deed as prepared by you.

Please find enclosed our Trust Account receipt in the matter. We reiterate that the same was received by our

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client without prejudice to our client's rights to appeal and therefore it is not correct for you to say that he accepted the same in terms of the Judgment.

Furthermore our clients Mrs Son Mati and Pradeep Kumar have just handed your letter dated the 13th day of April, 1987 asking them to vacate the estate farm. In view of the fact that we are appealing against the decision of Mr Justice Cullinan we take that status quo be maintained pending the determination of the Fiji Court of Appeal.

Yours faithfully,
SAHU KHAN AND SAHU KHAN

Enc: 1"

In that letter they ignored the prior two letters and Messrs Stuart Reddy & Co.'s letter, a copy of which they received from Messrs R.D. Patel & Co.

This letter written by the Appellant's Solicitors establishes that the money was received by them on account of the appellant but for the first time Messrs R.D. Patel & Co. are notified that the money to quote from their letter, "was received by our client without prejudice to our client's rights to appeal against the Judgment."

Messrs R.D. Patel & Co. replied on the 15th April, 1987 in the following terms:

"15th April, 1987

Messrs Sahu Khan & Sahu Khan,
Solicitors,
B A.

Dear Sirs,

Re: Ambika Nand vs. Brij Mohan S/C 214/1982

We received your letter of the 13th instant this afternoon.

We are surprised to learn that now you send the receipt for \$1278.00 (Twelve Hundred and Seventy-Eight Dollars) and now claim that you have received the same without prejudice. If you wanted to accept it without prejudice you should have asked us whether our client was prepared to pay without prejudice.

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You cannot accept it without prejudice after more than a month of cashing unilaterally.

If you now try to appeal, our client will plead that your client has lost his right of appeal by estoppel by his conduct.

*Yours faithfully,
R.D. PATEL & CO."*

One would have expected that Messrs Sahu Khan & Sahu Khan on receiving the last letter would have hastened to refund the money. It was not until almost two years later on 7th March, 1989 that Messrs Sahu Khan & Sahu Khan endeavoured without success to return the money. That was on the same day as the Appellant's appeal was first set down for hearing when Mr Mishra raised, as a preliminary point, the issue which the Respondent's Solicitors had warned the Appellant's Solicitors it would raise on the appeal.

We quote Messrs Sahu Khan & Sahu Khan's letter of the same date:-

"7th March, 1989

Our Ref: 9/8

*Messrs R D Patel and Company,
Barristers and Solicitors,
Varoka,
B A.*

Dear Sir,

Re: Ambika Nand -vs- Brij Mohan

We refer you to the payment of \$1,278.00 (ONE THOUSAND TWO HUNDRED AND SEVENTY EIGHT DOLLARS) made by you to us for our client subsequent to the Judgment given by the learned trial Judge.

We had made it very clear to you that the said sum was received by us without prejudice to our client's right to appeal. Infact the receipt makes it very clear that the same was received without prejudice.

In view of the misconstruction placed by you with respect to

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the payment of the said sum of \$1,278.00 (ONE THOUSAND TWO HUNDRED AND SEVENTY EIGHT DOLLARS), please find enclosed our trust account cheque in the said sum.

Kindly acknowledge receipt in due course.

*Yours faithfully,
SAHU KHAN AND SAHU KHAN*

Encl. 1"

This letter appears to have been written after the Court was notified by Mr Mishra that he was raising a preliminary objection. The hearing was adjourned. The Respondent refused to accept payment of the \$1278.

These are the facts and the issues to be considered are whether the Appellant received the \$1278 and, if we so hold, whether that resulted in satisfaction of the Judgment and loss of any right the Appellant has to now challenge the Judgment.

The first point we make is that unless the Judgment is set aside or varied the Appellant's cause of action has merged in the Judgment.

The second point is that if the Appellant accepted payment of the Judgment debt that could be the end of the matter. He could not be permitted to appeal against the Judgment since his cause of action has merged in the Judgment which has been fully satisfied. Unless the purported qualified acceptance has any validity.

Halsbury 4th Edition Volume 16 paragraph 1536 states:-

"It is also probably true to say a person who has once recovered Judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same of cause of action."

On the issue of payment there are two further matters to

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consider. The first is the condition imposed by Mr Patel in his letter of the 10th March, 1987. The second is whether the Appellant was entitled to accept the money without prejudice to his right to appeal.

Mr Patel made it clear that if the Appellant did not sign the Deed he forwarded with his letter of the 10th March, 1987 the money was to be returned to him.

The date 10th March, 1987 is highly significant. The cheque was forwarded with Mr Patel's letter of 2nd March, 1987 unconditionally.

The cheque was debited by the bank to Messrs R.D. Patel & Co. on the 11th March, 1987 and is the first debit shown in the bank statement after the close of business on the 10th March, 1987. The probability is that the cheque was lodged in Messrs Sahu Khan & Sahu Khan's bank account not later than the 10th March, 1987.

These facts indicate that the cheque when received was accepted by the Appellant's Solicitors when the letter of 2nd March, 1987 was delivered to them that day.

It is highly improbable that the Appellant's Solicitors had received the letter of the 10th March, 1987 before negotiating the cheque. That is more likely than accepting payment when they were fully aware that their client had not executed the Deed and they had been asked to return the money.

Ignoring the condition would then have been unethical conduct. On the evidence before us we have no doubt the money was accepted before the letter was received. The condition imposed in the letter of the 10th March, 1987 was ignored. They could have returned the money at that early date.

No receipt was issued by Messrs Sahu Khan & Sahu Khan and

sent to Messrs R.D. Patel & Co. by the 10th March, 1987 although the cheque was received on the 2nd March, 1987 and payment received on or about the 10th March, 1987 as evidenced by a receipt bearing that date. Over a month later Mr Patel had to write again and then for the first time Messrs Sahu Khan & Sahu Khan notified Mr Patel that the money was received by the Appellant without prejudice to his right of appeal. The Appellant's Solicitors receipt for that payment dated 10/3/87 is expressed to be "*without prejudice to right of appeal*".

No satisfactory explanations were given by Dr Sahu Khan as to why he ignored any reference to Messrs Stuart Reddy & Co.'s letter of the 6th April, 1987, a copy of which Mr Patel sent to Messrs Sahu Khan & Sahu Khan and also no reference was made to Mr Patel's condition that the money was to be returned to him if their client did not sign the Deed. Nor was it explained why the receipt was not sent to Mr Patel until over a month after payment was accepted.

The other issue is whether the Appellant through his solicitors can now argue that payment was received without prejudice to his right of appeal.

The first mention to Mr Patel of any intention to appeal in the papers before us is Messrs Sahu Khan & Sahu Khan's letter to Mr Patel's firm of 13th April, 1987 almost two months after Judgment was delivered and more than a month after the full Judgment debt was paid.

When the Appellant's Solicitors received the letter of 2nd March, 1987 and the cheque which they negotiated on or before the 10th of that month they must have been aware the Appellant had a right of appeal. They purported to add the words "*without prejudice to the right of appeal*" to the receipt.

What effect did those words have?

No case has been cited to us where a Judgment creditor has accepted full payment of a Judgment debt in his favour but reserving his right to seek a larger sum by recourse to an appeal against the Judgment.

Some guidance can be obtained from cases where payees have issued receipts "without prejudice".

In UNSWORTH v. ELDER DEMPSTER LINES LIMITED (1940) 1 K B 658 dealing with a case of election where a workman had two options as to the action he took. The Court of Appeal reversing the trial Judge held, that as the workman did not know of his rights before he consulted his lawyer, he could not before that date exercise any election. It was further held that the correct inference to be drawn from the addition of the words "without prejudice" to the receipts for payment received after consulting his lawyer was that the employers who had accepted the receipts without question had agreed that the payments had been made without prejudice to the worker's rights at common law and the workman was not prevented from bringing his action at common law.

A similar case is OLIVER v. NAUTILUS STEAM SHIPPING COMPANY LIMITED (1903) 2 K B 639. In that case receipts given "without prejudice" were accepted by the employers and it was held the workman had not exercised an option he had.

In the instant case the Appellant through his solicitor knew or ought to have known that acceptance of the money would be satisfaction of the Judgment. He knew he had a right of appeal.

His solicitors wanted both the money and preservation of their client's right of appeal and sought to achieve both objectives by purporting to accept the money "without prejudice". When Mr Patel became aware of the situation he quite rightly objected. He pointed out that his firm should have been asked whether his client was prepared to pay without prejudice. It is clear his client never agreed.

On our reading of the UNSWORTH and OLIVER cases the workmen succeeded because it could be shown that the employers had consented to or accepted that payments were made without prejudice.

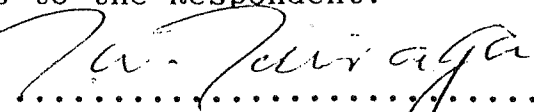
Ignoring for the moment the "without prejudice" qualification, the Appellant at the time the cheque was negotiated had no cause of action which had merged in the Judgment. Acceptance of full payment of the Judgment debt had the effect of satisfying the Judgment. The action was finalised and no appeal could be entertained.

Addition of the words "without prejudice" in the circumstances could not have the legal effect of reviving the Judgment. It was mere surplusage.

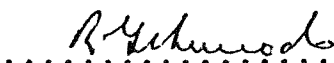
If by the 10th March 1987 Messrs Sahu Khan & Sahu Khan had received instructions to appeal they should either have returned the money as Mr Patel had asked them to do or to suggest that Mr Patel agree to acceptance without prejudice and if such agreement was reached to hold the money in trust for each of the parties pending the appeal.

In all the circumstances of the case we find that the Appellant through his solicitors accepted full payment of the Judgment debt and the purported qualified acceptance without approval of Mr Patel on behalf of his client did not have the effect of preserving the Judgment which had been fully satisfied.


The Appellant has no right of appeal and accordingly the appeal is dismissed with costs to the Respondent.



 (Sir Timoci Tuivaga)
 President, Fiji Court of Appeal



 (Sir Ronald Kermode)
 Judge of Appeal



 (Sir Moti Tikaram)
 Judge of Appeal