

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 13 OF 1992
(High Court No. 282 of 1990)

BETWEEN:

RAM PADARATH BROTHERS LIMITED

APPELLANT

and

THE ATTORNEY GENERAL OF FIJI

RESPONDENT

Mr V Mishra for the Appellant
Mr D Singh for the Respondent

Date of Hearing : 20th May, 1994
Date of delivery of Judgment : 26th May, 1994

JUDGMENT

This is an appeal against a decision of the Hon Justice Saunders in the High Court at Lautoka on 15 August 1991.

The facts are not in dispute. Mohammed Sikandar Buksh, was arrested on an absconding debtor's warrant on the appellant's application. His passport had been deposited in the Magistrates Court in Suva on a previous warrant taken out by solicitors, Messrs Parshotam & Co. The Chief Registrar of the Supreme Court undertook, on 6 October 1981, in writing that his passport would not be released until the Lautoka Supreme Court civil case 449/81 was settled or disposed of. Buksh was thereupon released from arrest. On 5 June 1987 the resident Magistrate at Suva having received a letter from Messrs Parshotam & Co (which consented to his doing so), ordered the release of the passport to Mohammed Sikandar Buksh. This letter, however, related to the action in

the Magistrate's Court not the Supreme Court Action 449/81 at Lautoka. Buksh then absconded to Australia. The plaintiff obtained judgment against him in the Supreme Court action on 20 March 1989 in default of his appearance.

The learned Judge held that there had been a breach of contract by the Chief Registrar and by his employer the State. He further held that the plaintiff had no claim in negligence. We comment in passing that it should not be assumed that we agree that there was a breach of contract. It is our view that the cause of action was more probably in negligence but that does not appear to be of any significance in this case. It is not suggested that there would be any difference in the damages award for negligence as opposed to breach of contract. The damages sought were the amount for which judgment was entered, \$15,234.70, plus interest and general damages.

The learned Judge held, the Chief Registrar should have foreseen that Buksh would be likely to abscond if he had his passport. He noted that the appellant had not made any attempts to exhaust all the remedies open to him. He said that the judgment could be registered overseas. He went on, to find that it could not be said that the plaintiff had suffered any financial loss. He awarded nominal damages of \$50 and costs on the higher scale.

It is, of course, a basic principle that anybody seeking damages must establish the amount that they have lost. The loss

here is what the appellant would have received if Buksh's passport had not been released. Proof of the amount beyond reasonable doubt is not required but there must be some evidence that appellant could have recovered all or part of the debt. We have looked at the cases cited by Mr Mishra but none of them are contrary to this principle.

A letter from the office of the official receiver dated 26 July 1989 addressed to the solicitors for the appellant is on the file. The official receiver says, after referring to a letter sent to him by solicitors for the appellant -

"I wish to advise that the debtor did not make any payments as promised by him in the last creditors' meeting. The deposit paid to cover my initial expenses, \$25, has already been overspent in the creditors meetings and advertising charges."

An affidavit by Sunil Kumar filed by the Attorney-General states

"9. THAT I am informed by Mr Mohammed Azam Khan, the Deputy Official Receiver, whose information I verily believe to be true that a Receiving Order was made by the High Court in Bankruptcy Action No. 86 of 1984 taken out by Messrs G.P. Lala and Associates Counsel for Island Brothers of Fiji Ltd. against the debtor.

10. THAT pursuant to Paragraph 9 there were other creditors interested in the Receiving Order, of whom the present Plaintiff/Applicant is one.

11. THAT "Part of the estate" of the debtor's father referred to in Annexure 'D' of the affidavit of Aruna Devi is a building (Lot 2 on Suva Street; and is the joint entitlement of the debtor and five other beneficiaries to the estate of their father, Madar Buksh.

12. *THAT the property described in paragraph 11 above had, prior to the Bankruptcy Action been mortgaged to Messrs H.P. Kasabia Brothers Limited and National Bank of Fiji, registered with the Registrar of Titles as No. 188681 of 1st December 1981, and no shares of the estate could be distributed to any of the beneficiaries by reason of the mortgage, Annexed and marked 'B' is a photocopy of the mortgage and other dealings in respect of the Property registered in the Titles Registry.*
13. *THAT as secured Creditor on the property, the National Bank of Fiji had lodged a caveat on dealings with the property and is proceeding to exercise into mortgage right of sale to satisfy its debt.*
14. *THAT I am further informed by the Official Receiver whose information I verily believe to be true that the debtor has since 1987 (to-date) resided in Australia and that none of the debts of the other creditors interested in the Receiving Order has been satisfied despite several efforts by him."*

It would appear from this that the official receiver had not had any success in obtaining money from Mr Buksh. We note that the claim by the appellant was apparently filed in 1981. No progress had been made in the matter for approximately six years which is when Mr Buksh absconded. There was nothing to indicate that the appellant would have been able to recover the \$15,234.70 if Mr Buksh had stayed in Fiji. The receiving order was made in 1984.

The appellant submitted that if the passport had not been released the plaintiff would have obtained -

"(a) Payment as Parshotam & Co got paid in their case."

This refers to the case in the Magistrate's Court in respect of which the letter was sent authorising the release of the passport. There is no evidence what amount was paid. Presumably it was a small amount since the case was in the Magistrate's Court. Mr Mishra advised us it was of the order of \$5-600. But even if that amount was paid it does not mean that the \$15,234.70 would have been paid.

"(b) Could have had Buksh adjudicated and realised his assets through the Official Receiver."

The affidavit of Sunil Kumar shows the Official Receiver had been unable to realise assets.

"(c) He would have been able to obtain a deposit or payment into Court or a bond or security of some sort before release of Buksh or the passport."

There is no indication that Buksh had finance to enable him to make a deposit or payment into Court or give a bond.

"(d) Alternatively, if the passport was not released, he could have executed in the normal manner or acted on any security or bond given."

Again there is no indication of assets on which execution could have been levied or that Mr Buksh would have been able to give any security or bond. The official receiver had not been able to obtain any money from the property referred to in Sunil Kumar's affidavit.

It is our view, therefore, that the learned Judge assessed the situation correctly and accurately. No financial loss has been proved. The nominal damages of \$50 plus costs on the higher scale is appropriate. The appeal will be dismissed with costs to the respondent on the higher scale.

We think it proper to mention that on 10 December 1993 the President of this court gave judgment on an application by the Respondent for leave to cross-appeal out of time against the judgment of Saunders J in this case. The President said that the Respondent was asking that the judgment be completely set aside in his favour on a substantive ground (among others) which was separate and distinct from the Appellants contention. As such it was a proper matter for a cross-appeal.

The Respondent however was out of time and was asking for an indulgence. The President finally granted the application but required the Respondent to file and serve Notice of cross-appeal within 14 days. The Respondent failed to do so and referred in his skeleton argument before us to grounds on which his cross-appeal would have been based.

They are matters which should not and could not be raised simply in opposition to the appellants appeal. They are based on S 65 of the Magistrate Court Act Cap 14 and S 3(5) of the Crown Proceedings Act Cap 24. Those sections give protection to persons acting judicially. We have substantial doubts whether the action of the Registrar in this case was a judicial act it

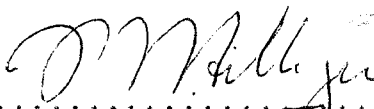
seems more an administrative one. Raising the matter at this stage however is going directly contrary to conditions on which the indulgence was granted by the President and we are not prepared to consider it further. Mr Singh told us in reply to a question that he was not seeking to have the decision varied.



.....
Sir Peter Quilliam
Judge of Appeal



.....
Mr Justice Savage
Judge of Appeal



.....
Mr Justice Hillyer
Judge of Appeal