

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 150 of 2020

BETWEEN : THE DIRECTOR OF PUBLIC PROSECUTIONS of 25 Gladstone
Road, Suva, Fiji

APPLICANT

AND : MARC WINSTON TJIN KONKOEN of Wairabetia Lautoka.

FIRST RESPONDENT

AND : MITCHELL MADONNA REDDY of Wairabetia Lautoka.

SECOND RESPONDENT

AND : ABILESHNI SEEMA CHAND of Lot 2 Nasoso Road, Nadi.

THIRD RESPONDENT

AND : URMILA DEVI AUTAR of Lot 17 Adams Street, Lautoka.

FOURTH RESPONDENT

AND : CREDIT CORPORATION (Fiji) Pvt Ltd of 10 Gorrie Street, Suva.

INTERESTED PARTY

AND : BRED BANK of 5th Floor, Tappoo City Building.

INTERESTED PARTY

Counsel : Applicant: Ms Prasad. J
: Respondent: Mr Khan. I

Date of Hearing (through written submissions filed): 31.12.2020

Date of Judgment : 15.01.2021

JUDGMENT

INTRODUCTION

1. Director of Public Prosecution is the applicant in this action instituted in terms of Section 19B(1)(b) of Proceeds of Crime Act 1997 (PCA) for restraining order. The Applicant is empowered under PCA to make an application for restraining of the properties, when there are reasonable grounds for suspecting, that such properties are tainted properties where forfeiture order may be made in terms of Section 19 E or 19H of PCA. Once such an application is made court can make an order either for restraining or to take custody of the property to the Attorney General in terms of Section 19B (1)(a) of PCA or 19B(1)(b) respectively. An *ex parte* application was made to certain properties to be taken to custody of Attorney General and also restraining order was made prohibiting any dealing with such property by Respondents. When this matter was first mentioned *inter partes* first, second and forth Respondents did not oppose to the orders made *ex parte* application. Third Respondent and an interested party Credit Corporation (Fiji) Ltd , opposed to the *ex parte* orders, hence an opportunity was granted for an affidavits in opposition to be filed and parties agreed to dispose the hearing through written submission considering circumstances. Third Respondent is owner of a vehicle that was subjected to restraining order In the affidavit in opposition third Respondent state that she is the mother of a person who was initially charged in connection with an offence relating to **possession and supply of illicit drugs**, but was later discharged, hence her property cannot be subject to restraining orders under Section 19B (1) of PCA. This is a misconception of law as PCA allows even, forfeiture of properties without any conviction of owner and or charge of any person, if the properties are **tainted or terrorist properties**. There may not be a successful prosecution due to death of perpetrator, or lack of evidence to prosecute and or any other technical issue including and not limited to issues relating jurisdiction, extradition conditional pardon, etc. **This is not an application for forfeiture**, but a restraining order to take custody of property to Attorney General in terms of Section 19 B (1) PCA and Applicant need not prove a successful prosecution or any charge against owner of the property. If there were **reasonable grounds for suspecting** that the vehicles were tainted properties and *may be* subjected to forfeiture in terms of Section 19 E the court can grant the restraining orders. This is for preservation of properties and also prevent third parties from dealing with such properties.

ANALYSIS

2. Plaintiff had instated this action in civil court seeking orders in terms of Section 19B of PCA which states

·[PC 19B] Restraining orders

19B(1) Subject to this section, where the Director of Public Prosecutions applies to the court for a restraining order against property and the court is satisfied that there are reasonable grounds for suspecting that the property is tainted property or terrorist property for which a forfeiture order may be made under section 19E or 19H, the court may make an order-

- (a) prohibiting any person from disposing of, or dealing with, the property or such part thereof or interest except in the manner specified in the order; and
 - (b) at the request of the Director of Public Prosecutions, where the court is satisfied that the circumstances so require, that the Attorney-General take custody of the property or such part thereof and manage or otherwise deal with all or any part of the property in accordance with the directions of the court.'
3. According to Section 19B of PCA the Applicant can obtain orders for restraining orders prohibiting dealing with properties and or taking custody of such properties to Attorney General.
 4. Section 19A(1) of PCA empowers Applicant to seek restraining orders. The burden is with the Applicant to satisfy the court , that *'there are reasonable grounds for suspecting that the property is tainted property or terrorist property for which forfeiture order may be made under section 19E or 19H of PCA.'*
 5. Section 19E of PCA deals with **non-conviction base forfeiture** order for *tainted* property.
 6. Section 19H of PCA deals with terrorist property.
 7. Plaintiff in the affidavit in support had described the circumstances in which investigations were initiated upon successful conviction of a person in Australia. This person had come to Fiji without any luggage but had left with a luggage which contained large quantity of Cocaine.
 8. According to affidavit in support all the vehicles subjected to this application were tested for presence of Cocaine, the same illicit drug that was subject to conviction in

Australia. The results were affirmative and detection of the vehicles were not done randomly, but due to the connections of the network of the parties.

9. Credit Corporation (Fiji) Pvt Ltd had appeared in this proceedings as interested party their name had been wrongly stated in the application as Credit Corporation. I cannot see any merits in the objection relating to naming them as Credit Corporation as there was no prejudice to them hence it is now corrected as Credit Corporation (Fiji) Pvt Ltd. There is no mandatory requirement for the Applicant to make a party such as Credit Corporation (Fiji) Pvt Ltd a party in ex parte application, in terms of Section 19B(1) though they can intervene in the interest of justice.
10. In an application for forfeiture in terms of Section 19C of PCA it is mandatory to make all 'known' interested parties in terms of Section 19D of PCA but this was not made mandatory for restraining orders in terms of Section 19B of PCA.
11. The affidavit in support was filed by Detective of Fiji Police Force. There is no additional authority needed for such a person to provide an affidavit for official purposes to court. It is part of their duty. This application is filed by Director of Public Prosecution. So the objection raised by interested party as to the authority of the deponent of affidavit in support is without merit.
12. Orders sought in terms of Section 19B are not forfeiture of properties, but interim measure prior to such an application for forfeiture for preservation of such properties for limited time period. Hence the other objections raised by Credit Corporation (Fiji) Ltd are premature. The basis on which a future application for forfeiture need not be revealed by Applicant at this stage, but needs to show that there are reasonable grounds for suspicion in terms of Section 19B(1) of PCA.
13. Applicant only needs to satisfy the court that there are reasonable grounds for suspicion that property restrained in terms of Section 19B of PCA are tainted and forfeiture order may be made in terms of Section 19E or 19H of PCA. Then the court depending on the circumstances of the case may grant restraining order. In this instance affidavit in support had described the investigations and findings.
14. The preservation of properties and restraining them is essential in this instance. There can be innocent third parties being victimized as the properties restrained are movable properties.
15. What is a tainted property is defined in Section 3 of PCA which includes using such property for commission of an offence.
16. In the circumstances the objections raised by third Respondent and Credit Corporation (Fiji) Ltd is overruled.

CONCLUSION

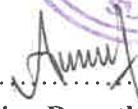
17. Applicant had satisfied that there were reasonable grounds for suspecting that properties stated in the application were tainted. Applicant was seeking restraining orders in terms of Section 19B(1) of PCA. This was based on evidence presented through affidavit in support. Trans national crimes such as illicit drugs trade required thorough investigations to be conducted to trace, the network and also proceeds of crime. Section 19B(4) of PCA allows a witness certain protection from answering a question or producing a document if such an act may prejudice investigation. So , it is clear that an application in terms of Section 19B(1) of PCA only needs to satisfy the court that there are reasonable grounds for suspecting that that property subject to restraint is *tainted* property which *may* be subjected to forfeiture in terms of Section 19 E or 19H of PCA. The sequence of events and involvement of all the Respondents and the results of lab tests that indicated presence of Cocaine in all the vehicles had fulfilled burden in terms of Section 19B(1) for the restraining orders granted . Preservation of such property is equally important and it is important to prevent third parties from dealing with such property. So the objections of third respondent that her son was granted immunity and made a state witness was irrelevant fact for restraining order in terms of Section 19B(1) of PCA. The objections raised by Credit Corporation (Fiji) Ltd regarding their name and authority of deponent of affidavit in support are overruled. Other objections raised by them are premature as this is not a forfeiture, but a restraining order prior to such an application, mainly to allow preservation of property, prevent unknown parties from dealing with such property etc. Objections raised by third Respondent and Credit Corporation (Fiji) Ltd overruled. Considering circumstances of the case no cost awarded.

FINAL ORDERS

- a. Objections to ex parte orders granted overruled.
- b. No costs.

Dated at Suva this 15th day of January, 2021.




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Justice Deepthi Amaratunga
High Court, Suva