

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC No. 210 of 1989

BETWEEN : **KRISHNA SAMI** of Nalovo, Nadi, Salesman.

Plaintiff

AND : **SANT RAJ** of Nalovo Nadi, School Teacher.

Defendant

AND : **RAJNEETA DEVI RAJ** of Auckland, New Zealand, Student.

Interested Party

Counsel : Pillai Naidu & Associates for the Plaintiff
Fazilat Shah for the Defendant

R U L I N G

INTRODUCTION

1. These proceedings relate to the enforcement of a consent judgement that was entered in this Court on **08 March 2005** by Mr. Justice D.D. Finnigan.
2. As I discuss below, the consent judgement was initiated by the judgement debtor following the commencement of trial and shortly after the plaintiff had given evidence and had adduced some medical reports.
3. The judgment debtor owns two properties in Nadi. The first is comprised in Certificate of Title 8351. The second one is comprised in Certificate of Title 27650. I did grant an Order for the sale of both properties to satisfy the judgment debt. This, after more than ten years of trying by the judgment creditor. The Order was handed down on 30 September 2016 with further related Orders on 18 January 2018 and on 30 May 2018.
4. The **18 January 2018 Order** was for the discharge of a mortgage on the property, on the ground that it was a fraudulent. That Order was made following a hearing which was attended by the Judgment Debtor's Solicitors.

There was no appearance though by the purported mortgagee. (See table below).

5. Although the Order for judicial sale was made on both properties, as it turned out, only CT 8351 was sold. This was because of the favorable market response to the tender of that one property. CT 8351 was in fact sold to the highest bidder in a tender process overseen, by Order of this Court, by the Deputy Registrar of the High Court of Lautoka. The proceeds of sale was sufficient to satisfy the “purported” mortgage debt on the property, as well as CGI Stamp Duties, the judgement debt, with still some surplus sufficient to settle costs and disbursements. The sale proceeds are currently being kept in the trust account of Pillai Naidu & Associates, the judgement creditor’s solicitors.
6. Incidentally, the price which the highest bidder paid was \$25,000 or so more than a projected valuation which the judgement debtor had made in an affidavit he had sworn seventeen (17) months earlier in 2016. It is fair to say that the tender process appeared to have attracted a favorable response from the market.

TWO APPLICATIONS BEFORE ME

7. There are two applications before me now. The first is an application pending by DS Naidu for the following Orders:
 - (a) release of the sum of \$63,126.52 to the Plaintiff being the balance sum owed under judgement.
 - (b) release of the sum of \$8,707.00 being the disbursements incurred as per paragraph 12(b) to my solicitor Messrs Pillai Naidu & Associates.
 - (c) release of the sum of \$20,000 as legal costs to my solicitors Messrs Pillai Naidu & Associates.
 - (d) release of the sum of \$20,996.90 to Fiji Revenue & Customs Authority being Capital Gains Tax (CGT) payable on the said property.
 - (e) release of the further sum of \$817.50 as cost incurred in the filing of this application to Messrs Pillai Naidu & Associates.
 - (f) release of the balance of \$111,352.08 being the balance sum left over and payable to the Defendants Mr. Sant Raj in to this Court.

8. The second is a Notice of Motion filed on 23 October 2018 by Fazilat Shah Legal seeking a stay of distribution of the proceeds of sale until his appeal against the 18 January 2018 Order to the Fiji Court of Appeal has been determined¹.

THE CONSENT JUDGEMENT

9. The judgement creditor filed a writ of summons and statement of claim on 12 July 1989. He was claiming damages for personal injuries sustained as a result of a collision between a vehicle he was driving and another vehicle driven by the judgement debtor. The accident happened exactly three years earlier on 12 July 1986.
10. The consent judgment was entered by Mr. Justice D.D. Finnigan in this Court on 08 March 2005. The judgment was entered after the trial of the matter had begun and some crucial evidence had been led for the judgement creditor. The judgment was sealed on 09 March 2005, as follows:
1. Judgment for \$55,000.00 including all damages and costs.
 2. Execution of this judgment is suspended for six months and it will become effective on 9 September 2005.
 3. The Defendant has the right as between the parties to appeal if he so desires from the ruling of this Court on the issue of the application to the claim of the statute of limitations. Such appeal if any must be filed within 14 days i.e. by 4pm on 22 March 2005.
 4. The Ex Parte order as to passport etc. made in Chambers on 16 October 2003 by Byrne J. is hereby dissolved with no order as to costs.

¹ The Notice of Motion seeks the following Orders:

1. That all further execution of the Orders dated 18th January 2018 be stayed pending the determination of Civil Appeal No. 0015 of 2018 in the Fiji Court of Appeal.
2. That the status quo on Certificate of Title No. 8351 do remain pending the determination of Civil Appeal No. 0015 of 2018 in the Fiji Court of Appeal.
3. That the Plaintiff whether by his servants or agents or nominees or any other interested Party be restrained from entering upon and remaining upon Certificate of Title No. 8351 until the determination of Civil Appeal No. 0015 of 2018.
4. That the Plaintiff/Respondent do pay costs of this application.
5. That the time for service of this Motion be abridged to one day.

Note: Only prayer 1 is being pursued on appeal after it became obvious that by the time the Motion was filed, CT 8351 had already been sold to a bona fide purchaser for value.

11. The last part of the consent judgment effectively dissolved an *ex-parte* Stop Departure Order of Byrne J of 16 October 2003².
12. Notably, the judgement debtor had tried to seek leave late last year before Mr. Justice Ajmeer to appeal the consent judgement entered in 2005. This, as I show below, after he had sworn an affidavit in 2016 that he had no intention to evade settling the judgment debt. However, that application was dismissed with costs against the judgement debtor (see Ajmeer J's Ruling (**Raj v Sami** [2019] FJHC 169; HBC206.2016 (27 February 2019)); see also my earlier Rulings (**Sami v Raj** [2017] FJHC 287; HBC210.1989 (21 April 2017) and **Sami v Raj** - Ruling [2014] FJHC 389; HBC210.1989L (30 May 2014)).

CHRONOLOGY FOLLOWING CONSENT JUDGEMENT

13. I tabulate below the chronology of proceedings filed following the consent judgment. I do so in order to accentuate certain conduct of the parties in the hope that this will give some proper perspective:

<i>Date</i>	<i>Proceedings</i>	<i>Comments</i>
27/07/07	Summons filed by Plaintiff	seeking Orders to sell CT 8351 being Lot 2 on DP 1991, Nalovo Part of in Malomalo to recover the judgment debt and costs and an Order that the Deputy Registrar execute the transfer documents and other papers.
13/08/07	Affidavit filed by Prem Chand	At paragraph 3, Prem Chand deposes that "the consent judgment was entered as the Plaintiff was to pursue the matter of payment with

² The Order was sealed on 21 October 2003 as follows:

UPON READING ex-parte Notice of Motion and affidavit of Krishna Sami filed on the 12th day of September 2003, **AND UPON HEARING** Mr. S. Nandan of Messrs Pillai, Naidu & associates Counsel for the Plaintiff **AND** the Plaintiff undertaking by Counsel to abide any Orders this Court may make as to damages in case this Court shall hereafter be of opinion that the Defendant Sant Raj shall have sustained any damages by reasons of this Order which the Plaintiff to pay **AND IT IS HEREBY ORDERED** as follows that:

- (a) The Defendant do deliver his passport and his passenger ticket and travel documents held by him to this Honorable Court forthwith.
- (b) A Writ *Ne Exeat Civitate* be issued and directed to the Sheriff of the High Court of Fiji and his deputy and all his constables and other peace and/or police officers and all customs and immigration officers commanding them that in the event that the defendant should seek or attempt to depart from this jurisdiction of the Honorable Court they should arrest him and bring him before a Judge of this High Court as soon as possible.
- (c) The copies of documents to be served on the Defendant within reasonable time.
- (d) Either party be at liberty to apply with a 24 hours notice.

	opposing above application.	<p>relevant Insurance Company".</p> <p>At paragraph 4, Prem Chand deposes that he: "had granted a Mortgage to Rajneeta Devi Raj which was granted on 5th day of July, 2005 over both the Certificates of Title Number 8351 and 27650".</p> <p>"The Mortgage could not be registered as the Certificate of Titles were held by the Fiji Development Bank under its Mortgage".</p>
21/09/07	<p>Inter-Partes Notice of Motion filed by Plaintiff</p> <p>This was filed because the Defendant was in Fiji at the time.</p>	<p>Seeking a warrant for the arrest of Defendant and that Defendant do deliver his passport and his passenger ticket and travel documents to Court and that a Writ of Ne Exeat Civitate be issued and directed to Sherriff...commanding them that in the event that the Defendant should seek or attempt to depart from this jurisdiction of the Court, that they should arrest him, and bring him before a Judge</p> <p>Note: Supporting affidavit of the Plaintiff deposes at paragraph 4 – "That in order to deprive me of the fruits of my judgment the Defendant on 20th July 2005, filed a caveat against this lands comprised in CT 8351 and 27650 in favour of his daughter Ranjeeta Devi Raj.</p>
03/03/08	Inter-Partes Notice of Motion filed by the Plaintiff	<p>Seeking following Orders:</p> <p>(i) That a charge be imposed on CT 8351 and CT 27650 and that these be charged or attached to answer the judgment</p> <p>(ii) That Defendant attend Court to show cause as to why his interest in above properties should not be applied to satisfy his debt.</p>
14/03/08	Charging Orders Nisi granted by Master Udit.	
28/04/08	Affidavit of Prem Chand sworn on 21/04/08	<p>Opposing Charging Order Nisi. Alleging that no documents (save for sealed copy of Charging Order Nisi) was ever served on Defendant. Relies on 2007 Affidavit sworn by Defendant in opposition to 2007 application for Charging Orders.</p> <p>Main points raised:</p> <p>(a) There is a mortgage in favour of Rajneeta Devi Raj granted 05/07/07 on both CTs</p> <p>(b) Mortgage not registered on account of FDB Mortgage</p> <p>(c) So caveats were registered on both CTs in favour of Rajneeta Devi Raj.</p> <p>(d) Judgment caveat entered by Plaintiff in 2003 is no longer valid</p> <p>(e) Charging Order cannot have priority over the Mortgage</p> <p>(f) Defendant has applied for Duplicate Provisional Title which has been advertised to enable Mortgages to be registered on Title.</p> <p>(g) Mortgage has priority over other dealings</p>
27/06/08	Submissions filed by Sahu Khan for the Defendant	<p>Admitting to Terms of Judgment. These are submissions to show cause. However, challenges the Charging Orders on ground that property is already encumbered with reference to the mortgages in favour of Defendant's daughter and the caveats lodged as a result due to fact that mortgages could not be registered on account of existing mortgages in favour of FDB.</p>
01/11/13	Ex-Parte Notice of Motion by the Plaintiff	<p>Seeking following Orders:</p> <p>(a) Defendant to deliver Passport and plane tickets and travel documents unless the Defendant can provide free and unencumbered assets having total value of \$55,000 or more.</p> <p>(b) Defendant to serve of Plaintiff's Solicitors within 14 days after service an affidavit disclosing full value of all and each of his assets in Fiji.</p> <p>(c) Disclose all rental monies being received from tenants of CT 27650.</p> <p>(d) Writ NE Exeat Civitate be issued that if Def should enter Fiji or seek to depart Fiji, Defendant be arrested and brought to Court.</p>

		(e) Defendants portion of rental being 50% from CT 27650 be paid into trust account of Pillai Naidu & Associates.
02/12/13	Affidavit In support of Above of Krishneel Kunal Kumar	Deposing that no appeal/stay has been filed against the Consent Judgement of 2005.
30/05/14	Ruling	Order in Terms of 01/11/13 application.
04/06/13	Order Sealed.	Praecipe for Writ Ne Exeat Civitate and Writ Ne Exeat Civitate issued.
27/05/16	Summons and Supporting Affidavit. (under sections 104 and 105 of Land Transfer Act)	Seeking following Orders: (a) That the encumbrances against the titles in favour of the defendant's daughter namely Caveat No. 569355 over CT 8351 and 27650 be discharged as fraudulent. (b) The plaintiff or his solicitors are to attend to the sale of all of the properties described in paragraph 15 of the Affidavit in Support filed herein by calling for tenders through acknowledgement in the local newspaper. (c) That the plaintiff will collect:- <ul style="list-style-type: none"> • \$55,000 from the sale proceeds as his share under consent judgment • Interest on the judgement sum of \$55,000 at a rate of 4% per annum from (18 March 2005 to date) • Solicitors legal costs
14/06/16	Ex-Parte Notice of Motion Order in Terms granted 28/06/16	Seeking leave to issue and serve Summons and Affidavit out of jurisdiction against Sant Raj (Defendant)
08/08/16	Supplementary Affidavit	Of Plaintiff. Defendant evading service in Auckland. Seek leave to serve by prepaid registered envelope with attached AR Card.
29/08/16	Notice of Change of Solicitors filed by Messrs Siddiq Koya Lawyers	For Defendant to take over from Messrs Sahu Khan & Sahu Khan.
31/08/16	Ex-Parte Notice of Motion	By Siddiq Koya Lawyers seeking to uplift Writ Ne Exeat Civitate (Stop Departure Order). In supporting affidavit, Defendant deposes inter alia at paragraphs 4, 15, 16 and 17: THAT I ALSO LOOK AFTER MY DAUGHTER NAMELY Rajneeta Devi Raj who is a student in the University of Auckland. THAT I own a piece of land comprised in Certificate of Title No. 8351[which] has a market value of \$200,000 THAT I also own another property, a Joint Tenant with my wife....comprised in Certificate of Title No. 27650 being Lot 44 on DP No. 4509...where three tenants reside and the property is valued at \$350,000. THAT the above paragraphs 13 and 14 strongly stipulate that I am financially stable and the value of my assets supersedes the value of the judgment sum. THAT I have no intention to evade any payments to the Respondent/Plaintiff since I have now appointed and instructed Messrs Siddiq Koya Lawyers as my Solicitors in this matter.
02/09/16	Affidavit Opposition in	By the Plaintiff. Notably, the plaintiff annexes an article from the New Zealand Herald where the Defendant (Sant Raj) is being implicated before the Real Estates Agents Disciplinary Tribunal for not having provided correct information during an official inquiry into a scheme involving also his wife and son. The defendant's family were allegedly involved in a

		scheme where they would grossly inflate house values to induce banks to lend more than the houses were worth – and benefitted financially from the scheme.
06/09/16	Notice of Change of Solicitors	Filed by Fazilat Shah Legal to take over as counsel for Defendant.
06/09/16	Order Sealed	Bank cheque of \$20,000 payable to Messrs Pillai Naidu & Associates to be made Costs to Pillai Naidu & Associates summarily assessed at \$1,500 Stop Departure Order revoked.
27/09/16	Affidavit of Assets	Of Defendant (CT 27650 (of which he claims to own one undivided half share) and full ownership of CT 8351.
30/09/16	Order in Terms of Summons dated 27 May 2016.	Order for Sale. Deputy Registrar to Call for Tenders. Costs to Pillai Naidu & Ass. Proceeds of sale to be deposited in Court. Date to be set for argument on how monies to be distributed.
11/01/17	Summons (Order 32 Rules 5 and 6 and Order 2 Rule 2)	Seeking to Set Aside the Orders made on 27/05/16 Summons. Supporting Affidavit of Defendant alleges: (a) Defendant was never served with the Summons (b) Summons was served on former Solicitors on 02/09/16. Contents not brought to his attention. (c) Date on Summons was 14 June 2016. No amendment to returnable date. (d) Def did not know that the said Summons listed for 30 September 2016. (e) Defendants current Solicitors only received Summons from previous Solicitors. (f) Defendants daughter affected party – not served. (g) Allegations of fraud – should have been tried. (h) Value of property enough to cover both remaining mortgage and plaintiff's balance of judgment sum
17/01/17	Orders	(a) 7 days to PF to file and serve affidavit in opposition (b) 7 days thereafter to Defendant to file and serve affidavit in reply (c) Adjourned to 13/02/17 for hearing (d) DR to continue to receive offers but to refrain from accepting any offers pending determination of this application.
14/02/17	Affidavit in opposition filed by Plaintiff	(e) Asserts that the processes in question were served on defendants solicitors M/S Koya on 02/09/16. Yes Summons dated 14/06/16 – but present counsel had appeared for defendant on instructions from Koya. (f) Matter was adjourned to allow defendant to file Affidavit in Opposition. (g) Misgivings about whether daughter a bona fide mortgagee given that defendant had conceded in last affidavit filed that he was "looking after the daughter".
23/02/17	Affidavit of Defendant	(h) My current solicitors were not served with application and were only dealing with stop departure orders. (i) Court had not ordered filing of response. Not reflected in sealed Order of 06/09/16. (j) Manner dealt with – not appropriately. Alleged fraud against daughter.
15/06/17	Amended Summons	By Pillai Naidu & Associates. Seeking Orders that the encumbrances in favour of defendant's daughter namely Caveat No. 569355 over CT 8351 and 27650 be discharged as being fraudulent. Plaintiffs or Solicitors to attend to sale by calling for tenders. PF to collect: (a) \$55,000 from sale proceeds as share of consent judgment. (b) Interest on judgment at 4% from 18/03/05 (c) Legal Costs of \$20,000

28/06/17	Ex-Parte Notice of Motion	Seeking leave to issue and serve amended Summons and Affidavit out of jurisdiction to Rajneeta Devi Raj at 2/46 Otahuhu, Auckland 1062, New Zealand.
27/07/17	Notice of Advertisement	To Advertise that amended Summons will be heard on 01/09/17 at 10.30 a.m. at Lautoka High Court
27/07/17	Affidavit of Service	Of Krishneel Kunal Kumar – deposing that he did on 19 July 2017 at Nadi Post Office serve Rajneeta Devi Raj with true copy of Amended Summons and Affidavit in Support dated 15/06/17
08/08/17	Affidavit of Service (Advertisement)	Of Krishneel Kunal Kumar. Amended Summons advertised in Fiji Times on 15 June 2017. Advertisement directed at Rajneeta Devi Raj of Auckland New Zealand. Giving Notice that matter will be heard before Judge on 01 September 2017 at 10.30 a.m.
09/10/17	Supplementary Affidavit of Krishna Sami	Confirming his authority to Krishneel Kunal Kumar on 14 June 2017 to swear affidavit.
18/01/18	Hearing	DS Naidu for the Plaintiff. S. Ravai for Defendant. No appearance for Interested Party. Defendant saw no reason to file Affidavit as they thought the affidavit sworn by Krishneel Kunal Kumar (Law Clerk) was defective. Defendant Lawyer could not confirm if they were acting for interested party. Krishna Sami Naidu (put on stand to formally prove Affidavit of 18/02/16). There was no cross-examination. Order in Terms of Summons .
18/01/18	Order	Ordered that encumbrances against titles in favour of Defendant's daughter be discharged as being fraudulent. PF and his solicitors to attend to sale.
22/02/18	Affidavit of Service	Of Vishnu Deo. Deposing that he did on 20/02/18 personally served DS Naidu & Ass true copy of Notice and Grounds of Appeal (to Fiji Court of Appeal).
28/05/18	Ex-Parte Summons of Pillai Naidu & Associates	Tenders have been called and processed by Deputy Registrar. One Mahendra Keshwan's tender was accepted as highest tender for purchase of CT 8351. He is represented by Vasantika Patel Lawyers. Both Certificates of title were advertised but since tender for CT 8351 was more than sufficient to satisfy judgment debt and costs, only tender for CRT 8351 accepted.
30/05/18	Hearing for the above.	Ordered that Deputy Registrar execute the Sale and Purchase Agreement and transfer documents in place of defendant and Order that Mortgage No. 705832 in favour of Ranjeeta Devi Raj be discharged and or removed.
16/10/18	Ex-Parte Summons	By Pillai Naidu & Associates seeking following Orders: (a) Release of \$63,126.52 to Plaintiff being the balance sum owed under judgment. (b) Release of \$8,707.00 being disbursements (c) Release of \$20,00 as legal costs (d) Release of \$817 as cost incurred in the filing of this application (e) Release of balance sum of \$111,352.08 being balance of sum left over and payable to Defendants into court
18/10/18	Mention in Court	Parties advised Court that they were settling.
19/10/18	Amended Ex-Parte Summons filed	(a) Release of \$63,126.52 to Plaintiff being balance sum owed under judgment. (b) Release of \$8,707 being disbursements (c) Release \$20,00 as legal costs (d) Release sum of \$20,996.90 to FICA being Capital Gains Tax (e) Release of further sum of \$817.50 as costs

		(f) Release of \$111,352.08 being balance sum left over and payable to defendants
23/10/18	Notice of Motion & Affidavit of Sant Raj	Seeking Orders that further execution of Orders dated 18/01/18 be stayed pending appeal Status Quo of CT 8351 do remain pending determination of Civil Appeal No. 0015 of 2018 in FCA. PFs be restrained from entering upon and remaining upon CT 8351 until determination of Appeal.
05/11/18	Affidavit of Sant Raj in Opposition to Application for Judicial Sale of CT 8351	
04/12/18	Affidavit in Opposition to stay	
04/02/19	Affidavit of Sant Raj in Reply to Plaintiffs Application for Sale	

OBSERVATIONS

14. In all post consent-judgement affidavits sworn by the judgement debtor in this case, he has always stated his address to be:

....**SANT RAJ** of Nalovo, Nadi, Retired School Teacher.....

15. However, what is clear is that he resides mainly in Auckland New Zealand and that his entire family is there. In fact, the family appears to be involved in the real estate business there (see 02/09/16 entries on table above).
16. The chronology highlights the judgment debtor's chronic evasiveness to undermine the judgment creditor's attempts to enforce the consent judgement. In saying this, I take into account the following:
- (a) there had been a stop departure order by Mr. Justice Byrne in October 2003. On account of this Order, the judgement debtor was not able to travel out of the country.
 - (b) the trial of the matter happened on 08 March 2005. The judgement creditor had given evidence and some medical reports had been tendered.
 - (c) the consent judgment was entered later. It was initiated by the judgement debtor's counsel.

- (d) in light of the evidence already given for the judgement creditor, it would appear that the judgement debtor had reassessed his case at that point, and then decided that there was a high likelihood of judgement being entered against him if the matter had proceeded to full trial.
- (e) given that the Stop Departure Order of Byrne J was still in force at that time of the trial, it would seem that the judgement debtor was apprehensive of the possibility that - if judgement was to be entered against him following a full trial, the Stop Departure Order of Byrne J would continue until he fully satisfied the judgement debt. That would have made it extremely difficult for him to travel out of Fiji.
- (f) hence – it would seem that the consent judgment was designed to enable the judgement debtor to “abscond” to New Zealand. It was designed also to cause future enforcement problems:
- (i) e.g. by reserving a right to the judgement debtor to appeal the decision on the statute of limitation point.
 - (ii) e.g. in providing a window of opportunity to the judgement debtor to leave Fiji following the uplifting of the stop departure orders of Byrne J while preserving a right of appeal on the limitation period
 - (iii) in providing a window of opportunity to the judgement debtor to further insulate his assets from execution by providing that execution was to be suspended for six months until 09 September 2005 and – during which time of suspension, he was able to grant a mortgage over CT 8351 and 27650 to his daughter, Rajneeta Devi Raj³ and to register a caveat on the titles accordingly on 05 July 2005. Then, by the affidavit of Prem Chand (Clerk of Sahu Khan & Sahu Khan for the judgement debtor) sworn on 11 August 2007, the judgement debtor would offer a convenient explanation that the said mortgage:

“...could not be registered as the Certificates of Titles were held by the Fiji Development Bank under its Mortgage”.

³ As deposed to in paragraph 4(i) of the Affidavit of Prem Chand (Clerk of Sahu Khan & Sahu Khan who were then Solicitors for the defendant.

- (g) it seems that this whole scheme was orchestrated by the judgement debtor and his solicitors Sahu Khan & Sahu Khan to ensure that the period of suspension would ward off the plaintiff for sometime to enable the judgement debtor to fathom and to register a caveat in favour of his daughter then yet unregistered mortgage⁴.
- (h) Chand even deposes in the same affidavit that they only entered into the consent judgment so that **“the Plaintiff [could] ... pursue the matter of payment with relevant Insurance Company”**.

COMMENT ON THE JUDGEMENT DEBTOR’S CLAIM THAT HE ONLY ENTERED INTO THE CONSENT JUDGEMENT “SO THAT THE PLAINTIFF COULD PURSUE PAYMENT WITH THE RELEVANT INSURANCE COMPANY”

17. This is what Prem Chand, a Clerk of the law firm of Sahu Khan & Sahu Khan, had deposed in an affidavit sworn on 13 August 2007. A consent order, when endorsed by the Court, becomes a Court Order. The judgement debtor’s motive in entering into the consent order, does not insulate any assets of the judgement debtor from execution.
18. In this case however, that disclosure by Prem Chand can only go towards highlighting – at the very least – a pre-disposition on the part of the judgement debtor’s and his solicitors’ to unethical untoward conduct. This goes ultimately to their credibility. If it is not an outright insurance fraud, it borders on insurance fraud.
19. An affidavit sworn by the judgement creditor on 02 September 2016 annexing an article in the New Zealand Herald where the judgement debtor is being implicated before the Real Estates Disciplinary Tribunal for not having

⁴ Hence, Prem Chand would depose in the same affidavit at paragraph 5 that “the judgment on Certificate of Title Number 8351 was registered after the said caveat of Rajneeta Devi Raj and the said Mortgagees Caveat was registered on 20th day of July 2007”.

provided correct information during an official inquiry involving his wife and son (see table above), does nothing to further his credibility.

THE MORTGAGE IN FAVOUR OF RAJNEETA DEVI RAJ

20. The picture that the judgement debtor paints is as follows. There was an FDB mortgage over his two properties at all material times, which in this case, is the year 2005 when the consent judgement was entered, and shortly thereafter when the judgement creditor began taking steps to levy execution on the properties. The judgement debtor had needed money in 2005 to build on a particular property of his, which is yet un-named. He would then approach his daughter who then lent him \$92,376-00 to be secured by a mortgage. As Prem Chand deposes there was an FDB mortgage on the properties, and it was then difficult to register the daughter's mortgage on the titles. The daughter however was able to still secure her interest vide a caveat which she would lodge over both CT 8351 and CT 27650 to support her yet unregistered second mortgage.
21. As I have said above, the conduct of the judgement debtor and his former solicitors leaves much to be desired in terms of their credibility. This is particularly so in relation to the alleged mortgage in question in this case.
22. The first instance when the mortgage is mentioned was in the affidavit of Prem Chand filed on 13 August 2007 in opposition to an application by the judgement creditor for an Order for judicial sale of the properties. This affidavit simply mentions that Prem Chand had granted a mortgage to Rajneeta on 05 July 2005. It does not say whether the mortgage was granted as security on account of some monies lent by Rajneeta to her father. It also does not annex any copy of the purported mortgage.
23. The second mention was in another affidavit of the same Prem Chand sworn on 21 April 2008. In that affidavit, there is annexed marked "B" an unstamped and unregistered copy of the mortgage instrument purportedly given by the

said judgement debtor to his daughter Rajneeta. According to its provisions, the mortgage was given as security for a loan of \$92,376-00 purportedly given by Rajneeta to her father, the judgement debtor. Notably, the said instrument stipulated *inter alia* that the judgement debtor was **“to pay to the Mortgagee the above sum of \$92,376-00on the 19th day of July 2006”**. Obviously, this affidavit was filed nearly two years after the stipulated deadline for repayment of the judgement debt, and yet, there was no accounting in the affidavit as to what the balance of the mortgage debt might be at that time.

24. It appears that a “judgement caveat” was entered onto the judgement debtor’s two properties. This is mentioned in Prem Chand’s affidavit sworn on 28 July 2008. Chand also stresses that Rajneeta’s mortgage must have priority over the “judgment caveat” of the judgement creditor on 13 April 2007 over CT 8351 and on 13 April 2007 over CT 27650. Chand also deposes that the said judgment-caveats had lapsed under section 105(2) of the Land Transfer Act in having exceeded 6 months without extension.
25. Notably, in an affidavit sworn by the judgement debtor himself on 31 August 2016, he deposes at paragraph 4 that he looks after his daughter namely Rajneeta Devi Raj **“who is a student in the University of Auckland”**. There is no mention in the said affidavit of the mortgage in favour of Rajneeta, and yet the judgement debtor would depose at paragraph 15, 16 and 17 as follows:

“...I own a piece of land comprised in Certificate of Title No. 8351[which] has the market value of \$200,000”

“...I also own another property, a Joint Tenant with my wife named Urmila Devi comprised in Certificate of Title No. 27650 being Lot 44 on DP No. 4509.. and the property is valued at \$350,000”

“.....I am financially stable and the value of my assets supersedes the value of the Judgment Sum”

26. In an affidavit sworn by the judgement debtor on 15 December 2016 to set aside the Orders for judicial sale made on 30 September 2016, he deposes at paragraph 3 that:

In response to the Plaintiff's allegations of fraud I deny the same. That my daughter had advanced me monies to build on my property, hence the Mortgage to her as security.

27. In none of his affidavits, has the judgement debtor annexed any documentation to verify the allegation that his daughter had indeed lent him the sum of \$92,376-00. A bank statement to show that the money was withdrawn from the relevant account would be helpful. A cheque or other documentation to substantiate that the said money was paid to the judgement debtor would also help – and so would a loan agreement if any, or any other set of documentation to confirm the paper trail of related transactions etc.

THE SALE

28. As I have said, CT 8351 was the only one of the two properties of the judgement debtor which was sold to recover the judgement sum. That sale was through an open tender process. The sale was made to one Mahendra Keshwan who was the highest bidder) for \$225,000 in January 2018.
29. It is unclear to me at this time whether or not the judgement debtor has complied with settling the purported debt to the daughter by the stipulated date. At the time of the Order for judicial sale, some twelve years or so had already lapsed since the stipulated deadline.
30. I also note the following:
- (a) the sale happened barely seventeen months after the judgement debtor had assessed the value of the same property at \$200,000⁵. Without any evidence of a formal valuation before me, this would appear to be an indication that there was a fair market response to the tender process.

⁵ See affidavit of Krishna Sami sworn on 15 October 2018.

(b) the judgement debtor deposes at paragraph 3 that “**my daughter has advanced me monies to build on my property, hence the mortgage to her as security**”. He also deposes at paragraph 5 that the “**value of the subject property would be sufficient to cover both the remaining Mortgage and the Plaintiff’s balance amount on his judgment**”. The phrase ‘remaining Mortgage’ would appear to suggest that the balance on the sum owed by the judgement debtor to the daughter has reduced from that which was owing initially. However, still, no proper accounting is given by the judgement debtor – let alone by the purported mortgagee.

(c) following from the above, assuming the mortgage held by the judgement debtor’s student-daughter was a *bona fide* one, and that the sum of \$92,376-00 was really loaned by the judgement-debtor’s student-daughter to the judgment debtor, and considering that some twelve years or so has now lapsed since the stipulated due date of the full repayment of the said judgement sum, one would assume that the balance of the sum owing would have further reduced at the time the Orders for sale were made.

JUDGEMENT DEBTOR’S COMMITMENT TO HONOUR JUDGEMENT DEBT

31. At paragraph 18 of the judgement debtor’s 31 August 2016 affidavit, he deposes:

...I have no intention to evade any payments to the Respondent/Plaintiff since I have now appointed and instructed Messrs Siddiq Koya Lawyers as my Solicitors on this matter

(my emphasis)

32. In an Affidavit of Assets sworn by the judgement debtor on 19 September 2016, he deposes that he owned one undivided half share in CT 27650 and full ownership of CT 8351. Curiously, he does not mention any mortgage in favour of his daughter.

RAJNEETA'S NON- PARTICIPATION IN THESE PROCEEDINGS

33. Throughout these enforcement proceedings, the judgement debtor's daughter has never appeared to defend her security interest in the "mortgage". This, despite the fact that she obviously would have known about the proceedings given that:
- (i) she was served (see 27 July 2017 and 08 August 2017 entries in table above).
 - (ii) she lived with the judgement debtor all this time and was dependent on him.
 - (ii) none of the firms of solicitors that have appeared for the judgement-debtor has carried any instruction for the defendant's daughter.
34. I find it curious that the mortgage was given in 2005. I note though that a copy of the stamped mortgage registered on 27 June 2008 lodged by Sahu Khan & Sahu Khan, describes the said Rajneeta as a student as follows:

"RAJNEETA DEVI RAJ (father's name San Raj) of Nalovo Nadi, Fiji, Student (hereinafter the Mortgagee).

35. Eleven years later, on 31 August 2016, the judgement debtor would swear by that affidavit (see above) at paragraph 4 that he looks after his daughter namely Rajneeta Devi Raj **"who is a student in the University of Auckland"**. If Rajneeta was a student at Auckland University in 2016, one would assume that eleven years earlier, in 2005 when the said Rajneeta purportedly loaned the sum of \$92, 376-00 to the defendant (her father), the said Rajneeta was still a minor. I have scoured all affidavits filed but have found no official document to confirm the said Rajneeta's birth records.

COMMENTS

36. In my view, all that the judgement debtor has been doing in this case has been to put his good money after bad money so to speak. While the consent judgement itself was initiated by his counsel, upon his instructions from where I sit, he has taken every step possible to evade his obligation to settle the judgement debt, despite confirming (see paragraph 31 above) that he has no such intention. He has also gone to great lengths to insulate his assets from execution by creating a mortgage in favour of his daughter over the said properties.
37. The property (CT 8351) has already been sold in a tender process to the highest bidder for \$225,000. The price paid is sufficient to settle stamp duties and Capital Gains Tax as well as the original mortgage debt of \$92,376-00 and to settle the judgement debt of \$55,000.00 plus interest accrued which the judgement creditor has assessed at \$63, 156.52 plus. It is also sufficient to settle the costs and disbursements of the judgement creditor's solicitors.
38. I see no reason why stay should be granted. At the end of the day, the consent judgement is there to be enforced.
39. Ultimately, this is a matter of the accounting of the proceeds of sale.
40. A bona fide mortgagee with priority would file the full set of documentation to establish the balance of the mortgage debt owing as this would be relevant in terms of the distribution of the proceeds of sale.
41. Notably, the daughter has not even bothered to appear in this case despite having been served, let alone, has she filed an affidavit deposing how much of the mortgage debt is still owing.
42. The only indication I have that there is a mortgage debt and that it has reduced is in the judgement debtor's affidavit where he says that the "**value of the subject property would be sufficient to cover both the remaining Mortgage**" (see paragraph 30 above).

43. As I have said above, this is the same mortgage debt which, according to the related purported mortgage instrument, was supposed to be fully repaid by her judgement-debtor father some twelve years ago in 2006. It is now twelve years later and neither the judgement debtor nor his “mortgagee”- daughter is able to give this court any accounting thereof. A bank statement showing the related repayment transactions would have sufficed.

44. I agree that the interest of a judgement creditor who has taken out a charging order would rank below the interest of a prior mortgagee or a debenture holder. The cases of **Re Anglesly** [1903] 2 Ch. 727 and **Re Bell** (1886) 34 W.R. 363 are useful. **Re Anglesly** is cited in the White Book as authority for the proposition that:

An order appointing a receiver by way of equitable execution has priority over a subsequent charging order.

45. **Re Bell** (1886) 34 W.R. 363 is also cited in the White Book as authority for the proposition that:

..a judgement creditor cannot by obtaining a charging order upon a fund in Court belonging to his debtor, acquire priority over a previous mortgagee.

46. The reason why this is so would appear to be as follows:

- (i) what a charging order does is it creates an equitable charge in favour of a judgement creditor.
- (ii) a mortgagee has an equitable proprietary interest over a charged asset.
- (iii) as a general rule, all things equal, equitable interests are ranked in the order of their creation so a prior mortgagee would have priority in time anyway. Hence, a mortgage registered earlier would have priority any way.

47. In addition to the above, a mortgagee has an equitable proprietary interest over a charged asset akin to that of a bona fide purchaser for value whereas a recipient of a charging order has, in some cases, been treated as a volunteer (as

opposed to being a *bona fide* purchaser for value). Equity would rank a volunteer-interest below the interest of a competing *bona fide* purchaser for value (as per Briggs J in **Hughman's Solicitors v Central Stream Services Ltd – In Liquidation & Stephen Hunt** [2012] EWHC 1222 (Ch) who followed the precedent in **United Bank of Kuwait plc v Sahib** [1997] Ch 107⁶).

48. The above rules presuppose that the mortgage is a *bona fide* one. In this case, as I have said above, I had some serious misgivings about whether the mortgage in question is such. I formed this conclusion based on the following:
- (a) the mortgage in question was created during the period of suspension of the consent order.
 - (b) the mortgagee is the judgement creditor's daughter
 - (c) the mortgagee appears to me to have been a minor at the time the mortgage instrument was created in 2005. What I deduce from an affidavit

⁶ Briggs J said as follows:

Most equitable charges are of course made for valuable consideration, and their enforcement in equity may depend upon that. Nonetheless, some equitable charges may be conferred voluntarily rather than for valuable consideration: see Megarry & Wade's Law of Real Property (8th Edition) at paragraph 24-042. It would therefore be wrong in my judgment to read section 3(4) as containing within it an unspoken presumption or deeming provision to the effect that a charge imposed by a charging order should, for the purposes of the Land Registration Act 2002 or otherwise, be treated as having been created for valuable consideration.

The question whether a charging order should be so treated arose directly in **United Bank of Kuwait plc v Sahib** [1997] Ch 107. The case concerned a competition between two banks for priority in respect of their competing alleged equitable interests in freehold registered land. The defendant bank claimed an equitable charge by the proprietor's deposit of the land certificate in its favour. The claimant bank relied upon a subsequently obtained charging order. Chadwick J held that the charging order was obtained by the claimant bank as a volunteer, rather than for valuable consideration, for the purposes of the rule in **Dearle v Hall**. Nonetheless since, following the coming into force of the Law Property (Miscellaneous Provisions) Act 1989, there could be no equitable charge created by deposit of title deeds, the claimant bank succeeded. The Court of Appeal upheld Chadwick J's decision on the issue as to the effect of the 1989 Act. It heard no argument, and therefore expressed no view, on the question whether the recipient of a charging order is a volunteer. Chadwick J's conclusion to that effect was based upon his analysis of the effect of **Scott v Lord Hastings** (1858) 4 K & J 633, which decided that a judgment creditor under a charging order (under section 14 of the Judgments Act 1838) obtained thereby no priority over an earlier equitable assignment of the debtor's interest in the relevant property. He concluded that the modernization of the language in section 3(4) of the Charging Orders Act 1979 gave rise to no difference in substance, and continued, at page 119G:

"If a charging order is to be treated as an equitable charge created by the judgment debtor, regard must be had to the circumstances in which it is created. The analogy must take into account the fact that the debtor receives no consideration from the judgment creditor at the time that the charge is created. The judgment creditor, as chargee, is a volunteer.

...

*The volunteer could take no more than the assignor or chargor was able to give: see **Justice v Wynne** (1860) 12 I. Ch. R. 289, 299, 304-305."*

In seeking to uphold Hughmans' claim to priority by virtue of its charging order, Mr. Warwick was constrained to submit that I should not follow Chadwick J's analysis, namely that the recipient of a charging order under the Act of 1979 is a volunteer, and gives no valuable consideration. But he could provide no persuasive reason why I should not do so. On the contrary, I consider that Chadwick J's analysis is compelling and correct. It seems to me most unlikely that the draftsman of the 1979 Act was unaware of **Scott v Lord Hastings**, still less that it was part of the purpose of the 1979 Act to confer upon the recipient of a charging order any priority over the holder of a prior beneficial interest in the relevant property, even if unprotected by registration.

sworn by the judgment debtor is that the judgement debtor has looked after her all these years between 2005 to 2016 at least. She was a student during these years.

- (d) although, a mortgage instrument was later annexed in one of the affidavits sworn by a law clerk of Sahu Khan & Sahu Khan, no documentation has been provided to confirm the trail of transactions that would confirm that the sum of \$92, 376-00 was indeed transferred from the daughter's account to the judgement debtor's account.
 - (e) in fact, I was curious as to whether the daughter/mortgagee, who appears to be a student dependent on the judgement debtor for many years, had that kind of money in the first place to lend to her father/judgement debtor.
 - (f) the lack of any appearance on the part of the daughter to defend her interest as mortgagee, and her lack of instructions to any solicitor in Fiji, does nothing to alleviate my doubts about the bona fides of her mortgage.
 - (g) further to (f) above, the judgement debtor has been the one trying to defend the mortgage without adducing supporting documentation to alleviate the doubts about the veracity of that mortgage, which documentation he should be privy to.
49. In light of the above, which were all raised by the judgement creditor in his various affidavits, it simply becomes a matter of credibility of the judgement debtor. The manner in which the judgement debtor has conducted himself throughout the various proceedings filed, as I have highlighted above, and the way he just changes his position from committing to payment of the debt in 2005 and in 2016 (see paragraph 31 above) to evading payments, and to challenging the Consent Order (in 2018 before Ajmeer J), simply tells me that he lacks bona fides.
50. Ultimately from where I sit, considering the years that have lapsed in the enforcement of the consent judgement in question, and after balancing the prejudices, I am of the view that the greater prejudice will be suffered by the

judgement creditor if a further stay is granted. He is entitled to the fruits of his litigation. The principles of stay are well settled and I do not intend to set them out in some detail here. Suffice it to say that, ultimately, in my view, the judgement debtor's chances of success in the appeal is relatively slim. Even if he was to succeed, he would still be left with a judgement debt to settle and the matter will likely revert to this Court for accounting.

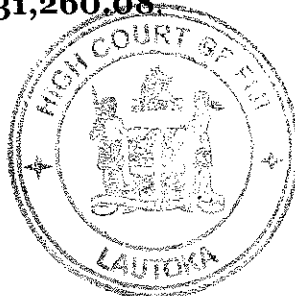
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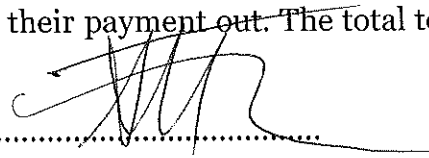
51. Order in terms of the following prayers of judgement creditor's amended summons dated 19 October 2018:

- (a) release of the sum of \$63,126.52 to the judgement creditor being the balance of the sum owed under the judgement.
- (b) release of the sum of \$8,707.00 being the disbursements incurred as per paragraph 12(b) to Messrs. Pillai Naidu & Associates.
- (c) release of the sum of \$20,996.90 to Fiji Revenue & customs Authority being CGT payable on the said transaction.
- (d) release of the further sum of \$817.50 as cost incurred in the filing of this application to Pillay Naidu & Associates.
- (e) payment of the balance of \$111,352.08 into Court.

TOTAL **\$205,002.92**

52. After the above deductions, there is a surplus of **\$19,908 -00**. This too (together with the \$111,352.08) is to be paid into Court to be held in the Chief Registrar's account to await any application for their payment out. The total to be paid into Court is **\$131,260.08**.





Anare Tuilevuka
JUDGE
Lautoka

29 March 2019