

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 61 OF 2005

BETWEEN : **MILTON ROSS DUBE, JOHN DEDABANOUW DUBE AND NINA KATHLEEN DUBE.**

Plaintiffs

AND : **KRISTAMMA GOUNDAR**

1st Defendant

AND : **HARI KRISHNA GOUNDAR**

2nd Defendant

AND : **THE REGISTRAR OF TITLES**

3rd Defendant

AND : **CHANDAR SEN**

4th Defendant

Counsel : Plaintiffs absent – No representation

Mr. Lutumailagi for the 1st & 2nd Garnishees (1st & 2nd Defendants) o/i of Mr. Anil J Singh.

Mr. Nacolawa for the 3rd Garnishee instructed by Nacolawa & Co.

Mr. Vipul Mishra for the 4th defendant (Judgment Creditor)

Written Submissions by: 4th Defendant on 29/11/2016.

3rd Garnishees on 28/02/2017.

1st and 2nd Garnishees on 15/03/2017.

Supplementary Written Submission by : 3rd Garnishee on 11/09/2017.

Date of Hearing : 11th September, 2017.

Date of Decision : 20th March, 2018.

Ruling Pronounced : 28TH March, 2018

Ruling by : Justice Mr. Mohamed Mackie

R U L I N G

A] Introduction:-

1. This ruling relates to the Summons dated 10th November, 2015 filed by the 4th Defendant- judgment creditor, namely, **Chandra Sen**, accompanied by his Affidavit sworn on 9th November, 2015 seeking following orders:
 - (1) *That the matter be set down before a judge to fix a hearing date for the Third Garnishee Mohamed Shamsudeen Sahu Khan to show cause as to why order absolute should not be made against him.*
 - (2) *That the cost in this application be cost in the cost*
2. The summons states that the application is made pursuant to the High Court Rules (HCR) and inherent jurisdiction of the Court.
3. The above summons being supported before the then Hon. Justice Mr. Lal Abeygunaratne on 17th November, 2015 and subsequently the matter being mentioned before his lordship and thereafter before Hon. Justice Mr. S. Sharma on several dates till 24th March 2017, during which period the parties involved filed their respective reply affidavits and main written submissions, finally ended up before me on 01st May, 2017 to fix a date for hearing.
4. Accordingly, the 4th Defendant- judgment creditor being present along with his Counsel and the rest of the contesting parties, though absent, also being represented by their respective Counsel, the hearing was taken up before me on 11th September, 2017, wherein the learned Counsel Mr. Nacolawa, who appeared for the 3rd Garnishee, namely, Dr. Mohamed Shamsudeen Sahu Khan (Dr. Khan) and the learned Counsel Mr. V. Mishra, who appeared for the 4th Defendant – judgment creditor, made their respective oral submissions on the question to be decided by me, namely, whether the Court can enter fresh Garnishee order absolute against the 3rd Garnishee Dr. Khan as pleaded in paragraph 1 of the prayer to the summons..
5. The learned Counsel Mr. Lutumailagi, who appeared for the 1st and 2nd Defendant- Garnishees, limited his appearance only for the purpose of ensuring that his clients are not subjected to this hearing as they had, admittedly, settled the matter in dispute with the 4th Defendant – Judgment Creditor as per the, purported, terms of settlement entered among them on 25th of July, 2012. A copy of same is filed of record.

B] Background & Chronology of Events:-

6. The original action dates back to the year 2005, wherein it transpires that the plaintiffs having purchased the land, which was the subject matter of the substantial action, from the 1st Defendant, assured the balance payment of purchase price by a Mortgage Bond (MB) in favour of the 1st Defendant. Later on plaintiffs' failure to honour the MB, same being put in suit by the 1st Defendant, the 4th Defendant purchased the land on Mortgagee sale for \$6,50,000.00 and after the deduction of the Town Rate arrears, the remaining sum of \$ 631, 513.00 was , admittedly, credited into the 1st and 2nd Defendants' then Solicitor Dr. Mohamed Shamsudeen Sahu Khan's Trust account. Dr. Khan is named as 3rd Garnishee herein.
7. It was not in dispute that the amount what was truly payable unto the 1st Defendant Mortgagee or to his assignee the 2nd Defendant (both 1st and 2nd named Garnishees) out of the said remaining amount of sale proceed, was only \$ 428,652.45 and the surplus sum of \$ 202,861.44 should have remained in the trust account of the 3rd Garnishee to be paid to the Plaintiff Mortgagors.
8. The 4th Defendant, who was initially not a party, intervened into the action and made a counter claim against the Plaintiffs, alleging that due to the interim injunction obtained by the Plaintiffs restraining the 1st Defendant Mortgagee and her assignee 2nd Defendant from carrying on with the Mortgagee Sale, he was compelled to pay \$650,000.00 as the purchase price, instead of \$380,000.00, which he had bided as the highest offer prior to the injunction. Accordingly, an uncontested judgment was entered against the plaintiffs for a sum of \$ 277,000.00 together with the interest in favour of the 4th Defendant and thereby he became the judgment creditor and the plaintiffs became the judgment debtors. **Vide the judgment dated 9th April 2010.**
9. The 4th Defendant – judgment Creditor in his attempt to recover the aforesaid adjudged sum of \$277,000.00, commenced Garnishee proceedings on 12th of April 2010, against the 1st Defendant – Mortgagee – Garnishee, her assignee 2nd Defendant – Garnishee, **3rd Garnishee Dr. Khan** (Solicitor for 1st and 2nd Defendant- Garnishees), and the 4th Garnishee, namely, Mr. Lajendra (Solicitor for the Plaintiff – Mortgagor-Judgment Debtors.)
10. Accordingly, Garnishee order Nisi for the said sum was entered against all four (4) Garnishees above named on 12th April.2010 by the then Hon. Judge Mr. Yohan Fernando.
11. Subsequently, when the matter had come up for show cause hearing before Hon. Mr. Yohan Fernando –J in the morning sessions of 11th June, 2010, the learned Counsel for the 4th Defendant – Judgment creditor had indicated to the Court that he was not

seeking order absolute against the 3rd and 4th Garnishees and limiting it only against the 1st and 2nd Defendant- Garnishees.

12. However, when the matter resumed for hearing at 12.50 afternoons on the same day, the learned judge, having terminated a garnishee proceedings only against the 4th Garnishee, proceeded for hearing and fixed the matter for ruling on 3rd August, 2010.
13. On 3rd August, 2010, the ruling being re-fixed, Hon. Yohan Fernando –J on 10th August, 2010 made the impugned Garnishee order absolute against 1st 2nd Defendant – Garnishees and 3rd Garnishee as well, against whom no order absolute was sought. It is on record that the learned Counsel for the 4th Defendant, prior to the show cause hearing before Hon. Fernando –J, had clearly indicated their intention that 4th Defendant was not moving for order absolute against the 3rd and 4th Garnishees. The impugned ruling that made the Garnishee order absolute dated 10th August, 2010, among other things, states as follows.
 1. *“That there be a Garnishee Order absolute jointly and / or severally against the First, Second, and Third Garnishees namely Kristamma Goundar, Hari Krishna Goundar and Mohammed Shamsudeen Sahu Khan trading as Sahu Khan & Sahu Khan in a sum of \$ 202, 861.44 to answer a judgement recovered by the Fourth Defendant / Judgment Creditor against the Plaintiffs in Civil action No: - 061 of 2005 on the 9th day of April 2010.*
 2. *It is this day ordered that the said First, Second, and Third Garnishees jointly and / or severally forthwith pay to the Fourth Defendant / Judgment creditor the sum of \$ 202, 861.44 being the debt due from the said Garnishees to the said judgment debtor together with the sum of \$ 3000.00 and/or taxed cost whichever is higher.*
 3. *The application for Garnishee against the Fourth Garnishee Nilesch Lajendra trading as Lajendra Law be discharged”.*
14. Thereafter, another Garnishee order Nisi was obtained on 26th October, 2010 by the 4th Defendant against one **Mr. Natrajan Pillai** (the Power of Attorney holder of the 1st Defendant) and the order absolute on it was refused by judgment dated 11th September, 2012 delivered by Hon. Yohan Fernando –J.
15. Being aggrieved by the above order absolute dated 10th August, 2010, the 3rd Garnishee, for himself and on behalf of his then clients the 1st & 2nd Defendant-Garnishees, filed an Appeal before the Court of Appeal. However, the 1st & 2nd Defendant-Garnishees- Appellants did not prosecute their Appeal and same stood abandoned or discontinued.
16. The Appeal by the 3rd Garnishee Solicitor Dr. Khan, being argued before the Court of Appeal on two grounds of Appeal, was allowed by judgment dated 29th May, 2014, pronounced by their Lordships, wherein the Garnishee order absolute, which had been entered against the 3rd Garnishee- Appellant by the High Court, was set aside. A cost of \$5000.00 was also ordered to be paid by the 4th Defendant-Respondent. For the Court of Appeal judgment- Vide- *Goundar v Sen [2014] FJCA 176; ABU0032.2010 (29 May 2014)*

17. Being dissatisfied with the above judgment, the 4th Defendant- Respondent made a Special Leave to Appeal to the Fiji Supreme Court and by the judgment dated 23rd April 2015, their Lordships of Supreme Court refused the Special Leave to Appeal Application and dismissed the Appeal imposing further cost of \$ 6,500.00, in addition to the cost of \$ 5000.00 ordered by the Court of Appeal, resulting total cost of \$11,500.00 payable by the 4th Defendant- Respondent- Appellant to the 3rd Garnishee Appellant – Respondent. For the Supreme Court Judgment – Vide *Sen v Khan [2015] FJSC 5; CBV08.2014 (23 April 2015)*

C. Observations & Discussion

18. It is on record that the 1st and 2nd Defendant – Garnishee -Appellants, before their Appeal was taken up for argument in the Court of Appeal, had entered into a settlement with the 4th Defendant – Judgment Creditor– Respondent on 25th of July, 2012. As a result they did not prosecute their Appeal and the Garnishee Order absolute that had been entered against them by the High Court of Lautoka on 10th August, 2010 stands intact till this date.
19. According to the, purported, terms of settlement filed of record, the 1st & 2nd Defendant- Garnishee- Appellants and the 4th Defendant- Judgment creditor- Respondent seem to have agreed among themselves that the 4th Defendant- Judgment Creditor-Respondent (4th Defendant) will initially execute the Garnishee Order absolute against the 3rd Garnishee for the recovery of \$202,861.44 and will pursue behind the 1st & 2nd Defendant – Garnishee – Appellants only in the event the 4th Defendant is unable to achieve full recovery of the said sum of \$ 202,861.44, from 3rd Garnishee Solicitor Dr. Khan.
20. It was only after the 1st and 2nd Defendant – Garnishee- Appellants entered into the purported settlement with the 4th Defendant, the 1st & 2nd Defendant- Garnishee-Appellants abandoned their Appeal in order to facilitate the recovery from the 3rd Garnishee. However, the abandonment or discontinuance had eventuated before the Appeal of the 3rd Garnishee was finally determined by the Court Appeal.
21. It was after the 4th Defendant's hope of recovery from the 3rd Garnishee was shattered, due to the success of the Appeal by 3rd Garnishee and thereafter the failure of 4th Defendant's Special Leave to Appeal to the Supreme Court, the 4th Defendant applied to this Court by his summons dated 10th November, 2015, moving this Court for a fresh hearing in order to enter another Order absolute against the 3rd Garnishee Dr. Khan.
22. The position taken on behalf of the 4th Defendant, on all the mention dates before my predecessor judges and during the hearing before me on 11th September, 2017, by the learned Senior Counsel Mr. V. Mishra, was that the Court of Appeal by its judgment dated 29th May, 2014 had only set aside the Order absolute entered by Hon. Yohan Fernando-J on 10th August, 2010 against the 3rd Garnishee and the Order Nisi originally entered against him on 12th April, 2010 still validly stands.

23. In order to fortify his stance, learned Counsel for the 4th Defendant made submissions stating that the former judge Mr. Lal Abeygunaratne, who was subsequently dealing with this matter, had made an order to the effect that the Garnishee Order Nisi still validly stands and it has not been appealed against by the 3rd Garnishee.
24. On careful perusal of the case record to ascertain the veracity of the above claim made by the learned Counsel, it is found that the Hon. Lal Abeygunaratne-J at the commencement of this proceeding before him on 27th November, 2015 has made a minutes to the following effect.

BEFORE THE HON. JUSTICE MR. L. ABEYGUNARATNE
ON 27th NOVEMBER, 2015 AT 9.30 A.M

No Appearance for Plaintiffs
Mr. Nacolawa for 3rd Garnishee
Ms. Naidu for 4th defendant

Counsel Submission

“Mr. Nacolawa states no instructions to appear for 3rd Garnishee.
Ms. Naidu states Anil J Singh lawyers withdrawing from 1st, 2nd
Garnishee appearance.
Ms. Nair states as Mr. Nacolawa is withdrawing issue a NOAH to 3rd
Garnishee in the meantime orders nisi to remain against all Garnishees”.

Order

“Order Nisi to remain against the 3rd Garnishee and 1st 2nd Garnishees.
NOAH to issue to 3rd Garnishee. Mention 08/02/2016 9.30” (emp. Mine)

Sgd
27/11/2015

25. However, on the subsequent dates i.e. on 08.02.2016 and 03.03.2016, when the matter had come up before the same judge, the Court being told that there is no proceeding against the 1st and 2nd Garnishees, their Solicitor has been allowed to withdraw and the proceeding against them has stood terminated. Accordingly this proceeding has continued only against the 3rd Garnishee.
26. Mr. V. Mishra, learned Counsel, who had appeared for the 4th Defendant on the subsequent date i.e. on 09th March 2016, has stated that the Court of Appeal had not granted all the reliefs prayed for by the 3rd Garnishee –Appellant and maintained the position that the C.A. had set aside only the Order absolute and not the order Nisi.
27. The learned Counsel, who appeared for the 3rd Garnishee on this date, has taken a stern position that once the Decree absolute is set aside there cannot be an order Nisi

in force as the Court of Appeal had completely disregarded the judgment of Justice Fernando.

28. The learned Counsel for both the parties before me at the hearing have maintained their respective positions with regard to the impugned Order Nisi and addressed the Court both orally and in writing, for which I am grateful to them. Though, the learned Counsel for the 4th Defendant was given leave to file reply submissions to the written submissions of the 3rd Garnishee, no such reply has so far been filed.
29. Mr. Nacolawa, the Learned Counsel for 3rd Garnishee, has mainly taken up the defence of *Res-Judicata* and argued that since the Supreme Court has finally decided the matter on the Special Leave to Appeal Application preferred by the 4th Defendant from the judgment of the Court of Appeal, no order absolute can be moved once again on 3rd Garnishee.
30. The 4th Defendant's stance, when obtaining the order Nisi, was that the excess Mortgagee sale Money was with the 1st, 2nd Defendant -Garnishees and 3rd Garnishee Solicitor Dr. Khan. However, at the show-cause hearing before Fernando –J, his Counsel had opted not to move against the 3rd Garnishee, admittedly, on finding that the relevant sum of money was not in 3rd Garnishee's Trust account during the time material.
31. The fact that moving for another Garnishee order on 26th .10.2010, against the Power of Attorney Holder of 1st Defendant Garnishee, namely, **Natrajan Pillay**, after the aforesaid Order Nisi was made absolute against all 3 Garnishees by the impugned judgment of Hon. Fernando –J dated 10th August, 2010, shows that the 4th Defendant was still in dark as to where the particular sum of Money was actually lying.
32. In view of the above factual position, the pivotal issues that beg adjudication by this Court are as follows.
 - a. **Whether the Order Nisi entered on 12th April, 2015 still validly strands against the 3rd Garnishee?**
 - b. **Whether the 3rd Garnishee can take up the plea of *Res- Judicata* as argued by the learned Counsel for the 3rd Garnishee?**
33. If the answers for the above issues are arrived at in favour of the 4th Defendant only, this Court can consider making a fresh order absolute against the 3rd Garnishee as prayed for by the 4th Defendant in his summons, provided it is proved on cogent evidence that the Money in question (subject matter of this proceedings) still remains with the 3rd Garnishee in his Trust Account or in some other form, without being disposed in the way expected of him as a Solicitor.

34. Initially, by not moving for the order absolute against the 3rd and 4th Garnishees and limiting it only to the 1st and 2nd Defendant -Garnishees prior to the show cause hearing before Hon. Yohan Fernando-j, it is abundantly clear that the 4th Defendant, his Solicitors and his learned Counsel were certain that the Money in question was not lying with 3rd and 4th Garnishees.
35. The very fact that the 3rd Garnishee did not have this sum of Money in his Trust account during the time material to the Garnishee Order Nisi and thus no order absolute was moved against him, stand clearly admitted in both the Oral and written submissions of the learned Counsel for the 4th Defendant and same has been highlighted in the Court of Appeal and the Supreme Court judgments as well.
36. The main ground of Appeal before the Court of Appeal was, that the learned High Court Judge by his impugned judgment dated 10th August ,2010 made the Garnishee order absolute against the 3rd Garnishee, while same relief had not been , admittedly, moved for against the 3rd Garnishee. It is only on the above ground the Court of Appeal set aside the judgment against the 3rd Garnishee. The Court of Appeal has observed that the Court bellow could not have granted the relief that was not asked for. Apart from the above the Court of Appeal had not gone into the merits or the propriety of the impugned judgment of the High Court, in making the Order absolute against 3rd Garnishee.
37. Had the 3rd Garnishee Solicitor possessed the relevant money in his Trust account during the time material, the 4th Defendant, undoubtedly, as a first option, would have moved for the Order absolute against him and need not have gone behind the 1st, 2nd Defendant Garnishes or the Plaintiff's Solicitor Mr. Lajendra or subsequently against the 1st Defendant – Garnishee's Power of Attorney holder Mr. Natrajan Pillay.
38. It is after the alleged subsequent revelation, that the 1st and 2nd Defendant – Garnishees did not in fact get the relevant Money from the 3rd Garnishees, the purported settlement has been entered by and between the 4th Defendant and 1st, 2nd Defendant – Garnishees. It is on the said revelation the action No: - HBC-158 of 2011 against the 3rd Garnishee by the 1st Defendant Garnishee and her power of Attorney holder Natrajan Pillai has subsequently been filed claiming to be on new evidence.
39. It is also to be borne in mind that the 4th defendant's chase behind the 3rd Garnishee is not to execute a formal judgment obtained in an action filed against him on a distinct cause of action. All what the 4th Defendant attempts is to recover his adjudicated sum of money in a counter claim made against the plaintiff – judgment debtor in this case, by way of Garnishee proceedings on the alleged remaining sum of Mortgagee sale proceeds, which was, admittedly, credited into the 3rd Garnishees Trust Account. But the 3rd Garnishee through his Clerk PREM CHAND had taken up a position that the

entire sale proceed was disposed as per the instructions of the 1st Defendant Garnishee.

40. Interestingly, it was the same **Prem Chand**, who avowed the affidavits on behalf of both the 3rd Garnishee and 1st and 2nd Defendant Garnishees, by playing a dual role, propriety of which was criticised by the Hon. Y. Fernando- J.

41. I shall now revert to the two (2) issues raised by me as shown above and try to ascertain the most suitable answers to them in the light of my observations above, the submissions made by both the Counsel and the relevant law governing the subject of Garnishee proceedings and the defence of *Res- Judicata*.

a. Whether the Order Nisi entered on 12th April, 2015 still validly strands against the 3rd Garnishee?

42. On perusal of the record, it is clear that on 12th April, 2010, only **one Order Nisi** was entered in common to all four (4) Garnishees (1st, 2nd Defendant- Garnishees, 3rd Garnishee Solicitor and plaintiff's Solicitor Mr. Lajendra) for a single amount of \$ 202, 861.44, which was said to be the remainder of the total Mortgagee sale proceeds, admittedly, credited to the 3rd Garnishee Solicitor's Trust Account, to be paid unto the plaintiff-judgment debtor.

43. There is no evidence to show that separate and distinct Nisi Orders were made against each Garnishee. The one and only order Nisi entered on 12th April, 2010 was common to all 4 Garnishees (including Mr. Lajendra) for the said single amount of Money, being the subject matter of these proceedings.

44. Also there is no evidence in the record to the effect that the right to proceed against the 3rd Garnishee on same order Nisi was reserved by the counsel for the 4th Defendant at the commencement of the show cause hearing before Fernando -J.

45. It is my considered view that once an order absolute is entered against one of the Garnishees in respect of the very same amount of Money, the order Nisi, which was the foundation stone for same, disappears or become non-existent and no further order absolute can be made on the very same order Nisi.

46. The judgment creditor is supposed to go only behind the person, who held the relevant Money during the time material to the order Nisi. What the 4th Defendant now moves is to enter a fresh order absolute against the 3rd Garnishee basing on the order Nisi, entered on 12th April, 2010 on which an order absolute presently exists against the 1st and 2nd Defendant- Garnishees for the same amount of Money.

47. There is clear admission on the part of the 4th Defendant that the relevant Money was not in the Trust Account of the 3rd Garnishee. Hence, the 4th Defendant neither moved for an order absolute against him nor reserved the right for same at the first hearing. E
48. With due respect to the learned Counsel for the 4th Defendant, I beg to disagree with him when he says that there is a valid Order Nisi against the 3rd Garnishee. He appears to be relying on hand written minutes dated 27th November, 2015 made by Hon. Judge Mr. Abeygunaratne (Vide paragraph 24 for the impugned minutes). An order Nisi, as claimed by the learned Counsel, is not in existence and making an order absolute on such a non- existing order Nisi is not viable.
49. What is found on the said minutes of the Hon. Judge is not a decision arrived at after a due hearing. More or less it appears to be an observation made by the judge. His lordship would not and could not have made such a decision when 1st , 2nd Defendant- Garnishees and 3rd Garnishee were absent and particularly when the Counsel for the 3rd Garnishee informed that he was withdrawing as he had no instruction and Mr. Anil J Singh, the Solicitor for the 1st and 2nd Defendant Garnishees, was also withdrawing .
50. It is also noted that the same minute has been made affecting the 1st and 2nd Defendant- Garnishees as well, while such a move or decision was not warranted against them in view of the fact that an order absolute had already been entered against them . However, the minutes made on subsequent mention dates clearly show that the question of order Nisi has remained to be a disputed issue and if the learned Counsel argues it as an order duly made by the Judge, I must say with due respect, it is a ruling made in the absent of the parties concerned and without a due hearing. This Court is not inclined to act on it.
51. A fresh order absolute against the 3rd Garnishee could be possible, only on a fresh Order Nisi being entered against him on cogent evidence to prove that the said balance Money still remains with him without being duly disposed in the way expected of him.
52. I can remember inquiring from the learned Counsel for the 4th Defendant during the hearing, whether this is not an exercise similar to “Having the Second Bite on the Same Cherry”, for which I did not get a satisfactory answer.
53. Therefore, the irresistible conclusion this Court can safely arrive at with regard to the issue (a) above is that once an order absolute is made, the Order Nisi initially entered automatically becomes non-existent. As such there cannot be any order Nisi in operation against the 3rd Garnishee. Since an order absolute entered rightly or wrongly against the 1st and 2nd Defendant – Garnishees on 10th of August, 2010

stands intact, no a fresh order absolute can be made against 3rd Garnishee on the same order Nisi..

b. Whether the 3rd Garnishee can take up the defence on the plea of Res-Judicata as argued by the learned Counsel for the 3rd Garnishee?

54. What the 4th Defendant moved before Hon.Y.Fernando-j, was to execute the judgment he had obtained against the Plaintiff –Judgment debtor, by issuing Garnishee summons against the 3rd Garnishee on the basis that the balance Money of the Mortgage sale that was allegedly payable to the Plaintiff- Judgment Debtor was lying in the Trust Account of the 3rd Garnishee and accordingly an order nisi was entered against him.
55. However, during the show cause hearing, despite the admission on behalf of the 4th Defendant that no such Money was available in the Trust Account of 3rd Garnishee and though it was specifically informed to the Court that no order absolute was prayed for against the 3rd Garnishee, the Hon. Judge on his own volition had entered order absolute against the 3rd Garnishee. The judgment making the order absolute against 3rd Garnishee now stands vacated by the Court of Appeal and affirmed by the Supreme Court, on the sole ground that the relief not prayed for could not have been granted by the Court bellow.
56. Thus, the present factual position is that there is no any final decision by a competent Court, whether he could be subjected to a fresh Garnishee proceeding or not for the said amount of money, which was admittedly credited to his Trust account after the Mortgagee sale. This Court cannot engage in such an exercise now due to the absence of a valid Order-Nisi entered on acceptable evidence.
57. There has not been any formal adjudication whether the Money involved herein was misused, misappropriated or he has performed his fiduciary duty towards his clients, in respect of the said amount of Money, in the way expected of him, which of course is not the duty of this Court through this Garnishee proceedings.
58. The action said to have been filed by the 1st Garnishee and Natrajan Pillai (HBC-158 of 2011) in this Court would, probably, bring suitable answers to the above questions.
59. However, the admitted fact that the Money in question was not available in his Trust account during the time Material or the fact that an Order absolute has been entered against the 1st and 2nd Defendant – Garnishees need not necessarily exonerate the 3rd Garnishee or bestow him the defence of Res- Judicata. With due respect to the learned Counsel for the 3rd Garnishee, I beg to disagree with him on the purported defence of Res – Judicata and such an argument will not hold water.

60. It is further is observed, that the above plea of Res-Judicata advanced by the learned Counsel for the 3rd Garnishee was not based on the argument that there is an order absolute already entered against the 1st and 2nd Defendant-Garnishees. When such a position is not taken up, this Court need not take notice of it or act on it.

D. Conclusions:-

61. The order Nisi, initially entered on 12th April, 2010 does not exist anymore and it has ceased to be in force with the making of the order absolute by the impugned judgment dated 10th August, 2010.

62. The setting aside of the Order absolute against the 3rd Garnishee by the Court of Appeal does not bring back the Order Nisi against him into operation and it is on the same order Nisi , the order absolute has been entered against 1st and 2nd Defendant – Garnishees.

63. Under these circumstances, no a fresh order Absolute can be entered against the 3rd Garnishee – Solicitor on such a non-existent order Nisi, unless a fresh order Nisi is entered, supported by cogent evidence and same survives the subsequent show cause hearing.

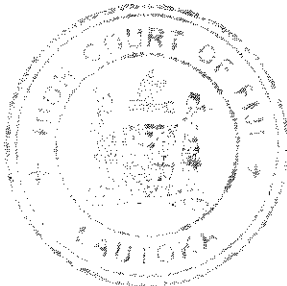
64. Unless the allegation that the balance mortgagee sale Money in question was **not** duly disposed by the 3rd Garnishee, in settlement of the dues to the Plaintiffs in the way expected of him, is duly proved by cogent evidence, Garnishee proceedings against 3rd Garnishee Solicitor is a futile exercise as far as 4th Defendant is concerned.

65. The plea Res-Judicata advanced on behalf of the 3rd Garnishee – Solicitor should fail.

E. Final Order:

1. The Summons dated 10th November, 2015 filed by the 4th Defendant – Judgment Creditor, moving for an order Absolute against the 3rd Garnishee Dr. Sahu Khan, is hereby dismissed.

2. Considering the circumstances no cost is ordered.



A handwritten signature in black ink, appearing to read 'A.M. Mohammed Mackie', written over a dotted line.

A.M.Mohammed Mackie

Judge

**At Lautoka
28th March, 2018**