

Sundarjee Brothers Ltd. v. Coulter

Court of Appeal
Speight V.P., and Mishra and O'Regan JJ.A.
8 October 1987

10 *Constitutional law – fundamental rights and freedoms – section 14 of Constitution of 1970 – freedom of movement – freedom to leave Fiji – whether Debtors Act 1967 warrant to arrest absconding debtor is inconsistent with section 14 of the Constitution – whether Debtors Act warrant is "reasonably required in order to secure the fulfilment of any obligations imposed on the person by law".*

Constitutional law – fundamental rights and freedoms – section 14 of Constitution – freedom of movement – freedom to leave Fiji – subject to section 3 public interest – whether commercial community of Fiji is "the public interest".

20 The appellant provided goods, worth over \$3000, to two companies. The respondent (on behalf of whom there was no appearance) identified himself as "managing director" of both companies. The appellant sought a civil judgment for \$3175 and applied for a warrant to arrest the respondent, under section 6 of the Debtors Act 1967, as an absconding debtor. The application was dismissed in the Supreme Court on the ground that section 6 of the Debtors Act was, in part, inconsistent with the Constitution. The appellant appealed against the dismissal of the application for civil arrest.

HELD: The appeal was dismissed.

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- (1) The debt was incurred by two companies. There was no evidence that respondent was personally responsible: *l. 100.*
 - (2) Having disposed of the appeal, it was, strictly speaking, unnecessary to continue with any resolution of the constitutional issues. However, out of deference to the arguments of counsel, and because of the general interest in the matter, the Court proposed to discuss the constitutional issues and express an opinion thereon, of persuasive affect only, but to assist the resolution of future cases involving the Debtors Act 1967 and the Constitution: *l. 190.*
 - (a) A personal debt is not an "obligation imposed by law" in terms of the exception set out in section 14(3)(h): *l. 350. Badcock v. Hunt (1888) 22 Q.B.D. 147 followed.*
 - (b) A commercial debt does not equate with "the personal interest" set out as an exception in section 3, to the fundamental rights and freedoms, including section 14, of Chapter II of the Constitution.
 - (c) To the extent that actions in contract are meant to be included in section 6 of the Debtors Act 1967, there is an inconsistency with the Constitution and section 6 of the Debtors Act is, to that extent only, void.
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Other cases referred to in judgment:

Attorney-General of Fiji v. Director of Public Prosecutions [1983] 2 A.C. 672; [1983] 2 W.L.R. 275

Barlow v. Teal (1885) 15 Q.B.D. 501

50 *Fiji Waterside Workers and Seamen's Union v. R* (unreported) Cr. App. 104/77
Kermode J.

Minister of Home Affairs v. Fisher [1980] A.C. 319; [1979] 2 W.L.R. 889; [1979] 3 All E.R. 21

Noble v. Laygate Investments Ltd. [1978] 1 W.L.R. 1457; [1978] 2 All E.R. 1067

Oliver v. Buttigieg [1967] 1 A.C. 115; [1966] 3 W.L.R. 310; [1966] 2 All E.R. 459

R. v. The Inhabitants of the County of Bedford (1855) 24 L.J.Q.B. 81; 6 Cox C.C. 505;
1 Jur. N.S. 208; 3 W.R. 205; 4 El. & Bl. 535; 119 E.R. 196

Société United Docks v. Government of Mauritius [1985] A.C. 585; [1985] 2 W.L.R. 114; [1985] 1 All E.R. 864

60 **Legislation referred to in judgment:**

Agricultural Holdings Act 1883 (U.K.)

Debtors Act 1967, section 6

Constitution of Fiji 1970, sections 35 and 14

Constitution of Malta 1964

Constitution of Mauritius 1968, section 3

70 **EDITOR'S OBSERVATION:** Section 14 of the Constitution of Fiji of 1970, as discussed in the instant case, is replicated as section 15 of the Constitution of Fiji as promulgated on 25 July 1990. Section 3 of the 1970 Constitution is replicated with minor textual differences, as section 4 of the 1990 Constitution. The 1970 text protected rights whatever the person's "race, place of origin, political opinions, colour, creed, or sex", whereas the 1990 text uses "religion" as well as creed and rearranges the order, as follows: "race, sex, place of origin, political opinions, colour, religion or creed".

J. Singh for the appellant

S. Sharma and *J. Apte* for the Attorney-General

No appearance by the respondent

O'REGAN J.A.80 **Judgment of the Court:**

On 25 July 1986 the appellant issued a writ against the respondent seeking judgment of \$3175 for goods sold and delivered. At the same time it applied ex parte for an order, pursuant to the authority of section 6 of the Debtors Act (Cap. 32) for a warrant to arrest the respondent on the ground that he was about to abscond from the jurisdiction without having paid the debt.

On the same day, counsel for the appellant appeared before Rooney J. who after drawing counsel's attention to sections 5 and 14 of the Constitution, adjourned the matter to 28 July for further consideration. He also ordered service of the application on the respondent.

90 The record shows that on 28 July 1986 counsel made a very brief submission after which the matter was adjourned to 31 July 1986. On that day counsel again

appeared. No further submissions were offered and the learned Judge announced that he would consider the nature of the application and give a ruling. No order was made for service on the Attorney-General to represent the public interest nor was an amicus curiae appointed to argue the matter.

On 12 August 1986 the learned Judge dismissed the application. In his written reasons for decision he held that section 6 of the Debtors Act Cap. 32 was to a limited extent inconsistent with the Constitution of Fiji and to that extent void.

100 Before proceeding to consider the appeal, we find it necessary to state that the proceedings in the court below had such unsatisfactory features as to render the case an inappropriate vehicle for the determination of such an important question.

No consideration was given to the facts of the case. In our view, if the facts had been given even cursory consideration, the learned Judge would have felt himself constrained to hold that the evidence failed to establish that the alleged debt was the debt of the respondent - and that, to the contrary, it was established that the debt was incurred by two companies named in the documents.

The order submitted to the appellants for the goods in question was in writing, under a printed letter head which reads:

110 TAVEUNI INTERNATIONAL HOLIDAY RESORT
P.O. Box 1, Waiyevo, Taveuni Island, Fiji, Telex FJ 8277 Lesuma A Division of
Coulters Taveuni (Fiji) Ltd. and Coulters Sports Tours (Fiji) Ltd.

The order was addressed to the appellants at their address in Suva and bears an illegible signature, which we assume to be that of the respondent, above the typed words:

GEOFF COULTER
MANAGING DIRECTOR

In the body of the document, immediately following the items of goods ordered, appear the following words:

120 **PLEASE NOTE**
ALL GARMENTS SUPPLIED WILL BE ACCEPTED TO
INSPECTION BY THE UNDERSIGNED IN TAVEUNI

On 7 April 1986 after the goods had been delivered "Mr Jeff Coulter" wrote to the appellants as follows:

7th April 1986
To the manager
Sundarjee Bros. Ltd
Suva.

130 Confirm our order for supply of T-shirts and beach tops as enumerated in your invoice numbers 10669 to 10673.

I certify that I am the authorized officer of Taveuni International Resort to order the above goods.

I further certify that the goods have been received in good order and condition.

Sgd
Mr Jeff Coulter

7/4/86
Date

In his affidavit in support of the application for the warrant of arrest Mr Pravin Sundarjee deposed, inter alia, as follows:

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- (4) The the said defendant, Geoffrey John Coulter a.k.a. Jeff Coulter is truly and justly indebted to the plaintiff in the sum of \$3175.00, interest and costs.
- (5) That the said defendant ordered the said goods from the plaintiff and photocopies of the written order and receipt of confirmation of the said goods dated 7th April 1986 and 9th May 1986 are attached marked "B" and "C".
- (6) That the said goods were ordered personally by the defendant in his personal capacity.
- (7) That the defendant erroneously referred to himself as Managing Director in the letter-head of Taveuni International Holiday Resort in Exhibit "C" where in fact Taveuni International Holiday Resort is neither a registered firm nor a registered company.

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In our view, the documents do not support the conclusion reached by Mr Sundarjee and advanced in his affidavit. In any event it was not within his province to decide whether or not Coulter had personally ordered the goods. It was for him to depose to the relevant facts and for the Court to make that decision.

It is clear from the heading of the order form that Taveuni International is not a company. To the contrary it is stated there in that it is "a division" of Coulters Taveuni (Fiji) Ltd. and Coulters Sports Tours (Fiji) Ltd. The signatory to the order identified himself as "Geoff Coulter" and gave his designation as "Managing Director". From a fair reading of the order it seems to us clear enough that the order was made on behalf of Coulters Taveuni (Fiji) Ltd. and Coulters Sports Tours (Fiji) Ltd. of both of which Coulter held himself out as managing director. They certainly do not establish that Coulter personally was in contract with the appellants and proof of that was a pre-requisite to an order that a warrant to arrest should issue.

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Had the learned Judge considered these matters he would surely have found himself obliged to dismiss the application and that would have been the end of the matter. On this ground alone we must hold that the application was properly dismissed and dismiss the appeal.

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Had the Judge dismissed the application on the basis we have just mentioned the legal issues which he proceeded to discuss would not have arisen for consideration in the case. And if, as appears to be the case, the respondent had already left the company when the application was heard, there was no lis.

We also think that once the question as to whether the Debtors Act infringed the provisions of the Constitution arose, the learned Judge should have ordered that the application be served upon the Attorney-General as the chief legal officer of the Crown so that the state, one of the provisions of whose Constitution was to be scrutinized, should have had the opportunity of being heard. We say at once that there is no statutory or other legal requirement in this country which required the learned Judge to take such a course but the inherent importance of the issue and the desirability of his having adversarial argument on the matter should, in our view, have dictated such a course.

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In the result the Judge was left to consider the matter without adversarial argument and had to reach his conclusions without the traditional and beneficent aid to judicial decision making. The result is that the decision is more in a nature of a

190 legal opinion than of a judgment of a court of law reached after consideration of contrary arguments. It also resulted in the learned Judge considering the matter without the assistance of the decisions to which reference will later be made in this judgment and which the researches of counsel could well have discovered and brought to his notice.

Notwithstanding the disposal of the appeal on the facts, we propose, out of deference to the arguments of counsel and the lively interest which we understand there to be in this case generally, to discuss the legal issues and express an opinion thereon. Our judgment of course, in the circumstances, will be of persuasive effect only but we venture to hope that it will assist the resolution of any future cases involving section 6 of the Debtors Act.

200 In the court below the learned Judge considered section 6 in the light of both sections 5 and 14 of the Constitution each of which has to do with personal liberty. However section 14 deals specifically with freedom to leave Fiji and we propose to confine our considerations to that section only.

Section 14, as far as it is relevant, provides:

- (1) No person shall be deprived of his freedom of movement and for the purposes of this section the said freedom means right . . . to leave Fiji.
- (2) . . .
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions:
 - 210 (a) . . .
 - (b) . . .
 - (h) for imposing restrictions on the right of any person to leave Fiji that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law, except so far as that provisions or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

220 We have not rehearsed the limitations contained in paragraphs (a) to (g) of subsection 3. The learned Judge considered that they bore no application to the case and we agree with him.

Section 6 of the Debtors Act provides:

230 If it is shown to the satisfaction of the court that the defendant in any action for the recovery of a sum exceeding ten dollars is about to abscond, the court may, in its discretion, issue a warrant to arrest the defendant and commit him to prison, there to be kept until he shall have given bail or security in such sum, to be expressed in the warrant, as the court thinks fit, not exceeding the probable amount of debt or damages and costs, for his appearance at any time when called upon while the action is pending and until execution or satisfaction of any judgment that may be made against him in the action; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against him in the action with costs:

Provided that the court may at any time, upon reasonable cause being shown, release the defendant from such arrest.

The learned Judge in considering the scope of the Act had this to say:

The Debtors Act refers to the defendant in any action for the recovery of a sum exceeding ten dollars. It is not confined in its scope to a simple debt created by way of loan or the supply of goods and services on credit. The defendant may be sued in tort.

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Having so said he went on to consider the section in the light of the constitutional provisions and on the basis that the former had to do only with claims in simple debt and tort.

And having so limited its ambit he went on to say:

I am prepared to concede that a debt is an obligation. It is less easy to accept that a claim in tort which is genuinely resisted also constitutes an obligation. But on either case I do not consider that such obligations are imposed by law.

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In our view the section clearly is wider in its scope than the learned Judge held it to be. In its terms it applies to all money claims exceeding ten dollars and, to give but a few examples, would encompass such money claims by central and local governments for taxes and rates and other dues; actions by beneficiaries against trustees and actions in tort for breaches of statutory duty.

The generality of the section is such that each individual case must be considered in the light of its own intrinsic nature and its own facts, and the inquiry in each instance is whether or not an order is "reasonably required in order to secure the fulfilment of any obligations imposed on the person [respondent] by law."

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The learned Judge did not embark upon any consideration of the meaning of the phrase "imposed by law" in section 14. The phrase has been the subject of judicial interpretation in several other contexts.

In *Badcock v. Hunt* (1888) 22 Q.B.D. 147 it fell to the Court of Appeal to consider the meaning of the word "imposed" as it appeared in a covenant by a lessee to pay "all rates, taxes and impositions whatsoever whether, parliamentary, parochial or imposed by the Corporation of the city of London . . ." and the question was whether a water rate could be said to be a rate or imposition "imposed" within the meaning of those words. In his judgment Lord Esher M.R. had this to say at p. 148:

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The question appears to me to be whether this water rate can be said to be a rate or imposition "imposed" within the meaning of those words. I do not think it can. I do not think that a charge to which a person can only be made liable with his own consent can be said to be imposed upon him within the meaning of this covenant. If a man buys things in a shop, the liability to pay the price may be said in one sense to be imposed on him by law but that is not, in my opinion the sense in which the terms "imposed" and "imposition" are used in the covenant.

And in the same case Fry L.J. said at p. 149:

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is this a rate which comes within the words "imposed otherwise howsoever." In my judgment it is not imposed at all within the meaning of the covenant; it becomes payable by the voluntary action of the person who chooses to take the water and thereby incurs the legal liability to pay for it; it is not, like the rates and charges previously mentioned in the covenant, an imposition by some superior authority by which a man becomes liable to pay whether he will or not.

In *Barlow v. Teal* (1885) 15 Q.B.D. 501 the phrase "by law necessary" fell for consideration. In that case, dealing with the question whether a particular notice required by the Agricultural Holdings Act was "by law necessary", Lord Brett M.R. at pp. 502-503 said:

290 I am of the opinion upon the true construction of the Act that the section applies where there is no express stipulation as to the termination of the tenancy, and that it does not apply where there is an express stipulation. Where there is no express stipulation, the mode of determining the contract of demise is governed by the law and not by the contract entered into between the parties. Whenever a tenancy from year to year is created by implication of law, there must be a full half-year's notice to quit; if no stipulation is contained in the demise for the determination of the tenancy, a stipulation would be introduced by law that it should be determined by a half-year's notice. But where the parties to a notice have agreed that a half-year's notice shall be given this is a stipulation created by the contract entered into between the parties, and it is not a stipulation created by the law.

300 In the same case, Baggalley L.J. is to like effect. He said, at p. 504:

[I]n the present case, the parties have by their contract stipulated for a six month's notice; and therefore the mode of determining the tenancy is not regulated by law.

There is little, if any, difference in meaning of the phrases "imposed by law" and "by law necessary". Certainly a requirement imposed by law is by law necessary.

310 Both these decisions were approved by Oliver J. in *Noble v. Laygate Investments Ltd.* [1978] 1 W.L.R. 1457; [1978] 2 All E.R. 1067 in which the words "any restriction imposed by law" appearing in a statute were considered and it was held that certain provisions in the defendant company's articles of association did not fall within the phrase because it was "a legal consequence of the arrangements voluntarily assumed by the company and not something which can be said to be imposed on the company by law".

320 Both Mr Sharma and Mr Singh submitted that the learned Judge in construing sections 5 and 14 of the Constitution had been unduly restrictive in his approach and failed to take into consideration the special rules set for the construction of a constitution. They referred to *Minister of Home Affairs v. Fisher* [1980] A.C. 319; [1979] 2 W.L.R. 889; [1979] 3 All E.R. 21 in which Lord Wilberforce said that the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but "as sui generis, calling for interpretation of its own suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation and private law" [at p. 329 (A.C.); p. 895 (W.L.R.); p. 26 (All E.R.)].

In *Attorney-General of Fiji v. Director of Public Prosecutions* [1983] 2 A.C. 672; [1983] 2 W.L.R. 275 Lord Fraser delivering the judgment of the Privy Council had this to say [at p. 682 (A.C.); p. 281 (W.L.R.)]:

330 Their Lordships fully accept that a constitution should be dealt with in that way and should receive a generous interpretation. But that does not require the courts when construing a constitution to reject the plain ordinary meaning of words.

Against that background, Mr Sharma went on to refer to a passage in the judgment of Lord Esher in *Badcock v. Hunt* (supra) in which he observed that "if a man buys a thing in a shop the liability to pay the price may be said in a sense imposed on him by law" and he submitted that a like construction should be applied here.

We do not accept this submission. First we note that Lord Esher did not apply the construction himself and that accordingly his remarks are obiter. That, however, does not necessarily preclude its use in the construction of section 14.

Lord Esher said that liability was "in a sense imposed . . . by law" but he did not go on to say in what sense. It seems to us that he merely intended to convey the notion that when parties entered into an agreement for valuable consideration (which the transaction of which he spoke, indeed was) the law, placed or set liabilities upon them. That sort of situation is greatly different from that where a tax, a rate or other impost is imposed by Parliament or some other superior authority. The word "impost" throws the distinction into bold relief. It could not be said that the liability created by a contract is an impost.

In this case we do not think there is scope for doing other than ascertaining the plain meaning of the words in the context of the subsection. In the context of section 14 we think the words "obligations imposed . . . by law" refer to obligations arising from "an imposition by some superior authority which a man becomes liable to pay whether he will or not" - words of Fry L.J. in *Badcock v. Hunt* (supra).

We accordingly are of the opinion that the transaction in this case was not one which created "any obligation imposed by law" and, assuming for the moment that it was in respect of a personal debt, the issuance of a warrant under section 6 would have been in breach of section 14 of the constitution.

Mr Singh also submitted that the learned Judge in coming to his decision failed to give consideration to the effect of section 3 of the Constitution. That section provides:

- (3) Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
- (a) life, liberty, security of the person and the protection of the law;
 - (b) freedom of conscience, of expression and of assembly and association; and
 - (c) protection for the privacy of his home and other property and from deprivation of property without compensation,
- the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

This section appears in Chapter II of the Constitution in which section 14 is also to be found. Accordingly the references in section 3 to "the provisions of this Chapter" includes the provisions of section 14 and it imports not only these provisions but also the "limitations . . . contained in those provisions" which of

course, includes paragraph (h) in subsection (1) of that section.

A section in the Maltese Constitution identical with section 3 was considered by the Privy Council in *Oliver v. Buttigeig* [1967] 1 A.C. 115; [1966] 3 W.L.R. 310; [1966] 2 All E.R. 459 in which Lord Morris who delivered the judgment of the Board, said at p. 128 (A.C.); p. 315 (W.L.R.); p. 461 (All E.R.):

390 Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement – coupled however with a declaration though "every person in Malta" is entitled to fundamental rights and freedoms of the individual as specified. Yet such entitlement is "subject to respect for rights and freedoms of others and for the public interest."

A similar provision in the Constitution of Mauritius (also section 3) was considered by the Privy Council in *Société United Docks v. Government of Mauritius* [1985] A.C. 585; [1985] 2 W.L.R. 114; [1985] 1 All E.R. 864. In that case Lord Templeman said [at p. 599 (A.C.); pp. 122-123 (W.L.R.); p. 870 (All E.R.)]:

400 Their Lordships have no doubt that all provisions of Chapter II, including section 8 must be construed in the light of the provisions of section 3.

... Section 3 recognizes that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation subject to respect for others and respect for the public interest. Section 8 sets forth circumstances on which the right to deprivation of property can be set aside but it is not to curtail the ambit of section 3.

410 It was Mr Singh's submission that the effect of these decisions is that in considering section 14 not only do the limitations and exceptions upon it stated in subsection 3 thereof have to be taken account of but also the limitations stated in section 3 and in this case, in particular, that in relation to the public interest.

We accept that submission. It is of interest to note that the same principle was stated by Kermode J. in the *Fiji Waterside Workers and Seamen's Union v. Reginam* (unreported) Cr. App. 104/77 in which he said:

420 Of more significance however is the wording of section 3 of the Constitution to which section the other sections of Chapter II are subordinate. I interpret subsection (2) of both sections 12 and 13 as specifying limitations in subsection (1) in both sections but necessarily all the limitations. There still has to be taken into account the overriding final words of section 3... There is no express reference to the public interest in subsection (2) of sections 12 and 13. While the limitations specified are in the public interest, I do not consider the omission of any specific reference to the "public interest" in the subsections to be exclusionary, as effect must be given to the operative provisions of section 3 where the words "the public interest" are used twice.

Mr Singh went on to submit that the restrictions of freedom of movement of persons who come within the ambit of section 6 of the Debtors Act is a matter of public interest. He contended that if they were free to abscond commercial activity

430 in the country would be thrown into a state of chaos.

The phrase "the public interest" in section 3 appears in the context of "limitations designed to ensure that the employment of the said rights and freedoms by any person does not prejudice . . . the public interest." The phrase embodies an elusive concept; it is to be found in a host of statutes and its meaning is chameleonic; always accommodating its shade to its environment. In our view the meaning most apposite to the present situation is:

That in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.

440 As per Lord Campbell C.J. in *R. v. The Inhabitants of the County of Bedford* (1855) 24 L.J.Q.B. 81, 84; 119 E.R. 196, 198

The commercial community of Fiji may well be sometimes adversely affected by a finding that simple contract debts are outside the ambit of section 6 of the Debtors Act but we do not think it as a body meets the prescription of "the public interest" which we have set out above. There is also a competing constitutional interest to be considered namely that of those persons minded to leave Fiji who may be impeded by a mere money claim for ten dollars or so which may be frivolously or fraudulently made and which may or may not be sustainable in a Court of Law.

450 We do not think a case has been made out for imposing a limitation pursuant to section 3 under the head of public interest and we accordingly reject the second limit of Mr Singh's submission.

The conclusion reached by the learned Judge was that section 6 of the Debtors Act is inconsistent with the constitution of Fiji and is to that extent void. The words he used came directly from section 2 of the Constitution which reads:

The Constitution of Fiji is the supreme law of Fiji and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency be void.

460 The inconsistency thrown up by this case falls within a narrow ambit. It excludes actions in contract from the ambit of section 6 of the Debtors Act and it is to that extent only that the section is void.

The appeal is dismissed.

Reported by: P.T.R.