

Bank of Tonga v Kolo

Supreme Court, Nuku'alofa

Lewis J

10 C.1256/96

23 & 29 May, 1997

Execution of judgment - delivery of goods

Practice and procedure - judgment - delivery of goods - res judicata

20 This matter was reported, at an earlier stage, in 1995 Tonga LR when it was held a writ of possession of chattels was not available, the judgment obtained only being for a sum of money and not for delivery of goods. A second writ, seeking a judgment for delivery of chattels was taken.

Held:

1. The defendant raised a plea of estoppel by res judicata.
2. It is not enough that the matter alleged to have been estopped might have been put in issue or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue and claimed.
- 30 3. What had not been claimed here, previously, was the proper method of recovery. So the defence of res judicata was not available.

(This matter was affirmed on Appeal - judgment immediately follows)

Cases considered: re a Debtor [1958] 1 All ER 581

Counsel for plaintiff : Mr Appleby

Counsel for defendant : Mr Talanoa

Judgment

This action was commenced by Writ on 21 November 1996. Judgment on the same issues, (breach by the Defendant of the terms of a loan agreement made with the Plaintiff), and between the same parties was delivered by Ward CJ on 21 April 1995 and later on matters of enforcement by Hampton CJ on 17 November 1995 in Action No. 1019/92.

The prayer for relief in the matter before Ward CJ did not include a claim for the delivery up of Chattels, rem in personam - the delivery of goods. Hampton CJ held that:-
"A judgment for the delivery of goods can only be obtained in this (Civil) Court, and may be enforced by either or both (under O.26 r.2):-

(a) a Writ of delivery (O.26 r.8)

(b) if O.16 r.3 applies, an order of committal (O.26 r.12)

Again those means of enforcement correspond to, and reflect, the enforcement provisions available in England, this time under O.45 r.4. That rule provides that a judgment for the delivery of goods may be enforced by either or both a Writ of delivery (or sometimes a writ of specific delivery) and an order of committal or sequestration.

As with a writ of possession in England, so with a writ of delivery - such a Writ of delivery may include provision within it for enforcing payment of money adjudged or ordered to be paid in the Judgment for the delivery of goods. It is a necessary incidental enforcement procedure; and that is available in Tonga and is set out in O.26 r.8(2) and in the Writ of delivery itself (Form 7).

That provision does not allow a judgment for the payment of money only to be enforcement by the issue of the Writ of delivery. Such a Writ of delivery can be issued only to enforce a judgment for the delivery of goods."

The Chief Justice made it clear in that judgment that he would not be prepared to make the declaration sought by the plaintiff of a right to possession of the houses nor the sale of the houses in question. He added "In my view proper proceedings seeking judgments in those terms would need to be taken." The plaintiff here, (the Judgment Creditor there), says we have taken proper proceedings in the appropriate (Civil Court) - give me the enforcement we seek!

The Judgment Debtor (defendant) here says in the most minimalist submission that this matter has already been decided. The judgment debtor pleaded 'The Plaintiff cannot make a claim on issues already adjudged and appeal refused on no grounds (sic).'

The Judgment Creditor pleads in the statement of claim here that on 26 August 1993 the Judgment Debtor was found to be indebted to the Judgment Creditor in the amount of \$18,812.41 including costs in the amount of \$500.00 plus interest at 10% per annum until paid and seeks judgment for the delivery of the dwelling house at Hala'ovave, Kolomotu'a.

Presumably the pleadings and submission of the Judgment Debtor enter a plea of estoppel by res judicata. No expanded submission was made by counsel for the judgment debtor. He cited no authorities.

In order that a defence of res judicata succeed, it is necessary for a defendant to show that not only is the cause of action the same but also that the plaintiff has had an opportunity of recovering and might have recovered in the first action what he seeks to recover in the second action.

It is not enough that the matter alleged to be estopped might have been put in issue

or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue and claimed. *Re a Debtor* [1958] 1 All ER 581. There is no doubt that the entire indebtedness was tried before Ward CJ and latterly Hampton CJ. A judgment was entered against the judgment debtor. The Plaintiff pleads the judgment and all it is comprised of. What was not claimed was the 'proper method' of recovery. These present proceedings concern a proof by the plaintiff of the existence of a judgment and enforcement.

Broadly speaking, *res judicata* is to do with avoiding the courts being troubled by re-litigation of identical matters when judgment has been entered in an earlier action. As between this action and 1019/92 this one requires proof of the Judgment in 1019/92 and little more. (That is admitted and is proved. It is not that this action is identical with No.1019/92. It is to do with what is prayed for in this action.)

In my opinion, the defence of *res judicata* is not available here. The causes of action are different. For reasons I have given there will be judgment for the Plaintiff in the terms claimed.

IT IS ORDERED THAT,

1. Judgment be entered for the Plaintiff.
2. The defendant deliver up the dwelling house at Hala'ovave, Kolomotu's to the Plaintiff within 14 days of the date of this judgment.
3. The Plaintiff have the costs of these proceedings to be taxed.
4. This Order be served on the Defendant within a period of seven days of the date of this Order.

The Chief Justice made it clear in that judgment that he would not be prepared to make the declaration sought by the plaintiff of a right to possession of the houses nor the sale of the houses in question. He added "in my view proper proceedings seeking judgments in those terms would need to be taken". The plaintiff here, the judgment creditor here, says we have taken proper proceedings in the appropriate (Civil Court) - give me the enforcement we seek!

The judgment debtor (defendant) here says in the most minimalist submission that this matter has already been decided. The judgment debtor pleaded "The Plaintiff cannot make a claim on issues already adjudged and appeal refused on no grounds (sic)". The judgment creditor pleads in the statement of claim here that on 26 August 1993 the judgment debtor was found to be indebted to the judgment creditor in the amount of \$18,812.41 including costs in the amount of \$200.00 plus interest at 10% per annum until paid and seeks judgment for the delivery of the dwelling house at Hala'ovave, Kolomotu's.

Presumably the pleadings and submission of the judgment debtor enter a plea of estoppel by *res judicata*. No expanded submission was made by counsel for the judgment debtor. He cited no authorities.

In order that a defence of *res judicata* succeed, it is necessary for a defendant to show that not only is the cause of action the same but also that the plaintiff has had an opportunity of recovery and might have recovered in the first action what he seeks to recover in the second action.

It is not enough that the matter alleged to be estopped might have been put in issue