

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No.: 133 of 2011

BETWEEN : ROSY REDDY PLAINTIFF

AND : YANGTESH PERMAL REDDY, KALPNA REDDY and
GIYANANAND NAIDU SECOND DEFENDANTS

AND : REDDY CONTRUCTION COMPANY LIMITED THIRD DEFENDANT

AND : REDDY ENTERPRISES LIMITED FOURTH DEFENDANT

AND : CLYDE EQUIPMENT (PACIFIC) LIMITED FIFTH DEFENDANT

AND : REDDY HOLDINGS LIMITED SIXTH DEFENDANT

AND : FINEGRAND LIMITED SEVENTH DEFENDANT

Counsel : Mr. Simpson with Mr. I. Fa for the Plaintiffs
Mr. Newton with Mr. S. Singh for the Defendant

Date of Hearing : 24th January, 2014

Date of Judgment : 30th April, 2015

JUDGMENT

INTRODUCTION

1. There are two summonses filed for security for cost and summary judgment. The Plaintiff sought summary judgment for a part of a claim, namely for a sum of

\$1,965,093 being the dividend reached by the 4th Defendant for the period 2001-2008 but not paid to the estate of Narayan Reddy. The said summary judgment is solely depended on Director's report of the Reddy Construction Company Ltd (RCCL) for the year ended 31st December, and the notes to Financial Statement in the said report. The Defendants are disputing the said note contained in the annual report, and state that it was an error and due to a misunderstanding between the external auditors and the management of the company. They are also disputing the Director's report.

FACTS AND ANALYSIS

Summary Judgment

2. The law relating to summary judgment is contained in Order 14 of the High Court Rules of 1988 and it states as follows

'1(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2).....

(3).....

2(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim or the part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be or no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day.

3(1) Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court

may give such judgment for the plaintiff against that defendant on that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. (emphasis added)

3. In the affidavit in support there is no averment that there is no averment that there is no defence to the alleged fact on which the summary judgment was sought as required in Order 14 rule 2(1) above.
4. The Plaintiff is the administrator of the estate of her late husband Narayan Reddy. There is no dispute as to the entitlement of the estate of Narayan Reddy in RCCL (3rd Defendant). It is 120,064 shares or 21.2% of the shareholding. But the summary judgment is sought on the alleged shareholding of 10.8% in the 4th Defendant (Reddys' Enterprise). This fact is a disputed fact and needs to be established in trial.
5. RCCL held 208,000 shares in Reddys' Enterprise Limited (REL) and in 2001 RCCL had transferred its shares in REL to YPR Group. It was only 163,904 shares of REL that were transferred in 2001 and the remaining 44,096 shares were transferred in 2008 to Finegrand Limited (7th Defendant). The Plaintiff's position is that remaining 44,096 shares that were not transferred in 2001 belonged to the estate of late Narayan Reddy. This may seemed a plausible contention, but the evidence establishing this fact, is disputed.
6. The Director's report of RCCL's annual report stated as follows

'Share Transfer

As a result of change in trustee for YP Reddy Family Trust and re-organization of the Trust's operation, on 22 October ,2001 163, 904 shares in Reddys' Enterprises Limited and 106,379 shares in Clyde Equipment (Pacific) Limited were transferred to Y.P.R. Group Limited of Hong Kong, the new trustee for the trust. The balance of the shares in these companies held by the Company is held (Sic) in trust for minority shareholders. As a result of this process, there is no change in beneficial interest of any shareholders'.

Further at page 10 of the said RCCL's notes to Financial Statements for the Year Ended 31stDecember, 2001 states as follows

'Shares held in Reddys' Enterprises Limited and Clyde Equipment (Pacific) Limited are to be held in trust for minority shareholders in the company. Any dividend received by the companies for such investments will accrue entirely to minority shareholders.'

7. The Plaintiff claims dividend on the basis that late Narayan Reddy was the only minority shareholder hence the Summary Judgment is sought. The Annual Report of RCCL and the Director's report contained therein and the notes to the Financial Statements for year ended 31st December, 2001 is documentary evidence and it is a prima facie evidence in support of the Plaintiff's claim but this cannot be considered as established fact.
8. The Defendants had filed affidavit evidence to support the said statement in the annual report was an error and misunderstanding between the external auditors and the management of RCCL. If so this can only be elicited in the trial and cannot be dealt in a Summary Judgment. The Defendant had filed affidavit evidence in opposition.
9. A complete defence does not have to be shown by the defendant at the stage when summary judgment is sought: The *Cloverdell Lumber Co Pty Ltd – v – Abbott* [1924] 34 CLR 122 at 133 but if the defence is doomed to fail it should not be an obstacle to grant summary judgment for all or some of the claims of the Plaintiff as stated in Order 14 rule 1(1) of the High Court Rules.
10. In *Fancourt – v – Merchantile Credits Ltd* [1983] 154 CLR 87 the plaintiff had applied for summary judgment pursuant to order 18 of the rules of the Supreme Court of Queensland. The court said (at 99):

"The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."
11. The following passage from the New Zealand Court of Appeal judgment in *Doyles Trading Company Limited – v – Westend Services Ltd* [1989] 1 NZLR 38 at 413 stated

"While the desirability of eliminating the frustration and delays which can be caused by unmeritorious or tendentious defence needs no emphasis, it is important to pay proper regard to the defendant's interest and to be wary of allowing the rule to become an instrument of oppression or

injustice in the laudable interest of expediting litigation. It is true that "justice delayed is justice denied", but not at the expense of a fair hearing for both parties, unless the court is sure there is no real defence. It is unlikely to reach this conclusion if the affidavits disclose disputed questions of fact, the resolution of which depends on an assessment of credibility or reliability of witnesses."

12. Upon the evidence submitted the issues are not simple and complex even the shareholding of 10.8% on which the Summary Judgment was based on assumptions, and the entire Summary Judgment was based on RCCL's Director's Report and Notes to the Financial Statement which is only a piece of evidence that is not conclusive. These are no doubt evidence, but not conclusive considering the complexity of the issues before the court based on the Amended Statement of Claim comprising 17 pages where there are distinct claims from (a)-(t) which also contained sum sub claims. In the circumstances the position of the Defendants cannot be ruled out at this juncture.
13. I am not inclined to grant Summary Judgment considering the complexity of the statement of claim and the defence and more specifically solely rely on one piece of evidence when the Defendants are claiming that it was an error and misunderstanding in reporting by the external auditors.

Security for Costs

14. **Order 23 rule 1 (1) (a)**

Order 23 Rule 1 of the High Court Rules provides as follows:

ORDER 23

SECURITY FOR COSTS

Security for costs of action

Order 23 Rule 1 of the High Courts 1988 provides:

"1(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court –

- a) That the plaintiff is ordinarily resident out of the jurisdiction; or*
- b) That the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or*
- c) Subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*

- d) *That the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation;*

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just."
(emphasis is added)

15. The 1st and 2nd Defendant's applications for Security for Costs were made pursuant to Order 23 Rule 1 (1) (a) "*that the plaintiff is ordinarily resident out of the jurisdiction*" and also state that the claim of the plaintiff is without merit.

16. In the High Court of Fiji in *Furuuchi Suisan Company Limited v Hiroshi Tokuhisa and Others* Civil Action No. 95 of 2009, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C said in *Porzelack KG v Porzelack (UK) Limited* 1987 1 ALL ER 1074 at p. 1076:

"That the purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce a judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction".

His Lordship further stated

Under Order 23, r1(1) (a) it seems to me that I have an entirely general discretion either to award or refuse security having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer".
(emphases are added)

17. The exercise of court's discretion is vital component in an application for security for cost. The question cannot be answered simply in the favour of the Defendant only looking at the residence of the Plaintiff. If that was expected there was no need to grant

any discretion to court. The court should examine the circumstances of the case and see whether security for cost can be justified.

18. In this case the Plaintiff is the widow of late Narayan Reddy and she is claiming substantial interest from the estate of her late husband. Undoubtedly, the estate of late Narayan Reddy is worth considerable amount and at the moment such estate interests are with the Defendants. So there is no need for security for costs. If the Plaintiff is not having any property in Fiji there can be a need for the Defendant to seek security for costs. If costs are awarded at the end of the action in this action there is no risk of that being not recovered as the Plaintiff is suing on behalf of the estate. The summons for security for cost is struck off.

CONCLUSION

19. The Plaintiff's application for Summary Judgment is struck off for the reasons given earlier in this decision. The Defendants' application for security for costs is also struck off. The cost of these applications are cost in the cause. The delay in this decision is regretted.

FINAL ORDERS

- a. The summons for Summary Judgment is struck off.
- b. The summons for Security for Costs is struck off.
- c. Cost of these applications will be cost in the cause.
- d. The matter is to be mentioned before the Master for directions.

Dated at Suva this 30th day of April, 2015.




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Justice Deepthi Amaratunga
High Court, Suva