

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 339 of 2014

BETWEEN : GANGULAMMA aka GANGALLAMMA aka GONGLAMMA aka GANGALAMMA REDDY aka GANGULLAMMA aka GANGULAMMAL REDDY aka BELLA REDDY aka GANGLAMMA REDDY of 301 Heatherway, South San Francisco, California 94080, United States of America, Widow, as Administratrix of the Estate of RAJANA REDDY aka RAJANA aka SHIU NARAYAN aka SHIU NARAYAN REDDY aka S. N. REDDY

PLAINTIFF

AND : YANKTESH PERMAL REDDY of Waterfront Hotel, Marine Drive, Lautoka, Company Director.

FIRST DEFENDANT

AND : REDDY CONSTRUCTION COMPANY LIMITED a company duly incorporated in Fiji and having its registered office at 35 Ravouvou Street, Lautoka.

SECOND DEFENDANT

BEFORE : Acting Master Vishwa Datt Sharma

COUNSEL : Mr. Afzal Khan for the Plaintiff  
Mr. Subhash Parshotam for the Defendant

Date of Hearing : 24<sup>th</sup> June, 2015

Date of Ruling : 27<sup>th</sup> October, 2015

**RULING**

**A. INTRODUCTION**

1. The Defendants filed a **Summons** together with an **Affidavit In Support** on 11<sup>th</sup> March, 2015 and sought for the following orders-

- (i) That the Plaintiff does within fourteen (14) days give security for the Defendants' costs to the satisfaction of the court;
  - (ii) That in default of such security the action herein be struck out;
  - (iii) That in the meantime all proceedings herein other than the proceedings relating to the giving of such security be stayed; and
  - (iv) That the costs of this application be awarded in favour of the Defendants in any event.
2. The application was made pursuant to *Order 23 and Order 4 of the High Court Rules, 1988*.
  3. The Plaintiff filed an Affidavit in Opposition to the Defendants' application.

#### B. BACKGROUND TO THIS CASE

4. The proceedings concerned essentially a dispute between family members.

The Plaintiff claims as it can be ascertained from her Statement of Claim, is a claim for damages arising out of an alleged breach of fiduciary duty on a joint venture business that was commenced in 1947 under the name 'Reddy Construction Company' and where the partners then purported to incorporate the partnership in or around 1962. The Plaintiff claims that her late husband, Shiu Narayan Reddy, was a partner of 'Reddy Construction Company' but that when the Company was incorporated, he was not part of it. The incorporated Company is the Second Defendant. The Plaintiff also makes a further claim for an advance of Pounds 1,796/12/9 which she says her late husband had made to the Second Defendant and which has remained unpaid.

The Defendants, in their **Statement of Defence**, deny that the Plaintiff's late husband had any shareholding or beneficial interest in the Second Defendant or that the Defendants had any fiduciary duty to the Plaintiff's late husband. The Defendants further say; that the Plaintiff's claim is prolix in that it is too lengthy and includes facts which clearly cannot be made out or are irrelevant, confusing and difficult to determine as to what cause of action the Plaintiff has against the Defendants, that the Plaintiff is barred by laches ( as set out at paragraph 21 of

the Statement of Claim) from maintaining any claim against the Defendants on the facts alleged in the Statement of Claim, and that the Plaintiff is barred by the provisions of the Limitation Act in respect of the several claims made by the Plaintiff.

## C. THE LAW

### 5. Security for costs of action, etc. (O.23, r.1)

*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.*

- (2) The court shall not require a plaintiff to give security by reason only of paragraph (1)*
- (c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.*
- (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.*

### 6. Order 4 of the High Court Rules, 1988 deals with consolidation of proceedings and states as follows-

1. *Where two or more causes or matters are pending, then, if it appears to the Court-*

*(a) that some common question of law or fact arises in both or all of them, or  
(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or  
c) that for some other reason it is desirable to make an order under this rule,*

*the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.*

(Counsel representing the Plaintiff and the Defendant drew courts attention to a related pending matter HBC 133/2011).

#### D. ANALYSIS and DETERMINATION

7. This is an application by the Defendant seeking an order for security for costs to be made against the Plaintiff on the ground that the Plaintiff is ordinarily resident out of the jurisdiction.
8. It is appropriate that the parties to this proceeding must understand what is meant by security for costs.
9. Security for costs is a common law legal concept of application only in costs jurisdictions, and is an order sought from a court in litigation. The general rule in costs jurisdiction is that "costs follow the event". In other words, the loser in legal proceedings must pay the legal costs of the successful party. Where a defendant has a reasonable apprehension that its legal costs will not be paid for by the Plaintiff if the defendant is successful, the defendant can apply to the court for an order that the plaintiff provide security for costs.
10. In the present case, the Plaintiff has admitted and confirmed in her Affidavit in Opposition that she is a Resident of United States of America. She has said nothing about owning any assets in Fiji Jurisdiction.
11. She opposes the application for security for costs but states if the court so orders, then she believes may not be able to find any more than \$15,000.

12. The fundamental principle is the right of a litigant to pursue and enforce rights in the courts. The court must have a concern to achieve a balance between ensuring that adequate and fair protection is provided to the Defendant, and avoiding injustice to an impecunious Plaintiff by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings. (*Case of Idoport Pty Ltd v National Australia Bank Ltd [2000] NSWLR 598* refers).
13. Therefore, it follows that the discretion lies with the Court to order the Plaintiff to give security for the Defendants' costs of this action only after the Court has given due regards to all the circumstances of the case.
14. There is no hard and fast rule that security for cost should be ordered when the Plaintiff is ordinarily resident outside the jurisdiction. Hence it is not desirable to award security for cost solely on the ground of plaintiff being a resident in another jurisdiction. Court must consider other facts incidental to the proceedings
15. Reference is made to the White Book (1999) at page 429 - 430 (23/3/3) which states as follows;

*"Discretionarily power to order security for costs (rr1- 3) The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs to be given. Rule 1(1) provides that the Court may order security for costs 'if, having regard to all the circumstances of the case, the Court thinks it just to do so'. These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a Plaintiff (or the Defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former order 65 r 68 which had provided that the power to require a Plaintiff resident abroad, suing on a judgment or order or on a bill of exchange or other negotiable instrument, to give security for cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).*

16. Further, a passage from Sir Nicolas Brown Wilkinson VC as reported in the case of Porzelack K.G v. Porzeluck (UK) Ltd [1987] 1 W.L.R 420 at 422, 423 is of much importance to the present case. Therein it was stated as follows-

*'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 this court against which it can enforce the 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 is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiff's resident within the jurisdiction. There is only one exception to that, so far as I know, namely, in the case of limited companies, where there are provisions under the Companies Act for security for costs.'*

*Further, where the plaintiff resident outside the jurisdiction is a foreign limited company, different factors may apply: see DSQ Property Co. Ltd. v. Lotus Cars Ltd. [1987] 1W.L.R. 127. Under the R.S.C., Order 23, rule 1 (1) (a), it seems to me that I have entirely general discretion either to award or refuse security, having regard to all the circumstance 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 circumstance of the case, is the just answer.'*

17. The court also needs to take into consideration the following **general principles and guidelines** relevant to the exercise of the court's discretion as reported by Lord Denning in *Sir Lidsy Parkinson & Co Ltd. v. Farripian Ltd [1973] 2 A.E.R. 273 at 285-286* which is of great assistance in the present case before me.

*'If there is a reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively-so as to try and stifle a genuine claim. It would also consider whether the company' want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.*

18. The relevant factors reflected in the abovementioned case that needs to be taken into account in exercising the discretion cannot be stated exhaustively and will vary from case to case. Therefore, it will be grouped under the following headings-

(i) *The impecuniosity of the Plaintiff*

The court must first consider the threshold question of whether there is credible testimony to establish that the Plaintiff will be unable to pay the Defendant's costs if the Defendant is ultimately successful.

However, once the Defendant has led credible evidence of impecuniosity, an evidentiary onus falls on the Plaintiff to satisfy the court that, taking into account all relevant factors, the court's discretion should be exercised by either refusing to order security or by ordering security in a lesser amount than that sought by the Defendant. In other words, proof of the unsatisfactory financial position of the Plaintiff 'triggers' the court's discretion. (*Case of fiduciary Ltd v Morningstar Research Pty Ltd (2004) 208 ALR 564* refers).

On the outset, the Defendant has furnished court with itemized bill of cost \$174,150-00 as to the probable costs they will incur or grant 2/3rds of the proforma costs at \$115,000-00.

Firstly, the Plaintiff has admitted and the Defendant has established that the Plaintiff is a Resident in the United States of America.

Secondly, there is no evidence from either party whether the Plaintiff has assets within Fiji Jurisdiction that may be utilized to recover costs if the Plaintiff loses the case.

Thirdly, the Plaintiff has made it clear in paragraph 6 of her affidavit in opposition that if the court orders security for costs, she does not believe that she will be able to find any more than \$15,000. In any event, the **fundamental principle** is the **right of a litigant to pursue and enforce rights** in the courts. She should not be shut out from prosecuting her case.

(ii) *The bona fides of the claim*

Whether the claim is bona fide or a sham is a relevant consideration, and the court will take into account the motivation of a Plaintiff in bringing the proceedings. For example, unsatisfactory pleading, or a vexatious claim, particularly where the Plaintiff is self-represented with 'abundant time' to pursue incessant and numerous applications. (*Case of Lall v 53-55 Hall Street Pty Ltd [1978] 1 NSWLR 310 refers*).

Upon the perusal of the Plaintiff's affidavit filed in court, at paragraph 4 she deposes that "*Because of the breach of the fiduciary duty, as set out in the statement of claim, the contents of which I confirm are true, the estate and myself have been left in poor financial circumstances.*"

The Defendant submitted that the Plaintiff is barred by laches from maintaining any claim against the Defendants on the facts alleged in the Statement of Claim. Particulars of laches are set out at paragraph 21 of the Statement of Claim. Further, the Plaintiff is barred by the provisions of the Limitation Act in respect of several claims made by the Plaintiff.

To this, the court is of the view that it should not delve itself prematurely into the merits of the case at this stage of the case, rather deal with the pending issue of the security for costs. The Plaintiff's cause of action as it can be ascertained from the Statement of Claim is that of Breach of Fiduciary Duty on the part of the Defendants, hence a claim for losses and damages accordingly.

(iii) *The stultification factor*

Where the effect of an order for security would be to stifle or end the Plaintiff's claim, this is an important consideration to be weighed, particularly in light of the poverty rule. (*Case of fiduciary Ltd v Morningstar Research Pty Ltd (2004) 208 ALR 564 refers*).

It is appropriate to examine whether the impecunious Plaintiff is, in reality, the Defender in the proceedings, and not the attacker. It is also appropriate to look behind the actual litigant to examine the means of others who stand to benefit from the litigation.

The Plaintiff admitted at paragraph 4 of her affidavit "that the estate and myself have been left in poor financial circumstances." **The general rule is that poverty is no bar to a litigant. The exercise of the power to order security for costs is a balancing process, requiring the doing of justice between the parties to the proceedings.**

(iv) *The prospects of success of the claim*

A consideration of the Plaintiff's prospects of success is an important element of balancing justice between the parties. However, care needs to be exercised when assessing the proportionate strength of the cases of the parties at the early stages of proceedings. (*Case of fiduciary Ltd v Morningstar Research Pty Ltd (2004) 208 ALR 564 refers*).

**As a general rule**, where a claim is prima facie regular on its face and discloses a cause of action, then in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success. (*Case of KP Cable Investments Pty Ltd v Meltglow Pty Ltd (1995) 56 FCR 189 refers*).

As I have earlier on stated herein above that the Plaintiff's cause of action as it can be ascertained from the Statement of Claim is that of Breach of Fiduciary Duty on the part of the Defendants, hence a claim for losses and damages accordingly. At this stage of the proceedings the court should proceed on the basis that the claim is bona fide and has reasonable prospects of success.

(v) *The causation factor*

Where the Plaintiff's lack of funds has been caused or contributed to by the Defendant, the court will take this consideration into account. This has been the "causation" factor: (*Case of fiduciary Ltd v Morningstar Research Pty Ltd (2004) 208 ALR 564 refers*). It is a relevant consideration that an order would effectively shut a party out of relief in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure.

However, a Plaintiff cannot rely on the poverty rule where he or she so organized their affairs so as to shelter assets. It was said that in determining the causation factor it is not appropriate to have some regard to the apparent strength of the case.

(vi) *Foreign Plaintiffs*

Where a Plaintiff is ordinarily resident overseas and has no assets in the jurisdiction, there must be weighty reasons why an order for security for costs should not be made. A Defendant is not expected to bear the uncertainty of enforcement in a foreign country. The difficulty in enforcing an order for costs



overseas against a non-resident Plaintiff will usually be sufficient to ground an order, especially where there is no reciprocal right of enforcement in the relevant foreign jurisdiction.

(vii) Delay

Application for security should be brought promptly and delay by a Defendant is a relevant factor in the exercise of the discretion. However, the passage of time is but a factor to be taken into account in the balancing exercise. The delay must be weighed in terms of prejudice and factors that have led to the delay.

In this case the Plaintiff commenced proceedings on 28<sup>th</sup> November, 2014, and the Defendant filed an application seeking security for costs on 11<sup>th</sup> March, 2015, some six (6) months after.

19. The purpose of the rule and the prima facie presumption in favour of ordering security for costs has been recognized and applied in Fiji. In this Court in Furuuchi Suisan Company Ltd v Tokuhisa [2009] FJHC 194; Civil Action 95. 2009 (9 September 2009), Byrne J said -

"31.0. The first case I mention is *Porzelack (UK) Ltd, (1987), 1 All ER 1074* where Sir Nicolas Browne Wilkinson V.C. said at p. 1076: 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 this court against which it can endorse the 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 plaintiff's residents within the jurisdiction.

"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."

20. The rationale was also described in Sharma v Registrar of Titles [2007] FJHC 118, HBC 351. 2001 (13 July 2007), where Master Udit elaborated further -

"[3] The aforementioned rule, vests the court with an unfettered discretion to order security for costs. All this rule entails to protect is the risks to which an applicant may be exposed to for recovering of costs in a foreign jurisdiction. The quantum of costs comparatively in Fiji is not relatively high although fairly substantive within the jurisdiction which is worth recovering. Execution of costs abroad where the litigation costs are much higher will render the exercise as wholly uneconomical. Be that as it may, ultimately the issue is not that the respondent will not have the assets or money to pay the costs or that the law of the foreign party's country not recognizing an order of our court, and/or enforcement of costs order even be it under any legislation similar to our Reciprocal Enforcement of Judgments Act, (Cap 39), but it is also the extra steps which will be needed to enforce any such judgment outside the jurisdiction. Indeed, it will not be an irrefutable presumption to infer that an

*extra burden in terms of costs and delay, compared with the equivalent steps that could be taken in Fiji, will be an inevitable corollary. The obvious expenditure which comes to my mind is the engagement of an attorney and the conundrum of registering an order in the foreign jurisdiction before it can be enforced."*

21. The Plaintiff in this case commenced proceedings against the Defendants by way of a Writ of Summons on 08<sup>th</sup> December, 2014, wherein she claims breach of fiduciary duty, as set out in the statement of claim, the contents of which the Plaintiff confirms are true. The estate and the Plaintiff have been left in poor financial circumstances, hence claiming losses and damages accordingly.
22. So far, the pleadings have reached the stage where the Plaintiff has filed a Reply to the Defendant's Defence. The substantive matter came at a standstill and consequently, some six (6) months later, the Defendants thought fit to file an application for security for costs.
23. The Plaintiff has not attended to the next cause of action and or filed summons for directions in order to pursue the case further. The Plaintiff cannot just delay the prosecution of her case because of the pending application for security for cost. If the Plaintiff is at all serious about her claim, then she should have taken due diligence with the prosecution of the same rather than await the outcome of this case. Further, there is no evidence before me that the delay in this pending application for security for cost has caused hardship for the future conduct of this action by the Plaintiff.
24. The Defendant has submitted a pro-forma Bill of Costs at \$174,150-00 and this has been vigorously refuted by the Plaintiff. The Plaintiff did state that she believes may not be able to find any more than \$15,000 to pay as security for costs.
25. The security for cost is rather ordered to secure the Defendant in an event of Plaintiff's claim being not successful at the conclusion. The security for cost sought by the Defendant in anticipation up to the conclusion of the case to meet the cost, if the Plaintiff's claim is dismissed, is exorbitant in nature.
26. The court can order security for cost up to a particular stage of the proceedings. A further application will be required after passing that stage of the trial. The Defendant will be at liberty to make a decision whether a further application for security of costs will be necessitated having regards to all the circumstances of this case. Bearing in mind the present status quo of this case, it cannot be said how the case will be handled by the parties hereafter.
27. Considering the circumstance of the case, I will order a cost of \$12,000. This amount to be deposited into the Chief Registrar's interest bearing account in the High Court. Further, the Plaintiff is directed to remit the said sum within 28

days from today. If the money is not deposited within 28 days as directed herein, the Plaintiff's case will be struck out accordingly.

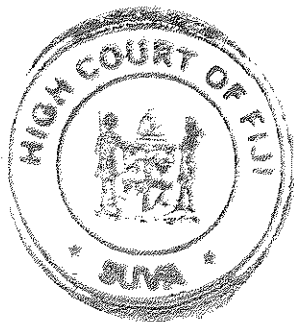
#### E. CONCLUSION

28. Taking into consideration the above rational, I will accede to the Defendant's application to order security for costs at \$12,000.
29. The Plaintiff is directed to remit the abovementioned sum within 28 days from today. If the money is not deposited within 28 days into the Chief Registrar's interest bearing account, the action will be struck out accordingly.
30. The Plaintiff is also directed to file summons for directions within 21 days from today.

#### F. FINAL ORDERS

31. The Plaintiff is directed to deposit a sum of \$12,000 into the Chief Registrar's interest bearing account at the High Court in Suva, as security for cost within 28 days.
32. The action will be struck out if the abovementioned direction is not complied within the stipulated time frame of 28 days.
33. The Plaintiff is further directed to file and serve summons for directions within 21 days from today.
34. The cost of this application is assessed summarily at \$500 and the cost should be paid to the Defendant within 21 days.
35. The case will now be scheduled for further directions on 02<sup>nd</sup> December, 2015 at 9 am.

Dated at Suva this 29<sup>th</sup> day of October, 2015.



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**VISHWA DATT SHARMA**  
Acting Master of the High Court  
SUVA.