

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

Civil Action No. HBC No 210 of 1989

BETWEEN : **KRISHNA SAMI** s/o Mardaiya of Nalovo, Nadi, Salesman
PLAINTIFF

AND : **SANT RAJ** s/o Ram Karan of Nalovo, Nadi, Retired
DEFENDANT

INTRODUCTION

1. The background to this case is set out in my ruling dated 30 May 2014 which is reported in paclii (**Sami v Raj** - Ruling [2014] FJHC 389; HBC210.1989L
2. commenced, counsel for the plaintiff ("**Sami**") and the defendant ("**Sant Raj**") advised Mr. Justice Finnigan in chambers that they had settled the matter.
3. The following day, on 09 March 2005, the Order was perfected. The said Order is reproduced in full below:

JUDGMENT IS ENTERED FOR THE PLAINTIFF
IN THE FOLLOWING TERMS:

1. Judgment for \$55,000.00 including all damages and costs.
 2. Execution of this judgment is suspended for six months and it will become effective on 9 September 2005.
 3. The Defendant has the right as between the parties to appeal if he so desires from the ruling of this Court on the issue of the application to the claim of the statute of limitations.
 4. The Ex Parte order as to passport etc. made in Chambers on 16 October 2003 by Byrne J. is hereby dissolved with no order as to costs.
(my emphasis)
4. Sami has been trying for many years to enforce the said above consent judgement.

APPLICATION FOR STOP DEPARTURE ORDERS & FOR DEFENDANT
TO DISCLOSE HIS ASSETS

5. On 01 November 2013, he filed an application in this Court pursuant to Order 29 of the High Court Rules 1988 seeking the following Orders:

(a) that Raj delivers his passport and travel documents to this Court forthwith unless he (Sant Raj) can provide free and unencumbered assets belonging to him having a total value of not less than \$55,000.00 (**FIFTY FIVE THOUSAND DOLLARS**)

(b) that Raj to, within 14 (fourteen) days after the service of the Order on him, discloses by affidavit the full value of all and each of his assets in Fiji and identify with full particularity the nature and whereabouts of each asset, whether the same be held in his own name or jointly or by nominees such as his wife or children or other solicitors on his behalf and particularly specifying:

(i) the identity of all banks, financial institutions including contribution with the Fiji National Provident Fund or other accounts held in his name or names either jointly or by nominees on his behalf and the balance of each such account and the name and the address of the branch at which it is held.

(ii) any other asset, monies or goods owned by him and the whereabouts of the same and addresses of all persons having the possession, custody or control or such assets, moneys or goods at the date of service of this order.

6. He also sought an order that a *Writ Ne Exeat Civitate* (stop departure Order) be issued to command the Sheriff of the High Court and his Deputy and all his constables and other Peace and/or Police Officers and all Customs and Immigration Officers to arrest Raj and bring him before a Judge as soon as practicable in the event Raj should enter Fiji.
7. Sami's application was supported by an affidavit he swore on 31 October 2013 by which he set out the background as to how the consent orders were entered by Finnigan J on 08 March 2005 and how his solicitors have tried in vain since 09 September 2009 to get the defendant to settle the judgement sum. Sami also sets out how the defendant had emigrated to New Zealand shortly after the consent orders were entered.
 6. That the Defendant is living abroad in New Zealand and I believe that he has a permanent resident's status in New Zealand as he has migrated to New Zealand.
 7. That right after the consent judgment made on 8th March, 2005 and dissolution of ex-parte of Justice Byrne, the Defendant went to stay in New Zealand with this family.
8. He also sets out in his affidavit details of some real property which the defendant purportedly owns in Nadi and from which properties the defendant receives rental income.

8. That the Defendant owns a piece of land comprised in Certificate of Title No. 8351 being Lot 2 DP No. 1991 situated at Nalovo in the district of Malomalo and having an area of 3 acres. (Annexed herein and marked as annexure "KS3" is a copy of the Certificate of Title No. 8351).
 9. That the Defendant also owns another property as joint tenants with one Urmila Devi father's name Hari Prasad comprised in Certificate of Title No. 27650 being Lot 44 on DP No. 4509 situated in the District of Nadi. (Annexed herein and marked as annexure "KS4" is a copy of the Certificate of Title No. 27650).
 10. That the Defendant is either refusing and/or neglecting to pay the judgment sum which he has consented to.
 11. That the Defendant also receives rental from his Martintar, Nadi property described in paragraph 9 hereinabove.
9. Sami then sets out in his affidavit how he believes the defendant has since taken steps to insulate his assets from any execution process that he (Sami) might attempt and has also proved to be rather evasive:

12. That since the entry of judgment the Defendant has adopted various means to deprive me of the fruits of the judgment entered in my favour and one of the method used is:
 - o (i) placing Caveat No. 569355 over Certificate of Title Nos. 8357 and 27650 to protect the interest of his daughter, RAJNEETA DEVI RAJ under an unregistered mortgage given by the Defendant immediately after the consent order was entered into.
13. That the Defendant has on several occasions visited Fiji after the judgment was entered in my favour but has made no attempt to pay the said judgment sum to me despite my solicitors serving him with the Bankruptcy Notice on 19th May 2006.
14. That whenever the Defendant visited Fiji, he normally stays here for one or two weeks and due to his short stay in Fiji I could not institute any proceedings pursuant to the consent judgment.
15. That I verily believe the Defendant has no intention to pay the said judgment sum to me though he has consented to the same.
16. That presently the Defendant is in Fiji and I have been advised by his neighbours that he is scheduled to fly out of the country sometimes next week.
17. That if the Defendant absconds from Fiji this time then I believe I will not be able to enforce the judgment which he has consented as I have been advised by the defendants neighbours and verily believe that he is selling and/or disposing off all his assets in Fiji.
18. That I give my usual undertaking as to damages to the Defendant, should he suffer any loss by reasons or orders prayed for herein being granted and which appears to this Honourable Court at the determination of this action that the Orders ought not to have been made and the Defendant has suffered loss and damages as a result of the same being granted. I am employed with Tappoos Warehouse as a Customs Clerk and own a substantial dwelling worth \$110,000.00 comprised in Certificate of Title No. 28848 on DP 7329 being Lot

1 situated at Nalovo, Nadi. (Annexed herein and marked as annexure "KS5" is a copy of the title).

19. In the premises I pray for order in terms of my application.

STOP DEPARTURE ORDERS GRANTED

10. In 2014, the plaintiff, through his solicitors, had a *Writ Ne Exeat Vicitate* issued out of this Court to restrain the defendant from leaving Fiji should he ever step foot in the country to answer to the consent judgement.

DEFENDANT RETSRAINED AT AIRPORT

11. On 22 August 2016, the defendant made entry into Fiji and whilst returning to New Zealand, he was stopped at the Nadi International Airport and was told that there was a Stop Departure Order against him. The next day, he instructed Messrs Siddiq Koya Lawyers to assist him who would, in due course after conducting a full file search at the High Court, discover the *writ ne exeat civitate*.

DEFENDANT'S APPLICATION TO REMOVE STOP DEPARTURE ORDERS

12. Messrs Siddiq Koya lawyers would file an *ex-parte* Notice of Motion on 29 August 2016 seeking to remove the stop departure orders. The application was supported by an affidavit sworn by the defendant on A on 31 August 2016.

13. On 01 September 2016, Mr. Raratabu appeared for the defendant. I directed that I would hear the application *inter-partes* and then stood down the case down to 2.30 p.m. to allow service of the application and for Mr. D.S Naidu to appear for the plaintiff.

14. At 2.30 p.m., Mr. DS Naidu appeared for the plaintiff and Mr. Mohammed appeared for the defendant on instructions of Messrs Siddq Koya.

15. In court, Mr. Mohammed submitted that he was there to uplift the stop departure order of 20 June 2014. He said that the defendant had a property in Nadi which was being rented out and for which the plaintiff had been receiving rental proceeds which was to go towards payment of the judgement sum. He submitted that the plaintiff has received \$21,650-00 in total from rental proceeds of the defendant's property which, when deducted from the total judgement sum of \$55,000, leaves a balance of \$28,350.
16. Mr. Naidu refuted that any money was ever paid. He said the property in Waqadra was in the name of the defendant and his wife. He said that his firm had tried to garnishee the sitting tenants of the property but no rental money was ever paid to them. Mr. Naidu said that the affidavit is full of dishonesty. He pointed out that the defendant has encumbered his Waqadra property by giving his daughter who is a University student a mortgage on 27 June 2007. Mr. Naidu argued that the said mortgage was not a *bona fide* mortgage.
17. After hearing both counsel, I then made the following time table:
 - (i) the defendant, Sant Raj, has undertaken to hand in his payment to Messrs Siddiq Koya and Company that same afternoon.
 - (ii) the Stop Departure Order is to continue until further Orders.
 - (iii) D.S Naidu to file and serve affidavit in opposition by 11.00 a.m. tomorrow.
 - (iv) Stood down to hearing at 2.30 p.m. tomorrow afternoon.

HEARING ON 02 SEPTEMBER 2016

18. On 02 September 2016 at 2.30 p.m., an affidavit sworn by the plaintiff on the same day was filed. By this affidavit, the plaintiff denies having received any rental from the defendant's property nor was any rental payment ever made to the trust account of the plaintiff's solicitors.
19. The plaintiff also annexes a copy of Certificate of Title 8351 over the defendant's Waqadra property which contains notations confirming that the

said property is owned by the defendant and his wife as tenants in common. There is also a notification on the said title of a mortgage in favour of the couple's (defendant and wife) daughter.

20. In Court, Mr. Raratabu again appeared for the defendant and Mr. DS Naidu for the plaintiff.
21. Mr. Raratabu argued that his client was retired and that a stop departure order would serve no purpose as judgement was already registered against his property which is valued at over \$250,000 compared to the \$50,000 judgement debt. He reiterated the argument that the judgement sum has reduced because the plaintiff has received some of the rental income from the property. He argues also that the defendant's wife needed urgent medical attention and desperately needed the defendant by her side in New Zealand. Mr. Raratabu said the defendant was willing to pay \$20,000 towards the balance.
22. The defendant's passport was also handed up in court. Sant Raj also undertook in court that he would pay \$20,000 by Monday 05 September 2016 towards the judgement sum.
23. After hearing both counsel, I then made the following Orders:
 - (i) The passport of the defendant/judgement debtor was to be held in court until Sant Raj pays the Trust Account of Pillay Naidu the sum of \$20,000.
 - (ii) Seven days to the defendant/judgement debtor to pay file and serve an affidavit in opposition to the plaintiffs application for any Order for the sale of the property.
 - (iii) 7 days thereafter to plaintiff/judgement creditor to file and serve affidavit in reply.
 - (iv) I then adjourned the case to Tuesday 06 September 2016 for mention at 10.30 a.m. to see if \$20,000 is paid and to consider release of the passport if the money is paid. I also set the date of hearing on the application for the sale of the property to 30 September 2016 at 2.30 p.m.

06 SEPTEMBER PROCEEDINGS

24. On 06 September 2016, Fazilat Shah Legal filed a Notice of Change of Solicitor confirming that they had been appointed to act as solicitor for the defendant in lieu of Messrs Siddiq Koya Lawyers. In Court, Mr. Mohammed said that he had a cheque of \$20,000 payable to the High Court.
25. Mr. Naidu objected saying that the defendant was ordered to pay his firm last Monday and was to have filed an affidavit of assets in Fiji and that unless he purged his contempt, his passport was not to be released.
26. I ordered that the passport was to be released to the defendant upon the following conditions:
- (i) Bank Cheque in the sum of \$20,000 payable to Pillay Naidu & Associates to be made.
 - (ii) Costs to Pillay Naidu & Associates in the sum of \$1,500.
 - (iii) Affidavit of Assets (including bank accounts) to be filed in fourteen days on defendant's undertaking in Court.
27. In due course, the stop departure order was uplifted upon the defendant fulfilling the above. He filed an affidavit of assets on 27 September 2016 wherein he inter alia disclosed that he has one undivided half share in Certificate of Title No. 27650 situate at Waqadra in Nadi and also full ownership of Certificate of Title No. 8351 and approximately \$1000 to his credit in an ANZ Account.
28. On 30 September 2016, at 2.30 p.m., Mr. Naidu appeared for the plaintiff but there was no appearance by or for the defendant.
29. Mr. Naidu took issue with the affidavit of assets filed by the defendant. According to him, the affidavit did not fully disclose the details of all the assets that the defendant owns.

30. I then stood down the case to 2.45 p.m. to await any appearance by the defendant or his counsel. During the time when the case was stood down, my clerk contacted Fazilat Shah legal but was informed by a clerk of that firm that they were not aware that the case would be called today and that Mr. Mohammed was out of the office.
31. Mr. Naidu pointed out that the case was on the cause list listed at 2.30 p.m. and that Mr. Mohammed was in Court when the date and time were set. He insisted on proceeding. I agreed.
32. Mr. Naidu relied on an affidavit filed on 27 May 2016. The affidavit shows two properties (CT 8351 and CT 27650) of the defendant and a caveat on one of these and a mortgage on the other. He says that the mortgage is fraudulent. In the affidavit, nothing is mentioned of the mortgage. Even so, the judgement was registered on the property earlier in time. For Certificate of Title 8351, judgement was registered on 30 April 2007, the mortgage was filed on 27 June 2008 and the caveat on 20 July 2005. It is not clear what interest is being claimed for the caveat. The only interest declared is a debt in favour of the daughter. Mr. Naidu argues that monies owed is not a caveatable interest because it is not a proprietary interest.
33. At the end of the Mr. Naidu's submissions on 30 September 2016, I granted Order in Terms of his Summons dated 27 May 2016. The said summons had sought the following Orders:
- (i) that the encumbrances against the titles in favour of the defendant's daughter namely Caveat No. 569355 over Certificate of Title Nos 8351 and 27650 be discharged as being fraudulent.
 - (ii) The plaintiff and/or his solicitors are to attend to the sale of all of the properties described in paragraph 15 of the Affidavit in support filed herein by calling for tenders through advertisement in the local newspaper.
 - (iii) The plaintiff will collect
 - (a) \$55,000.00 from the sale proceeds as his share under \$55,000-00 consent judgement

- (b) Interest on the judgement sum of \$55,000.00 at a rate of 4% \$24,000-00 per annum from (18th March 2005 to date)
- (c) Solicitors Legal Costs
- (iv) Any other orders that this Honourable Court deems just and fit.

34. The only variation to the above summons was that the Deputy Registrar be authorised to call for tenders and that the proceeds from sale were to be deposited into court.

DEFENDANT'S APPLICATION TO SET ASIDE ABOVE ORDERS

35. Then on 11 January 2017, Fazilat Shah Legal filed a summons seeking an Order that the Orders made on the plaintiff's summons dated the 27th May 2016 be wholly set aside. The said summons is supported by an affidavit sworn by the defendant on 15 December 2016.

COMMENTS

36. I have considered the arguments of both counsel. The issue that has emerged therefrom is whether I should set aside the last Orders on account of the fact that Sami's daughter, who has a mortgage and a caveat on the properties in question, should have been afforded an opportunity to defend her purported interest in the said properties before any order for the sale of the properties can be made.

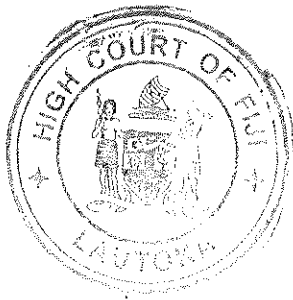
37. There is strong argument from Mr. Naidu that the caveats on the said properties created in favour are not *bona fide* and that they were only created to insulate the properties from any attempt to levy execution on them. As I have said above, Mr. Naidu supports that argument by pointing to the fact that the said daughter is still a student who the defendant has repeatedly said in Court and in his affidavits that he still supports and also

the fact that the said mortgage and caveat were only created after the judgement was registered on the said properties.

38. Mr. Naidu further argues that because the value of the properties in question far exceed the judgement debt, plus interest and costs, the properties are likely to fetch a price on the market which will be enough to settle both the judgement debt as well as any debt which the defendant may owe to his daughter (which Mr. Naidu still argues is not a *bona fide* debt).

ORDERS

1. The above Orders granted on 30 September 2016 are set aside.
2. I further Order that the defendant's daughter be added as an interested party pursuant to my powers under Order 15 Rule 6(2)(b) of the High court Rules 1988.
3. The case is to be called for mention on **Thursday 11 May 2017 at 10.30 a.m.** for further directions on the plaintiff's application for an Order for Sale.
4. Parties to bear their own costs.



Anare Tuilevuka
JUDGE
Lautoka
21 April 2017