

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 133 of 2011

BETWEEN : ROSY REDDY f/n Arjun Prasad, Process Worker of Auckland, New Zealand as Administratrix of **THE ESTATE OF NARAYAN REDDY** f/n Ranga Sami Reddy, late of Suva, Fiji, Deceased.

PLAINTIFF

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

1ST DEFENDANT

AND : YANKTESH PERMAL REDDY of Sankar Sanyasi, Company Director of **ROHIT REDDY** f/n Yanktesh Permal Reddy, Company Director, Level 2, Spartik House 6-8 Edward Wayte Place, Auckland, New Zealand, **KALPANA REDDY** f/n Yanktesh Permal Reddy, Company Director, Level 2, Spartik House 6-8 Edward Wayte Place, Auckland, New Zealand, **GIYANANAND NAIDU** (father's name not known by the plaintiff) of 15 Kadavu Street, Lautoka, Finance Manager and Director.

2ND DEFENDANT

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

3RD DEFENDANT

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

4TH DEFENDANT

AND : CLYDE EQUIPMENT LIMITED a company duly incorporated in Fiji and having office at 35 Ravouvou Street, Lautoka.

5TH DEFENDANT

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

6TH DEFENDANT

AND : FINEGRAND LIMITED a company duly incorporated in Hong Kong and having office at 13th Floor, Tung Hip, Commercial Building, 224 Des Vouex Road, Hong Kong.

7TH DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSELS : Mr. Isireli Fa for the Plaintiff
Mr. Ravi Singh for the Defendants

Date of Hearing: 13th February, 2017

Date of Ruling : 08th May, 2017

RULING

[Summons for Discovery of particular documents by the Plaintiff pursuant to Order 24 Rule 7 (1) & (3) of the High Court Rules, 1988]

A. INTRODUCTION

1. This is the Plaintiff's Application for Discovery of particular Documents pursuant to *Order 24, Rule 7.1 and 3 of the High Court Rules 1988*. The Application is made upon the grounds contained in the Affidavit of Sinate St John, Law Clerk in the office of Fa & Company, the solicitors for the Plaintiff and the affidavit of the Plaintiff. The Documents sought by the Plaintiff to be discovered are-

- (i) Letter from Ernst & Young to the Reserve of Fiji dated the 31st of August, 2001.
- (ii) Letter from G Lal & Company to the Reserve Bank of Fiji dated the 26th of August 2003.
- (iii) Three (3) letters dated the 18th of December 2007 from Ernst & Young to the Reserve Bank of Fiji.
- (iv) Reserve Bank of Fiji approval letters for the purported sale of 163,904 shares held by the 3rd Defendant (Reddy Construction Limited) in the 4th Defendant (Reddy Enterprises Limited) to the 7th Defendant (Fine grand Limited) in 2010.
- (v) Valuation Report for the 163,904 shares of the 3rd Defendant (Reddy Construction Company Limited) purported to be transferred in 2010;
- (vi) RBF exchange control approvals and confirmation of remittances for transactions that took place in 2010;
- (vii) Reddy Construction Company Limited (3rd Defendant) Accounts for 2010-2011;

(viii) Documentation (including exchange control approvals) in relation to the reversal of all dividends paid to YPR Group Limited of Hong Kong between 2001-2010 from the transfer of 163,904 shares in Reddy Enterprises Limited (4th Defendant) from the 3rd Defendant Reddy Construction Company Limited.

2. The Application is opposed by the Defendants.
3. Three (3) Affidavits are filed for Court's consideration-
 - (a) Affidavit in Support of Sinate St John deposed on 12th May, 2016;
 - (b) Affidavit in Response of Martha Ieli deposed on 22nd June, 2016; and
 - (c) Affidavit in Reply of Rosy Reddy deposed on 18th July, 2016.

B. PRINCIPLES OF DISCOVERY

Order for discovery of particular documents (O.24, r.7)

4. 7.-(1) *Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.*

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

5. The general principal governing discovery of documents was stated by Brett LJ *Compagni Fianciere -v- Peruvian Guano Co.* (1882) 11 QBD 55 at pg 63. His Lordship Mr. Justice Byrne in *Parvati Manilal Lallu Ranchod -v- Sundar Lal Lallu Suva* High Court Civil Action No. HBC 488 of 1991 at page 3 of the judgment after referring to the above case summarized the principle as follows :-

"This text was applied by Menzies J. in Mulley -v- Manifold [1959] 103 CLR 341 at 345 where His Honour stated that discovery is a procedure directed towards a proper examination and determination of the issues between the parties as disclosed in the pleadings and not towards assisting a party upon a fishing expedition."

His Lordship continued:-

"Only a document which relates in some way to a matter in issue is discoverable but it is sufficient if it would or if it would lead to a train of enquiry which would, either advance a parties own case or damage that of his adversary".

6. An application for discovery ordinarily falls into the following two distinct categories-
- (i) Firstly, there is the discovery of documents which are disclosed in the affidavit verifying list of documents; (O. 24, rule 2); or mutual discovery (O. 24, rule 1(2)). Largely they are disclosed voluntarily in the ordinary course of the pre-trial discovery.
 - (ii) The second category falls into discovery of specific documents, or those which are not disclosed; (O. 24 rule 4). This may include documents which are not listed in schedule A, Part 2 of the affidavit verifying list of documents.
7. The rule permits the discovery of documents. Order 24, rule 4(2) provides:-
- (2) Where in an action begun by writ an order is made under this rule for the determination of an issue or question, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application on which the order was made were a summons for directions.*
8. A fundamental prerequisite to discovery of specific documents is that the Summons must be supported by an affidavit. The affidavit must specify the particular document or documents or class of documents sought to be discovered. An applicant must establish a prima-facie case that the specific documents or class of documents do exist or have existed, and are relevant. Further they were in "possession, custody or power of the opposing party".
9. In *Halsbury's Laws of England* 4th Edition at pg. 78, the authors aptly describe the documents which are capable of being discovered as follows:-
- '8. Documents required to be disclosed
- The obligation of a party to make discovery necessarily involves that he must make a full and frank disclosure of all relevant documents which are or have been in his possession, custody or power. Apart from any order limiting the scope of the discovery of particular documents or class of documents, or to particular issues, there are two general and essential conditions as to what documents are required to be disclosed namely:-*
- (i) *They must be relevant; that is must relate to some matter in question in the action or other proceedings; and*
 - (ii) *They must be or have been in possession, custody or power of the party required to make necessary discovery.*
10. Hid Lordship, Mr. Justice Fatiaki (as he then was) in *A.B Annand (Christchurch) Ltd. v Australia and New Zealand Banking Group Ltd* (1997) 43 FLR 22 30 January 1997 as follows:-

"...pre-requisites: the document must be relevant to a question or issue in the proceedings in so far as the same may be deducted from the pleadings in the action. Secondly, the document(s), must be shown to exist and '...are or have been in (the) possession, custody or power...' of the party against whom discovery is being sought".

11. A relevant document is one which relates to:-

"...the matter in question in the action if it contains information which - not which must - either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary, or which may fairly lead to a train of enquiry which may have either of these consequences. Documents relate to matters in question in the action whether they are capable of being given in evidence or not, so long as they are likely to throw light on the case. The expression 'matter in question' means a question or issue in dispute in the action and not the thing about which the dispute arises". See Volume 13 paragraph 38 of Halsbury's Laws of England (4th Edition) page 34.

12. Custody, power and possession, is contextually defined as follows:-

*"...**"possession"** means the physical or corporeal holding of the document pursuant to the right to its possession, as in the case of an agent or a bailee.; **"custody"** means the mere actual physical or corporeal holding of a document regardless of the right to its possession, as in the case of a servant or employee; and **"power"** means an enforceable right to inspect it or to obtain possession or control of the documents from the person who ordinarily has it in fact". (See Halsbury's Laws of England Vol. 13 at page 35 paragraph 39).*

Further, it is trite law that for the purposes of the rule, the words possession, custody or power are interpreted as disjunctive.

13. However discovery will not be ordered in respect of documents which are not related to or may not affect the actual outcome of the action: *Martin and Miles Martin Pen Co. Ltd. -v- Scrib Ltd. [1950] 67 RPC 1-7*. Furthermore, discovery will also be prohibited if it is for a general purpose of enabling a party to fish for witnesses or a new case; *Calvet -v- Tomkies [1963] 3 ALLER 610*.
14. The overall purpose of this rule is to vest a wide jurisdiction to the court to order discovery and inspection of documents. Behind this robust approach, is the philosophy that, with proper discoveries, and the more discovery there is between the parties, the better disposed they are in thrashing out the issues between them in the pleadings. Ultimately, the Court will be far better disposed to determine the real issues raised in the pleadings. This is cost effective in that it saves time.
15. Discovery can be sought at any stage of a proceeding even after a judgment or order in an action has been made (see Singh v Minjesk Investment Corporation Ltd & Anor -

High Court Civil Action No. HBC 148 of 2006 where Master Udit cited Korkis -v- Wer & Co. [1914] LT 794 as authority for this position).

16. In Singh v Minjesk, Master Udit canvassed the applicable principles and case law authorities in some detail. From his analysis, what emerges clearly is that the onus initially is on the applicant to establish the following by way of affidavit evidence to:
- Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (Order 24 Rule 7(1)).
 - Show a prima facie case that the specific document or class of documents do in fact exist or have existed (Order 24 Rule 7(1)).
 - Establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see A.B Anand (Christchurch) Ltd -v- ANZ Banking Group Limited (1997) 43 FLR 22 30 January 1997).
 - It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see Volume 13 paragraph 38 of Halsbury's Laws of England - 4th Edition) page 34 s cited in Singh v Minjesk).
 - Show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the documents from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7(3)).
17. An applicant will need to be heedful of accumulated case law material that Courts will not allow the discovery process to be used towards assisting a party upon a fishing expedition such as to fish for witnesses or a new case (Martin and Miles Martin Pen Co. Ltd v Scrib Ltd [1950] 67 RPC 1-7 as cited in Singh v Minjesk), Calvet -v- Tomkies [1963] 3 All ER 610. Nor will discovery be ordered in respect of documents which are not related to or may not affect the actual outcome of the action: Martin and Miles Martin Pen Co. Ltd. -v- Scrib Ltd. [1950] 67 RPC 1-7). Furthermore, discovery will also be prohibited if it is for a general purpose of enabling a party.

D. ANALYSIS AND DETERMINATION

18. The issue for this Court to determine is whether an order be made for the Discovery of the following particularised Documents from the Defendants-
- (i) Letter from Ernst & Young to the Reserve of Fiji dated the 31st of August, 2001.
 - (ii) Letter from G Lal & Company to the Reserve Bank of Fiji dated the 26th of August 2003.
 - (iii) Three (3) letters dated the 18th of December 2007 from Ernst & Young to the Reserve Bank of Fiji.
 - (iv) Reserve Bank of Fiji approval letters for the purported sale of 163,904 shares held by the 3rd Defendant (Reddy Construction Limited) in the 4th Defendant (Reddy Enterprises Limited) to the 7th Defendant (Fine grand Limited) in 2010.
 - (v) Valuation Report for the 163,904 shares of the 3rd Defendant (Reddy Construction Company Limited) purported to be transferred in 2010;
 - (vi) RBF exchange control approvals and confirmation of remittances for transactions that took place in 2010;
 - (vii) Reddy Construction Company Limited (3rd Defendant) Accounts for 2010-2011;
 - (viii) Documentation (including exchange control approvals) in relation to the reversal of all dividends paid to YPR Group Limited of Hong Kong between 2001-2010 from the transfer of 163,904 shares in Reddy Enterprises Limited (4th Defendant) from the 3rd Defendant Reddy Construction Company Limited.
19. The Defendants have opposed the application and submitted that the particular Documents sought by the Plaintiff are not in existence. Further, the Defendants deny that these Documents are in their possession, custody, or power.
20. This action was initiated by a Writ of Summons. Discovery is made at the hearing of the Summons for Directions in terms of *Order 25 of the High Court Rules, 1988*. Certain orders are made by the Court directing the Plaintiff and the Defendant to file and serve an Affidavit verifying List of Documents within a time frame. According to the Plaintiff and upon Court's perusal of the Defendant's Affidavit Verifying List of Documents filed on 21st October, 2015, the Defendants List does not include the particular Discovery of Documents as sought by the Plaintiff herein and as enumerated at paragraph 18 (i)- (viii) hereinabove. Therefore, this application is made to seek the Particular Discovery.
21. Discovery may be sought at any stage of proceedings. In this action commenced by a Writ of Summons, orders by consent were granted by the Court on the Plaintiff's Summons for Directions on 08th June, 2015. On 11th August, 2015, with Court's leave, the Plaintiff filed and served its Affidavit Verifying Plaintiff's List of Documents. Thereafter, on 21st October, 2015 with Court's leave, the Defendants filed and served their Affidavit Verifying List of Documents. Subsequently, the parties to this proceeding were granted a months' time to complete the Discovery.

22. Upon receipt and perusal of the Defendant's Affidavit Verifying List of Documents that the Plaintiff's Counsel realised that the Documents enumerated at paragraph 18 (i) - (viii) hereinabove were not discovered. The plaintiff's Counsel was aware that the 2nd Defendant, Giyananand Naidu, filed an affidavit in this matter in opposition to the Plaintiff's application for Summary Judgment on 14th November, 2012, wherein he referred to **these Documents** for which the Plaintiff now seeks **Discovery** of from the Defendants and says that they are also **relevant** to these proceedings.
23. On 10th December, 2015, the Plaintiff's Solicitors Ms. Fa & Company wrote to the Defendants Lawyers Ms. Parshotam Lawyers seeking an explanation as to why the abovementioned documents were not disclosed in the Defendants Affidavit verifying List of Documents and if they could provide the Plaintiff's lawyers with copies of the Documents at the earliest.
24. No response was received and this prompted Ms. Fa & Company to write again on 03rd February, 2016 and seek a response and also sought from the Defendants to discover further documents which were also not disclosed in the Defendants Affidavit Verifying List of Documents.
25. It was not until 29th March, 2016 that Ms. Parshotam Lawyers wrote to Ms. Fa & Company and advised that the Defendants do not have copies of the Documents sought.

Identify the Documents sought

26. The particular Documents sought by the Plaintiff have been clearly identified as enumerated at paragraph 18 (i) - (viii) hereinabove. Not only that, the Plaintiff has also referred to the Affidavit deposed by the 2nd Defendant, Giyananand Naidu deposed on 12th November, 2012 and clearly pointed out the pages on which these Documents have been mentioned. That in itself tantamount to sufficient identification.

Existence of the Documents

27. 2nd Defendant Giyananand Naidu filed an Affidavit on 14th November, 2012 in opposition to the Plaintiff's application for summary judgment. Mr. Naidu mentioned that the Directors report for the 3rd and 4th Defendants external accountants in Fiji and New Zealand contained material errors. Reference to Documents made herein opposing the Plaintiff's Summary Judgment application is sought by the Plaintiff now.

Relevance of Documents Sought

28. According to the Plaintiff, the Documents sought were mentioned in the opposing affidavit of the 2nd Defendant, Giyananand Naidu and are relevant to this case since the revelation of those Documents surfaced for the first time in Court and had the effect of nullifying the Plaintiff's summary judgment application as it created a disputed fact and this disputed fact could now only be resolved at the trial.

A 'Relevant Document' is one which relates to- "...the matter in question in the action if it contains information which- not which must either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary, or which may fairly lead to a train of enquiry which may have either of these consequences. Documents relate to matters in question in the action whether they are capable of being given in evidence or not, so long as question or issue in dispute in the action and not the thing about which the dispute arises.". See Volume 13 paragraph 38 of Halsburys Laws of England (4th Edition) page 34.

Documents in Possession, Custody or power of the Defendants

29. 2nd Defendants Affidavit in Opposition revealed and or mentioned those Documents which are now being sought by the Plaintiff. These Documents were either referred to directly or by inference in the affidavit. The Defendant could only mention about these Documents in his affidavit if he had Custody, power and possession of the same.

Custody, Power and Possession, is contextually defined as- "...'**possession**' means the physical or corporeal holding of the document pursuant to the right to its possession, as in the case of an agent or a bailee...; ..'**custody**' means the mere actual physical or corporeal holding of a document regardless of the right to its possession', as in the case of a servant or employee; and '**power**' means an enforceable right to inspect it or to obtain possession or control of the documents from the person who ordinarily has it in fact'. (see Halsburys of England Vol. 13 at page 35 paragraph 39).

30. The substantive Amended Statement of Claim is seeking several orders jointly from the Defendants in terms of Damages, Declaratory orders, shares, Estate accounting and so forth. Both parties must come to court with clean hands and ensure that all the necessary documents are discovered and dealt with rather than holding on to some of the Documents forcing the other party to make an appropriate application for particular Discovery when the **complete Discovery** could have taken place when the orders for filing and serving of the Affidavit Verifying List of Documents of both Plaintiff's as well as the Defendants are filed accordingly. The Affidavit of 2nd Defendant Giyananand filed in opposition to the Plaintiff's summary judgment application does reveal that the Particular Documents sought by the Plaintiff does exist as referred to directly or by inference in his affidavit respectively.
31. The action has been pending since 2011, almost 6 years now and the parties to the proceedings are just filing Interlocutory applications and delaying the substantive cause for no good reason. I have always said that when an action is filed in court for determination, it must be seen that the pleadings are expeditiously filed and concluded so that the matter can then be assigned for hearing and determination for once and for all.

Affidavit Evidence by Clerks

32. The Affidavits deposed by Sinate St John on behalf of the Plaintiff in his capacity as a Law Clerk and Martha Leli on behalf of the Defendant in her capacity as a Legal Executive are defective and contrary to **Order 41 Rule 5 of the High Court Rules, 1988**. Also Courts have criticised court clerks deposing affidavits in court proceedings especially in contentious matters and struck out the affidavits. Upon a close read of the Affidavits, it can be concluded that the Plaintiff's affidavit seeking Discovery of Documents is completely denied by the Defendant of having any existence, possession, custody or power of the same.
33. Taking into consideration written submissions filed and the arguments raised by both counsels including the substance of both affidavits, I will invoke the provisions of **Order 41, Rule 4 (O.41, r.4)** and grant leave allowing both affidavits to be used in the Interlocutory Application seeking particular Discovery in this instant case. It must be noted that the Court will not always allow affidavits of this nature to be used in all applications, rather allowed only at this instance.

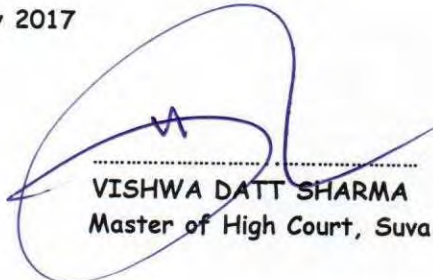
CONCLUSION

34. I direct and order the Defendants (1-7) as follows-
- (i) That the 1st - 7th Defendants make affidavits stating whether the documents enumerated at paragraph 1- (i) - (viii) inclusive in the Plaintiff's Summons dated 12th May, 2016 is or has at any time been, in their possession, custody, or power and if not then in their possession, custody, or power, when they parted with them and what has become of them.
 - (ii) That all affidavits of the Defendants (1-7) to be filed and served within 14 days.
 - (iii) Costs to be in Cause.
 - (iv) Matter to be expedited hereinafter without any further delay and/or excuses.

Dated at Suva this 8th Day of May 2017



Cc . Fa & Company, Suva.
Parshotam Lawyers, Suva.


VISHWA DATT SHARMA
Master of High Court, Suva