

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 310 of 2015

BETWEEN : DIVINDRA CHAND BHAGAT of 64A Hill End Road, Doonside, NSW 2767, Australia.

PLAINTIFF

BETWEEN : ROHINI DEVI BHAGAT of 64A Hill End Road, Doonside, NSW 2767, Australia.

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Anand Singh - for the Plaintiff  
Mr. Ritesh Singh - for the Defendant

Date of Ruling : 30<sup>th</sup> July, 2018

RULING

*(Application for Security for Costs by the Defendant pursuant  
to Order 23 and Rule 1 of the High Court Rules, 1988)*

**A. INTRODUCTION**

1. On 16<sup>th</sup> February, 2016, the **Defendant** filed a Summons for **Security for Costs** against the **Plaintiff** and sought for the following Orders-
  - (a) *That the above named Plaintiff within 7 days do provide security for costs in the sum of \$36,638.50 (Thirty Six Thousand Six Hundred and Thirty Eight Dollars Fifty Cents) by way of cash deposit or such other sum as this court deems just to prosecute this action;*
  - (b) *That the Plaintiff do persecute his claim within 7 days of depositing security for costs and if the Plaintiff fails to do so, the Plaintiff's claim be struck out for want of prosecution;*
  - (c) *That the costs of this application be paid by the Plaintiff.*
2. This application is made pursuant to **Order 23** and **Order 1 of the High Court Rules, 1988** and the **Inherent Jurisdiction of this Honourable Court**.
3. The Defendant relies on the affidavit of Rohini Devi Bhagat.
4. The Plaintiff did not file any Affidavit in Opposition to this application since the Plaintiff is serving a term of imprisonment.

**B. BRIEF BACKGROUND**

5. The Plaintiff is a resident of New South Wales in Australia. He brought this action against the Defendant by Writ of Summons on 23<sup>rd</sup> September, 2015 claiming that the Defendant entered into a Loan Agreement with the Plaintiff on 10<sup>th</sup> December, 2013 in terms of the laws of Australia.
6. The Defendant denies all the allegations made by the Plaintiff in his Writ of Summons and has filed her Statement of Defence on 11<sup>th</sup> January, 2016. The Defendant denies entering into any Loan Agreement with the Plaintiff as the signature on the purported Loan Agreement was not of the Defendant's as the borrower. This was forged by the Plaintiff himself as the signature was also witnessed by the son of the Plaintiff. The matter has been reported to NSW Police and Plaintiff has been charged for the offence of fraud and he is currently in prison for other related offences of criminal activities.
7. The Plaintiff is a bankrupt person who has been changing his identity and obtaining money illegally from people which have resulted in Police investigations and he has several cases pending in Australian Court in relation to his fraudulent acts.
8. The Defendant therefore submits that the Plaintiff does not have any assets in Fiji under his name and if adverse Orders are made against him, he will not be in a position to pay the costs that may be awarded against him.
9. The Plaintiff has not denied the Defendant's Defence and has not filed any Reply to Defence.



10. The Plaintiff also has not filed any Affidavit in Response to date and this clearly shows that the Plaintiff is not opposing the Defendant's application for Security for Costs. Therefore to cover the disbursements and other incidentals the Defendant requests an Order for Security for Costs.

C. The Law on Security for Costs

11. *Security for costs of action, etc. (O.23, r.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) .....  
 (c) .....  
 (d) .....

*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.*

12. The Rule states that "having regard to all circumstances of the case, the Court think, it just to do so, it may order" confers upon the Court a discretion whether or not to order security for costs.

D. ANALYSIS and DETERMINATION

13. The issue for this court to determine is 'Whether the Defendant is entitled to Security for Costs' as sought for in their application?

14. Security for Costs is not ordered because a Plaintiff is ordinarily resident outside of Fiji, the Court must consider other facts incidental to the proceedings.

15. Reference is made to the case of *Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd [2015] FJHC 812; HBC180.2013 (20 October, 2015) wherein the issue of security for costs was discussed and observed as follows:*

*"That the Plaintiff is a non-resident and has no assets in Fiji is a circumstance of great weight favouring a security order. I am of course mindful to the fact that the making of an Order for security for costs is discretionary and the Courts no longer adapt a rigid rule. [see, M.J. Raine, "In locals we trust - Foreigners pay cash; rethinking security for costs against Foreign Residents (2012) 1 JCTVP 210 at 214P]."*

*'Returning to the instant case, although the grounds for security for costs have been proved by the Defendants, I am not bound to make an order.'*

16. In the High Court of Fiji in *Furuuchi Susian 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 resident within the jurisdiction".*

17. The Defendant will only be entitled to costs if the Plaintiff's claim is ultimately dismissed with costs. The Defendant is not entitled to security for costs as of right. If the Court feels that the Plaintiff has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.
18. In *Ali v Chandra* [2014] FJHC 710; HBA14.2013 (30 September 2014), Judge Kumar also saw fit to highlight a portion from *Porzelack K.G v. Porzelack*(supra) and further enunciated as follows:-
- 3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not ordinarily reside in Fiji".
- 3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.
- 3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.
- 3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside" or "does not ordinarily reside" in the country then Court has to exercise its discretion as to whether to make an Order for security for costs or not.
- 3.30 Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (*Sharma v. Registrar of Titles*) chances of Plaintiff's claim succeeding (*Para 25.13.1 White Book. Vol 1, 2011*).
- 3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.
19. As reported in the White Book (1997) at page 407 (23/1-3/2) on Security for Costs it states that:

*"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 '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 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 6B 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).

20. Lord Denning as reported in Sir Lidsy Parkinson & Co Ltd. v. Farripian Ltd [1973] 2 A.E.R. 273 at 285-286.

.....'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. The court has a discretion which it will exercise considering all the circumstances of the particular case. ....The court might also consider whether the application for security was being used oppressively-so as to try and stifle a genuine claim.'

21. An exception applies if it is established that a foreign Plaintiff has substantial assets within the Jurisdiction which are available to satisfy a costs order. In that exceptional case, security for costs will not be ordered.
22. In *Babu Bhai Patel v Moanohan Aluminium Glass (Fiji) Ltd, Civil Appeal 19/1997*, an appeal from the Magistrates Court, Chief Justice Fatiaki held to the effect that to come within the exception a non- resident Plaintiff has the onus to prove that he has suitable property within Fiji.

'Once it is established that the Plaintiff was not ordinarily resident in Fiji, as in this case they are resident in Australia, the 'onus' then shifted to the Plaintiffs to satisfy Court that they have property within the Jurisdiction which can be made the subject to the process of this court. However, even if the Plaintiffs have no assets in Fiji, they may still avoid having to pay security for costs if they are able to convince the court pursuant to Order 23 of the High Court Rules, 1988, that having regards to all the circumstances of the case, it would not be just and fair to order security for costs or that it would be oppressive to do so in the circumstances.'

In this case, the Plaintiffs have admitted in their affidavit in opposition of paragraphs 4 & 5 that they are 'resident' in Australia and have 'no assets' in Fiji and further derive 'no income' in Fiji. There is no dispute with regards to this.

23. The Plaintiffs filed a Writ of Summons and the Statement of Claim on 23<sup>rd</sup> September, 2015.
24. The Defendants filed their Statement of Defence thereafter on 11<sup>th</sup> January, 2016.
25. It is noted that upon filing of the Defence, no Reply to Defence was filed as per the requirements of the High Court Rules.

26. The Defendants contention are as follows-

- That the Plaintiff has no such business as financial broker/investor and financier in Sydney as he has been unemployed since December 2010 and has been surviving on payments from Center link. He is further financially dependent on the Defendant.
- The Plaintiff has other aliases. He is also known as Charlie Kartik under which name he has been declared and currently remains an undischarged bankrupt person in Australia.
- The Plaintiff has been changing his identity and obtaining money illegally from people which have resulted in Police investigations.
- The Defendant denies signing any Loan Agreement with the Plaintiff.
- That the signature on the purported Loan Agreement (the "*Purported Agreement*") dated 10th December, 2013 is not of the Defendant's as the borrower. The Defendant says that the Plaintiff forged the Defendant's signature on the said Purported Agreement.
- The Defendant did not sign any Mortgage document over the NSW property in favour of the Plaintiff.
- The signature on the Mortgage document is not of the Defendant's and has been forged by the Plaintiff.
- That there was no trust between the parties.
- The Defendant never requested any loan from the Plaintiff. The Plaintiff is put to strict proof and to provide further and better particulars of the same. The Defendant re-iterates that the Plaintiff is unemployed and an undischarged bankrupt person. He was never in a financial position to assist the Defendant in any manner.
- The Defendant repeats paragraph 6 hereinabove.
- That the Plaintiff's claim is frivolous and vexatious and an abuse of Court process and does not disclose a reasonable cause of action.

27. Prima facie, bearing in mind the Defendants contention as based hereinabove, and the Statement of Claim of the Plaintiffs as set out within the Statement of Claim, upon a careful consideration, the Plaintiffs have an arguable case with good prospects of success. However, this court at this stage of the proceedings cannot delve itself into the merits of the parties' case, since that would be determined upon a proper hearing accordingly.

28. In '*Kadavu Shipping Company Ltd v Dominion Insurance Ltd*' 2009 HBC 508 Master Udit said in relation to the 'Strength or bona fides of a claim'

*'Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona fide.'*



29. In *Allan v Hillview Limited [2003] HBC 366*, Connors J said:

*'....another matter of importance for the Court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the Court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court.'*

30. The balance of convenience lies in the Court accepting that the Plaintiff has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of success.
31. The Defendant's main thrust is that since the Plaintiffs are resident out of this Jurisdiction, they should be required to pay security for costs. On the other hand, the Defendant will only be entitled to costs if the Plaintiff's claim is dismissed.
32. The Plaintiffs have initiated this proceeding and they have the prosecution of the case to ensure they bring it to the conclusion on the balance of probabilities. And it is for the Defendants to counter the claim in terms of their Defence. However, it is obvious in the circumstances that expenses in terms of costs will be incurred and therefore the parties to the proceedings must be ready to cater for the costs. In this case the Defendants have sought for security for costs against the Plaintiffs.

#### Quantum of Costs

33. No formula for ascertaining the quantum of the security for costs was furnished to court by any of the Counsels. However, a very helpful guide is provided for in *Halsbury's Law of England (4<sup>th</sup> edition) Vol. 37 para 307*, which states as follows-

*'The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an indemnity basis. In the case of a Plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up the stage of the proceedings for which security is ordered, but there is no hard and fast rule.'*

34. Reference is made to the New Zealand Court of Appeal case of *Mclachlan & Others v. Mel Network Limited [2002] NZCA 215 (29 August 2002)* at paragraph 27 of the Judgment wherein His Lordship, Mr. Justice Gault said-

*'[27] The amount of security is not necessarily to be fixed by reference to likely costs awards: National Bank of New Zealand Ltd v Donald Export Trading Ltd [1980] 1 NZLR 97, at 103- 'It is rather to be what the court thinks fit in all the circumstances...'*

35. For the abovementioned rationale, it is only appropriate in the circumstances of the nature of the case in hand that the Defendant's application for security for costs should be acceded to. Accordingly, I grant the Defendant's application and make an order for \$10,500 security for costs to be paid and summarily assessed costs of this application of \$1,000.


36. I proceed to make the following orders.

**E. ORDERS**

- (i) The Plaintiff is hereby ordered to pay a sum of \$10,500 as security for costs into the Chief Registrar's interest bearing account within 28 days.
- (ii) The Plaintiff's Writ of Summons and the Statement of Claim will be struck out upon the non-payment of the ordered security for costs.
- (iii) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.
- (iv) Cost of this action is summarily assessed at \$1,000 and to be paid within 14 days.
- (v) The case will now be scheduled for further directions accordingly.

DATED at SUVA THIS 30<sup>th</sup> DAY OF JULY 2018



  
.....  
Master  
MR VISHWA DATT SHARMA

cc. *Singh & Singh Lawyers, Suva*  
*Sherani & Company, Suva*