

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 74 of 2020

BETWEEN: **CREDIT CORPORATION (FIJI) PTE LIMITED** a limited liability company corporate having its registered office at Credit House, 10 Gorrie Street, Suva, Fiji Islands.

PLAINTIFF

AND: **METAL SAFEWAY ENGINEERING & CHEMICAL SUPPLIES PTE LIMITED** a limited liability company having its registered office at Lot 7, Reservoir Road, Warehouse No. 2, Suva in the Republic of Fiji Island.

FIRST DEFENDANT

AND: **ILISAPECI TAKAYAWA** of Kelekana Settlement, Lami in the Republic of Fiji Island and **SHAILESH NARAIN** of Lot 22 Ram Hara Street, Kinoya, in the Republic of Fiji Island, both Company directors..

SECOND DEFENDANT

BEFORE: **Honorable Mr. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Tuitoga T** - for the Plaintiff
Mr. Chand A. - for the 1st Defendant and 2nd named 2nd Defendant

DATE OF DECISION: **14th December, 2020 9.30am**

DECISION

INTRODUCTION

[1] The Plaintiff filed Inter- Parte notice of motion on 25th February, 2020 and sought for the following relief:

(a) *The Plaintiff and/or its servants/agents/employees/bailiffs take immediate possession of the following vehicle together with all the other parts/tools and or accessories with the assistance to Police and/or the Land Transport Authority Officers: -*

- *One Only New Nissan X-Trail Registration No. JT474
(with Engine No. MR20373819C and Chassis No. JN1JANT32Z0011579).*

(b) *An Order requiring the Defendants whether by themselves, their servants and/or agents to immediately release the custody and possession of the following vehicle together with all the other parts/tools and/or accessories to the Plaintiff and/or its servants /agents/ employees/bailiffs:*

- *One Only New Nissan X-Trail Registration No. JT474
(with Engine No. MR20373819C and Chassis No. JN1JANT32Z0011579)*

(c) *An Injunction restraining the Defendants whether by themselves, their servants and/or agents from interfering with or obstructing or stopping the Plaintiff and/or their servants/agents/employees/bailiffs from taking possession and custody of the following vehicle together with all other arts/tools and/or accessories:*

- *One Only New Nissan X-Trail Registration No. JT474
(with Engine No. MR20373819C and Chassis No. JN1JANT32Z0011579)*

(d) *That the Defendants whether by themselves, their servants and/or agents be restrained from interfering with the Plaintiff's possession and disposal of the following vehicle together with all the other parts/tools and/or accessories:*

- *One Only New Nissan X-Trail Registration No. JT474
(with Engine No. MR20373819C and Chassis No. JN1JANT32Z0011579)*

(e) *That the Plaintiff dispose the following vehicles together with all the other parts/tools and/or accessories in accordance with the Bill of Sale dated 23rd October 2018 respectively upon repossession:*

- *One Only New Nissan X-Trail Registration No. JT474
(with Engine No. MR20373819C and Chassis No. JN1JANT32Z0011579)*

(f) *An Order that the Police and/or Land transport Authority Officers assist the Plaintiff in enforcing the above Orders and/or to maintain peace; and*

(g) *Costs*

(h) *Such further or other relief as the Court may deem just.*

[2] This application is supported by an affidavit deposed by Ranga Naidu on 20th February 2020 and was assigned with a returnable date of 16th March 2020.

- [3] The Affidavit of Service filed herein confirms service has been effected on the Defendants.
- [4] Amrit Chand Lawyers appeared for the 1st and 2nd Named 2nd Defendant on 16th March 2020. These Defendants were granted 14 days' time to file and serve their Affidavit Response while the Plaintiff was granted 14 days to file and serve any Reply Affidavit.
- [5] However, the Defendants failed to file any Response Affidavits and/or Affidavits in Opposition to counter the orders sought in the Plaintiff's Notice of Motion.
- [6] Due to Covid 19 and in all fairness, Amrit Chand Lawyers was served with Court's Notice of Adjournment of hearing, notifying him of the subsequent adjournment date of 29th June 2020.
- [7] However, Mr. Chand appeared in Court on 04th June 2020 and informed court that the returnable date on the Notice appeared as 04th June 2020 and not 29th June 2020. The Court then adjourned the matter to 29th June 2020 giving Mr. Chand once again the liberty to file and serve his affidavit in opposition.
- [8] The Defendants did not take the advantage of the liberty given and thus again failed to file and serve any affidavit in opposition. Further, Mr. Chand did not appear as well. The matter was adjourned to 06th July 2020 for written submission to be filed.
- [9] On 06th July 2020, Mr. Chand was present and sought time till 07th July 2020 to file and serve his Affidavit Response. There was no formal application filed by counsel seeking further extension of time to file his affidavit response. The Plaintiff had by now filed its written submissions and for the court to make a decision on the motion filed on 25th February, 2020. The matter was stood down for both Counsels to discuss.
- [10] After the court resumed, the Plaintiff's Counsel still objected to Mr. Chand's application to be granted further time to file and serve his Affidavit Response. Mr. Chand insisted that his clients were opposing the Plaintiff's application.
- [11] The Court adjourned the matter for Decision to 27th July 2020 @ 9.30 am. The decision of the court was not ready and therefore the matter was adjourned for delivery of decision on notice.

ANALYSIS AND DETERMINATION

- [12] There are **two issues** that this Court needs to determine now-
- (i) **Whether 1st Defendant and 2nd named 2nd Defendants be granted further time to file and serve his Response Affidavits? AND/OR**
 - (ii) **Whether this court should proceed to deliver its decision on the orders sought by the Plaintiff on the written submissions in terms of the notice of motion file don 25th February, 2020.**

- [13] The Counsel representing the 1st Defendant and the 2nd named 2nd Defendant was fully aware of the Plaintiff's application seeking for certain restraining orders. Firstly, he appeared and represented them on 16th March 2020 and sought for 14 days to file and serve the Response Affidavit.
- [14] The Defendants failed and still have made no formal application apart from the oral application, to seek the extension or further time to file and serve the Response Affidavit. Counsel was already given extension of time and liberty on 16th March 2020 and, 04th June 2020 to file and serve his Response Affidavit which he had failed to do so for the best reasons known to him.
- [15] However, the counsel comes to Court on 06th July 2020 when the Plaintiff's application was scheduled to be heard on the written submissions. The counsel sought for an extension of further time till 07th July 2020 to file and serve his Response Affidavit. The Plaintiff's Counsel objected to the grant of extension of time and asked Court to deliberate on the application.
- [16] Bearing in mind that Mr. Amrit Chand Lawyers has failed to comply with the directions that he had earlier sought and due to his noncompliance, this Court has no alternative but to decline his oral application seeking further time to file and serve his Response Affidavit.
- [17] The Plaintiff is now seeking an order for *inter alia* delivery of possession of the Vehicle from the Defendants. The right to possession arises because of the default in repayment to the Plaintiff. The Plaintiff is proceeding to exercise its powers under the Bill of Sale.
- [18] The Plaintiff's contention is that further of and its failure or refusal to hand over possession of the Vehicle to the Plaintiff is unlawful as the Plaintiff has the legal right to possession under the said Bill of Sale.
- [19] The Plaintiff submitted that if it is not able to repossess the Vehicle, the chances of recovering money from the Defendants is very little taking into account the Defendants' account history with the Plaintiff and its inability to make repayments. The Plaintiff believes that the Defendants are not in the position to pay damages to the Plaintiff.
- [20] Submitted that it is afraid that unless the Court assists, its security being the Vehicle may be at risk and its value would diminish substantially.
- [21] Further, any delay will result in an increase in liability by way of interest and cost and will seriously prejudice the financial interest of the Plaintiff. It is in the interest of the Plaintiff and the Defendants that the Defendants deliver possession of the Vehicle to the Plaintiff forthwith to allow the Plaintiff to well it and recover part of the debt owed by the Defendant.
- [22] On 8th October 2018, the Plaintiff agreed to offer to the First Defendant a loan of \$54,944.00 plus pre-determined interest of \$19,230.40 for purchase of a brand new Nissan X-Trail Registration No. JT474 for business use on the terms and conditions set out in its

letter of offer which was accepted by the Defendants accepted the terms of the offer by countersigning the letter of offer on 11th October 2018 (see annexure RN1 of the Supporting Affidavit).

[23] The First Defendant executed a Bill of Sale in favor of the Plaintiff over the Vehicle by way of security for the Loan (see annexure RN1 of the Supporting Affidavit).

[24] A Personal Guarantee also given by the Second Defendants - Shailesh Narain and Ilisapeci Takayawa for the Loan provided to the First Defendant (annexure RN1 of the Supporting Affidavit refers).

[25] The First Defendant defaulted in its obligations under the Bill of Sale and breached the Bill of Sale conditions with the Plaintiff.

[26] The First Defendant's Account was in arrears since December 2018.

[27] The Plaintiff issued 3 Default Notices between February 2019 and November 2019 to the First Defendant to update the Account and clear the arrears. The Default Notice stated the amount of the instalments due and requiring the said amounts to be paid to the Plaintiff within the time stated.

[28] The last payment the Plaintiff received from the First Defendant was on 17th October 2019 in the sum of \$5,000.00 and thereafter no payments have been made till to date.

[29] Despite the issuance of the Default Notices, the First Defendant continued to deliberately default in its payments. As a result, the Plaintiff became entitled to exercise its rights over the security -being the Vehicle. 3 Repossession Notices were issued (7th August 2019, 27th September 2019 and 25th November 2019) against the First Defendant.

[30] Despite several attempts, the Plaintiff's bailiff has not been able to recover possession of the Vehicle.

Undertaking as to Damages

[31] The Plaintiff's application seeking orders in terms of the Notice of Motion were heard unopposed since no Response Affidavit and/or formal Affidavit of Opposition was filed, although the Defendants were given further extension of time to do so, they had failed to do so.

The Plaintiff has provided the relevant undertaking as to damages at paragraph 26 and annexure RN6 of the Affidavit in Support deposited by Ranga Naidu refers.

Case Laws

- [32] In *Credit Corporation (Fiji) Limited v Mohammed Imran Qamer* - High Court Civil Action No. 89 of 2013, Justice Deepthi Amartunga granted similar orders *ex parte* in fairly identical circumstances on 19th April 2013 (**Tab 2 refers**).
- [33] In *Credit Corporation (Fiji) Limited v Genesi Asset Management (Fiji) Limited* - High Court Civil Action No. 284 of 2014, Justice Mayadunne Corea granted similar repossession orders *ex parte* on 20th October 2013 (**Tab 3 refers**).
- [34] In *Dominion Finance Limited v Mohammed Shameem Ahmed* - High Court Civil Action No. 239 of 2018, Justice A L B Brito-Mutunayagam granted a repossession order *ex parte* on 28th September 2018 (**Tab 4 refers**).

Conclusion

- [35] The Defendant's have failed to appear and/ or file their respective affidavits opposing the Plaintiff's application and to appear in this case despite being given several opportunities to do so. In doing so, they have put this court into extreme inconvenient. Thus, delaying the matter followed no valid reason rather failing to file any response affidavit opposing the application.
- [36] Written submission in the matter was already filed when counsel representing the first honesty 1st and 2nd named second Defendant's appeared on 6th July, 2020 and sought for further time again to file its affidavit response.
- [37] On the failure of the Defence counsel's filing any Affidavit Response and/ or file formal application seeking further extension of time and bearing in mind that the Plaintiff's had gone a further step into the proceedings to furnish this court with its written submissions, in the instance, I am left with no alternative but to refuse the oral application of the Defence counsel seeking extension of time to file Affidavit response.
- [38] On the perusal of the Plaintiff's affidavit coupled with the written submissions, it is only appropriate that I accessed to the grand of orders sought in the Plaintiff's Notice of Motion filed on 25th of February, 2020 from (a) -(f) inclusive and as reflected in my decision hereinabove at paragraph 1 (a) - (f) inclusive accordingly.

Costs

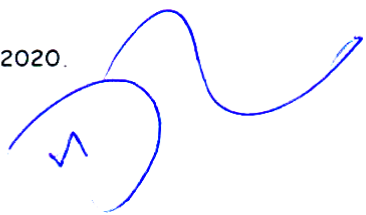
- [39] The Plaintiff is entitle to costs at the discretion of this court
- [40] The Defendant's conduct was reprehensible. They have failed to appear either in person or by counsel on occasions of returnable court dates. Further, they have failed to file and serve any affidavit response. Thus, delaying the proceedings unnecessarily.
- [41] I award costs to the Plaintiff against the 1st and 2nd named second Defendant's summarily accessed at \$500 each to be paid within 14 day's time frame.

Orders:

- i. The 1st and 2nd named second defendant's oral application by counsel seeking further extension of time to file response affidavit is hereby refused;
- ii. I grant the orders in terms of the notice of motion filed on 25th February, 2020 and as it appears in my decision hereinabove at paragraph (1) (a) - (f) inclusive accordingly;
- iii. The impending substantive writ of summons to take its normal course of action in terms of the High Court Rules 1988 filed herein accordingly;
- iv. There will be an order for costs summarily assessed against the 1st and 2nd named second Defendants at \$500 each to be paid within 14 days time frame.

Dated at Suva this 14th day of December, 2020.




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Vishwa Datt Sharma
Judge

cc: Credit Corporation Fiji (PTE) Limited (Haniff & Tuitoga Lawyers, Suva)
: Amrit Chand Lawyers