

IN THE HIGH COURT OF FIJI  
AT SUVA  
COMPANIES JURISDICTION

Companies Action No. HBC 364 of 2017

IN THE MATTER of the Companies  
Act 2015

AND

IN THE MATTER of an  
Application by the Plaintiff's to have  
the register of members of Nair's  
Transport Co. Ltd (the "Company")  
rectified and other reliefs.

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**BETWEEN:** PUSHPA DEVI of Lot 4 Manuka Street, Nakasi Park Estate, Domestic Duties as Executrix and Trustee  
of the ESTATE OF NARAYAN NAIR aka NARAIN NAIR.

FIRST PLAINTIFF

**AND:** AVISHESH NAVNIT NAIR of Lot 4 Manuka Street, Nakasi Park Estate, Clerk as Executor and  
Trustee of the ESTATE OF NARAYAN NAIR aka NARAIN NAIR.

SECOND PLAINTIFF

**AND:** WASU DEWAN NAIR aka VASU DEWAN NAIR aka BASUDEWAN NAIR of 5987 Leonardo  
Way, Elk Grove, CA 95757, Retired Machine Operator.

THIRD PLAINTIFF

**AND:** NARAINI NAIR of Vitogo, Lautoka, Domestic Duties.

FOURTH PLAINTIFF

**AND:** NAIR'S TRANSPORT CO. LTD a limited liability company having its registered office at Lot 81, 9  
Miles, Nasinu (alongside Kings Road - Wainibuku Road Junction).

FIRST DEFENDANT

**AND:** KUNJAN NAIR of Lot 81, Wainibuku Road, 9 Miles, Nasinu, Company Director.

SECOND DEFENDANT

**AND:** VINOD NAIR of 1 Corin Street, Manurewa, Auckland, New Zealand.

THIRD DEFENDANT

AND: SARITA DEVI NAIR of Lot 81, Wainibuku Road, 9 Miles, Nasinu, Domestic Duties as the Trustee of the ESTATE OF SARADA NAIR aka SHARDA DEVI NAIR AKA SARDA DEVI NAIR.

FOURTH DEFENDANT

AND: KUNJAN NAIR of Lot 81, Wainibuku Road, 9 Miles, Nasinu, Company Director as the Trustee of the ESTATE OF SARADA NAIR aka SHARDA DEVI NAIR AKA SARDA DEVI NAIR.

FIFTH DEFENDANT

BEFORE: Honourable Justice Vishwa Datt Sharma

COUNSEL: Mr. Singh V. - for the Plaintiff  
Ms. Sharma N. with Nair D. - for 1<sup>st</sup>, 2<sup>nd</sup> & 5<sup>th</sup> Defendants  
Mr. Pillai M. - for 3<sup>rd</sup> Defendant  
Mr. Nand A. - for 4<sup>th</sup> Defendant

DATE OF DECISION: 18<sup>th</sup> June 2019 @ 9.30 am

## DECISION

[Plaintiffs' Originating Summons seeking an Order for rectification of register and other reliefs together with Defendants' Striking Out application]

## INTRODUCTION

1. There are two applications impending before Court for hearing and determination.
2. The Plaintiffs filed an **Originating Summons** on 22<sup>nd</sup> February 2018 and sought for the following relief:
  - A. That the register of members of the First Defendant be rectified to the following:
    - (i) 1 share to Kunjan Nair;
    - (ii) 1 share to Vinod Nair;
    - (i) 1 share to Naraini Nair;
    - (ii) 1 share to Vasu Dewan Nair;
    - (iii) 1 share to the estate of Sarda Devi Nair;
    - (iv) 1 share to the estate of Narayan Nair;
    - (v) 1 share to the estate of Rajeshwar Nair.
  - B. A declaration that the purported resolution of directors of the First Defendant dated 1<sup>st</sup> August 2016 is null and void and contrary to the Articles of Association of the First Defendant.
  - C. A declaration that the purported resolution of directors of the First Defendant dated 22<sup>nd</sup> April 2016 is null and void and contrary to the Articles of Association of the First Defendant.
  - D. A declaration that the allotment of shares of the First Defendant on or about 6<sup>th</sup> May 2015 is null and void and contrary to the Articles of Association of the First Defendant.
  - E. A declaration that the Form A11 dated 30 January 2017 is null and void and filed contrary to the Articles of Association of the First Defendant.
  - F. An order that the Defendants provide the Plaintiffs access to the First Defendants:
    - (a) Members register;
    - (b) Minutes of Annual General Meetings held from 1<sup>st</sup> January 2002;
    - (c) Financial books and/or statements from 1<sup>st</sup> January 2002.
  - G. Such or other relief as this Honourable Court deems fit and proper.
  - H. Costs of this action.

## ON THE GROUNDS:

- A. The First and Second Plaintiffs are the Executors and Trustees of the Estate of Narayan Nair and two of the persons entitled to share in his estate as beneficiaries. Narayan Nair was a shareholder in the First Defendant.
- B. The Third and Fourth Plaintiffs are shareholders in the First Defendant.

- C. The shareholding and capital of the First Defendant was at all relevant times \$200,000.00 made up of 200,000 ordinary shares of \$1.00 each with 7 issued shares:
- (i) 1 share to Kunjan Nair;
  - (ii) 1 share to Vinod Nair;
  - (iii) 1 share to Naraini Nair;
  - (iv) 1 share to Vasu Dewan Nair;
  - (v) 1 share to the estate of Sarda Devi Nair;
  - (vi) 1 share to the estate of Narayan Nair;
  - (vii) 1 share to the estate of Rajeshwar Nair;
- D. Kunjan Nair, the Second Defendant, unilaterally acted in changing the shareholding of the First Defendant and diluting the interest of the Plaintiffs and other shareholders in breach of the Articles of Association of the First Defendant.
- E. Kunjan Nair, the Second Defendant, unilaterally acted in changing the shareholding of the First Defendant and removing the interest of the Plaintiffs and other shareholders in breach of the Articles of the First Defendant.
- F. Section 87 of the Companies Act 2015 empowers the Court to order the correction of the register of the First Defendant.
- G. Section 176 and 177 of the Companies Act 2015 empowers the Court to grant relief in the event of oppression against the Plaintiffs.
- H. The Second Defendants conduct in managing the affairs of the First Defendant is oppressive towards the Plaintiffs.
- I. Further grounds as appear in the affidavit filed on behalf of the Plaintiffs in support of the Originating Summons.
3. Subsequent to the Plaintiffs substantive Originating Summons, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed an Amended Summons to strike out the Plaintiffs action and sought for the following Orders -
- (i) This action be wholly struck out.
  - (ii) The within named Plaintiffs pays costs of this application to the First, Second, Fourth and Fifth Defendants.

**ON THE GROUNDS THAT:**

- (a) The claim is time barred under Section 4(1)(a) of the Limitation Act.
- (b) Discloses no reasonable cause of action against the Defendants.
- (c) The claim is frivolous and vexatious.
- (d) The claim will prejudice, embarrass or delay the fair trial of the action in view of the inordinate delay in bringing this action.
- (e) The claim is an abuse of process.

4. The Strike Out Application is filed pursuant to Order 18 Rule 18(1)(a)(b)(c) and (d) of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable Court.
5. The Plaintiffs and the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants to the proceedings furnished Court with written and oral submissions. However, remaining Defendants made oral submissions accordingly.

Cause of Action

6. The Defendants contention is that at the time of the incorporation of the company, both shareholders Kunjan Nair and Vinod Nair (2<sup>nd</sup> and 3<sup>rd</sup> Defendants) were not acting as the Trustees of the Estate of Raghwan. Therefore, in absence of any evidence to the contrary, the Plaintiffs do not have any legitimate claim that they had inherited beneficial interest in the company through the estate of Raghwan Nair in terms of Succession, Probate and Administration Act.

However, the Plaintiffs contention is that the interests of the Plaintiffs as shareholder and legal representative of the shareholders is explained in the Plaintiffs Affidavits with documents evidencing the shareholding. Therefore, this allows the Plaintiff to make the current application. Kunjan Nair cannot unilaterally deprive the other shareholders of their shareholding and then also say that because they have been deprived they cannot make an application to have the register corrected. Such a position is nonsensical. Hence, there is a good cause of action for which reasons the claim against the Defendants for rectification of the register should be allowed.

Time barred

7. The Defendants contention is that the Plaintiffs action in time barred since no action was filed to challenge the initial shareholding of the company. Hence, time barred and no cause of action.

However, the Plaintiffs contention is otherwise.

Plaintiffs Right to Access Register and other Records

8. The Defendants submission is that the right to access the records of the 1<sup>st</sup> Defendant is with the members of the company. The 1<sup>st</sup>, 2<sup>nd</sup> Defendants are acting as Trustees of the late Narayan Nair who was a member of the company and appointed as one of the Directors. Upon his demise the appointment was rescinded but during his lifetime he was aware of the information in the register and did not challenge the same.

However, the Plaintiffs submitted that the Affidavit evidence clearly demonstrates that the claim against the Defendants for rectification of the register of the 1<sup>st</sup> Defendant and ancillary Orders should be made.

Whether 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs have a Legitimate Claim

9. The Defendants contention is that there has not been any evidence adduced to show that the deceased persons were registered as shareholders in the company. The Plaintiffs are relying upon the erroneous annual returns that had been rectified by the filing of the amended return A11.

However, the Plaintiffs submitted that Vinod Nair has given evidence as a Defendant confirming the cancellation of the share issues at the time of the incorporation of the company. The Plaintiffs were then issued shares and evidence of this has been provided in the form of annual returns signed by Kunjan Nair and other documents.

10. The Plaintiffs substantive Originating Summons is seeking for an Order for the rectification of the register together with other relief as stated hereinabove.
11. The fact of the matter is that the Plaintiffs are asking this Court to rectify the register to reflect the following share structure-
  - (i) 1 share to Kunjan Nair;
  - (ii) 1 share to Vinod Nair;
  - (iii) 1 share to Naraini Nair;
  - (iv) 1 share to Vasu Dewan Nair;
  - (v) 1 share to the estate of Sarda Devi Nair;
  - (vi) 1 share to the estate of Narayan Nair;
  - (vii) 1 share to the estate of Rajeshwar Nair;
12. The Plaintiffs claim hereinabove hinges on the premise in terms of the annual returns and copies of the share certificates which has been disputed by the Defendants as erroneous, mistake, misleading and/or fabricated.
13. The Plaintiffs Originating Summons before Court is also seeking this Court to grant the relief pursuant to Section 176 and 177 of the Companies Act 2015 which deals with the grounds for Court Order and the Orders that the Court is empowered to make.
14. The purpose of Sections 176 and 177 hereinabove provides that only a member of the company or a person to whom the share has been transmitted by Will or otherwise may invoke these Sections of the Act.
15. In the Plaintiffs case, it has not been fully substantiated whether any of them are members of the company and the deceased persons on whose estate the Trustees are purporting to act did not bequeath in the Will any share in the company.
16. The Defendants do not dispute the fact that the Court is empowered or has the Jurisdiction to issue Orders for the rectification of the register to reflect the share restructure as set out at paragraph A of the Plaintiffs Originating Summons.  
However, the Plaintiffs have to satisfy to this Court that there was a resolution that had restructured the shareholding from the initial allotment of 50 shares each issued to Vinod Nair and Kunjan Nair.

17. Taking into consideration the Defendants Striking Out application coupled with the Orders sought on the Plaintiffs Originating Summons together with all above, I find that there are triable issues which ought to be determined by witness evidence.  
Affidavit evidence filed herein somewhat shows that a further investigation of matters are required in terms of the evidence in order to reveal all the facts akin to the impending substantive issue.  
The matter currently before this court needs to be determined in terms of merits.
18. The parties to the proceedings will have an opportunity to put their case to the witnesses and carry out the respective cross and re-examination of the witnesses in order to illicit the facts. However, they wish to have the conduct of their case.
19. In conclusion-
- (i) The Defendants Striking Out application fails and is accordingly dismissed.
  - (ii) However, the Plaintiffs Originating Summons is now converted into a Writ action in terms of *Order 28 Rule 9 of the High Court Rules 1988*.
  - (iii) Further directions in the matter will be made on 18<sup>th</sup> June 2020.

#### ORDERS

- (a) The Defendants Striking Out application is dismissed.
- (b) The Plaintiffs Originating Summons is now converted to the Writ action.
- (c) Each party to bear their own cost.
- (d) The Court to make further directions for compliance by parties to the proceedings.

Dated at Suva this 18<sup>th</sup> Day of JUNE, 2020.



  
Vishwa Datt Sharma  
Judge

cc: Parshotam Lawyers, Suva  
Nilesh Sharma Lawyers, Suva.  
Kohli & Singh Lawyers, Suva.  
Moharsh Pillai & Associates, Suva.