

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 190 of 2021**

**IN THE MATTER** of Mortgage, No: 877652 given by  
**AVITESH NARAYAN SHARMA T/A VENUS 3 MINI**  
**MART** of 35 Drasa Avenue, Lautoka over the commercial  
property comprised in State Lease No. 812392 in favour of the  
**BANK OF BARODA**

**BETWEEN:**

**BANK OF BARODA** a Government of India Undertaking  
registered in Fiji under section 325 of the Companies Act 216  
and carrying on its banking business in the Republic of Fiji

**PLAINTIFF**

**AND:**

**AVITESH NARAYAN SHARMA T/A VENUS 3 MINI**  
**MART** of 35 Drasa Avenue, Lautoka

**DEFENDANT**

Before : Master U.L. Mohamed Azhar

Counsels : Mr. R. Singh with A. Swamy for the Plaintiff  
Mr. J. Dinati for the Defendant

Date of Judgment : 25.11.2021

**JUDGMENT**

01. The plaintiff Bank took out the originating summons pursuant to Order 88 of the High Court Rules against the defendant. The summons is supported by an affidavit sworn by Dharmendra Dipak Nand - the branch manager of the plaintiff company and seeks the following orders:

1. **THAT** the defendant and their families and or their agents to deliver the vacant possession of all that property comprised and described in State Lease No. 812392 known as Lautoka Township, Lot 6, ND 2827-Section 17, having an area of 761m<sup>2</sup> in the island of Vitilevu and District of Vuda, Ba together with all the improvements thereon situated in the

District of Vuda, Ba and Island of Viti Levu under Order 88 of the High Court Rules.

2. **AN** injunction restraining the Defendants and/or their servants and/or their agents from interfering or removing the improvements on the said property in any way so as to deplete its value.
  3. **THAT** a police assistance to be provided for the execution of the vacant possession order against the Defendant.
  4. **SUCH** further or other relief as may seem just and equitable to this Honorable Court.
  5. **COSTS** of this action.
02. The summons was served on the defendant and the affidavit of service was filed for the proof of service. Thereafter, the plaintiff's solicitor filed the Notice of Appointment to hear the Originating Summons pursuant to Order 28 rule 3 of the High Court Rules. Upon service of that Notice, the defendant, appearing in person, filed his affidavit in opposition. In the meantime, the plaintiff filed a supplementary affidavit in support of the summons, few days before the date fixed for hearing. At hearing of the summons, it was found by the court that, the defendant did not have an opportunity to respond to the supplementary affidavit filed by the plaintiff. The court then vacated the hearing and allowed the defendant to file his affidavit in opposition and also directed the plaintiff to file the affidavit in reply, if it was necessary.
03. The parties complied with the directions of the court and the affidavits were filed accordingly. At hearing of the summons, counsels for both the plaintiff and the defendant made oral submission and the counsel for the plaintiff tendered the written submission too.
04. The Order 88 of the High Court Rules provides for the procedure for the mortgage actions. It applies to any action by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the reliefs mentioned in sub rule 1 (1). If the plaintiff is the mortgagee and claims delivery of possession, in an originating summons, the supporting affidavit must comply with certain requirements mentioned in rule 3 of the Order 88, which reads that:
- (2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.
  - (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of-
    - (a) the amount of the advance;
    - (b) the amount of the periodic payments required to be made;

(c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under that mortgage.

(4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property.

05. The supporting affidavit sworn by the branch manager of the plaintiff clearly set out the grounds on which the current application was made. The defendant being the registered proprietor of the subject property mortgaged it to the plaintiff to secure repayment of all loans, advances, charges, interest and other banking accommodation. The copy of the duly registered Mortgage No. 877652 is exhibited with the supporting affidavit marking as "C". The affidavit also provides the details of the amount advanced and the repayment scheme. Accordingly, a sum of \$ 2,790,666.34 was advanced to the defendant on or about 21<sup>st</sup> March 2017 at the interest rate of 10% per annum. The defendant was to make monthly repayment in sum of \$ 12,275.00 to the plaintiff. The defendant defaulted in payment and the plaintiff through its solicitors sent Notice of Default/Demand on 23.01.2020 to the defendant. Thereafter, on 15.04.2020 the plaintiff issued a Mortgagee's Sale Notice on the defendant. Both notices were acknowledged by the defendant and copies of them are exhibited as "D" and "E" respectively. The defendant failed and or neglected to clear the arrears and pay the amount remaining due under the Mortgage. As at 26.08.2021, the monthly repayment arrears and the amount due under the Mortgage was a sum of 1,809,861.10. This led the plaintiff to commence this proceeding by way of an originating summons, seeking delivery of possession of the subject property. The supporting affidavit further highlighted the provisions in clause 5.2 of the Mortgage which allow the plaintiff to take possession of the subject property in case of default by the defendant.
06. The supplementary affidavit filed on behalf of the plaintiff, among other things, provides the updated loan statement as at 08<sup>th</sup> September 2021. Accordingly, the total amount due to the plaintiff under the Mortgage was 2,084,645.44.
07. The defendant, in his first affidavit filed in opposition of the supporting affidavit, admitted that he defaulted in repayment and also agreed to the total amount due under the Mortgage as claimed in the supporting affidavit. Conversely, he disputed updated total amount claimed in the supplementary affidavit filed on behalf of the plaintiff, whilst admitting his default. The defence, put forward by the defendant in his both affidavits, is that, the employees of the plaintiff had colluded and fraudulently embezzled approximated a sum of \$ 718,132.15 from his account maintained at plaintiff bank. He further claimed that, the deponent of the affidavits of the plaintiff and those in the headquarters of plaintiff knew about this embezzlement.
08. It has been a long-established right in common law that, a mortgagee has proprietary right as the owner of the legal estate to go into the possession of the mortgaged property, at any time after the mortgage is executed unless such right is limited either by a contract or a statute. There is number of cases which established this right. In

**Fourmaids, Ltd. v. Dudley Marshal (Properties), Ltd** (1957) 2 All ER 35 Harman, J held at page 36 that:

The right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right. He has the right because he has a legal term of years in the property. If there is an attornment clause, he must give notice. If there is a provision expressed or to be implied that, so long as certain payments are made he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.

09. Goff L.J. in **Western Bank Ltd. v. Schindler** (1977) 1 Ch. 1 cited the wording of Harman J in the above matter, and said of a mortgagee's right to possession of the mortgaged property at p.20 as follows:

"It has for a very long time been established law that a mortgagee has a proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property. This right has been unequivocally recognised in a number of modern cases: see, for example, *Four Maids Ltd. v. Dudley Marshall (Properties Ltd.)* (1957) Ch. 317. ... It has nothing to do with default: See per Harman J. in the *Four-Maids* case

10. This common law right has now been incorporated into the statutes in many jurisdictions and also has become a standard clause in the Mortgage Bond signed by the mortgagors and mortgagees. Accordingly, the statutes and the Mortgage Bonds now permit the mortgagees to enter into possession of mortgaged property upon failure of the mortgagor to repay the money so secured by mortgage.
11. The section 75 of the Property Law Act No. 18 of 1971 [Cap130] gives the power to the mortgagee to enter into possession of the mortgaged property upon default in payment of the mortgage money or any part thereof. The said section reads:

*Mortgagee may, after default, enter into possession*

75. A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may distrain upon the occupier or tenant of the said land for the rent then due.

12. The plaintiff and the defendant entered into the Mortgage No. 877652 on 03<sup>rd</sup> June 2019. A copy of the said Mortgage is marked as "C" and annexed with the supporting affidavit. A true copy of the same, certified by the Registrar of Titles, is marked as "C" again and annexed with the supplementary affidavit filed on behalf of the plaintiff. In addition, the counsel for the plaintiff, in compliance with the provisions of Order 88 rule 3, produced the original Mortgage at hearing of the summons. The clause 5.2 of the Mortgage provides for various consequences of default. Among those sub-clauses, (a), (b) and (f) are important for determination of this summons. Those sub-clauses are:

## 5.2 Consequences of default

If any event of default occurs, you are in default under each agreement between you and us and we may:

- (a) **require that you immediately pay us the secured money; and**
- (b) **take or give up possession (as often as we think necessary) of property and of any rents and profits of the property; and**
- (c) .....
- (d) .....
- (e) .....
- (f) **exercise all other rights, powers and remedies that a mortgagee or owner has at law in relation to the property.**

13. The plaintiff and the defendant by their covenants in Clause 5.2 conferred on the plaintiff the power to demand for immediate payment of money; and to take possession of the mortgaged property and to exercise all rights, powers and remedies that a mortgagee has at law. The court should enforce these positive covenants made on voluntary agreement between the parties. In addition, the plaintiff and the defendant agreed in Clause 12.3 that, the plaintiff has all the rights, powers and remedies available to the plaintiff as mortgagee under the Property Law Act Cap 130, subject to the certain limitations mentioned therein. The rights of the plaintiff as mortgagee to enter into possession of the subject property under section 75 of the Property Law Act Cap 130 is affected by the limitations in Clause 12.3 of the Mortgage. It clearly shows that, the plaintiff as the mortgagee in this matter, has the contractual power under Clause 5.2 of the Mortgage to take possession of the subject property; the statutory powers under section 75 of the Property Law Act Cap 13; and on top them, has the long-established proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property.

14. In Australia and New Zealand Banking Group Limited v. Amit Kumar and Another [2003] FLR 1, Singh J said at page 3 that:

Hence the mortgagee in the present case has its contractual powers under the mortgage to take proceedings for ejection, the statutory powers under the Property Law Act and its powers under common law to enter into possession. These powers have not been negated by the mortgage. The mortgagee therefore entitled to the possession.

15. Accordingly, there are sufficient reasons for the court to make order on the defendant to deliver the vacant possession of the subject property to the plaintiff in order to enable the latter to recover all the amount due from the defendant. Now I consider whether the defendant has negated any of the rights and powers of the plaintiff as the mortgagee. The first defence of the defendant is that, he disputes the updated amount that is

mentioned in the supplementary affidavit as due to the plaintiff under the Mortgage as at 08<sup>th</sup> September 2021. It must be noted that, the defendant did not dispute total amount claimed in the supporting affidavit to be due to the plaintiff as at 26.08.2021. It is settled law that, the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute. Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 32 states in paragraph 658 that:

**The mortgagee will not be restrained from exercising his power of sale because of the amount is in dispute**, or because the mortgagor has begun a redemption claim, or because the mortgagor objects to the manner in which the sale is being arranged. (Emphasis is added).

16. The main ground or defence of the defendant to oppose the plaintiff's summons for vacant possession of the subject property under the Order 88 is his claim of \$ 718,132.15 alleged to have been embezzled by the employees of the plaintiff bank. His position is that, since the said amount had been embezzled by the employees of the plaintiff as he claimed in both affidavits filed in this matter, he has a valid cross-claim and this led him not to make repayment towards the amount lent to by the plaintiff bank. The claim itself, on its face, is implausible, because his own letter which is marked as "C" and annexed with the affidavit in reply of the plaintiff refutes it. It is a letter of undertaking and indemnity by the defendant addressed to the plaintiff bank. The defendant in that letter has voluntarily and unequivocally stated that though he claimed irregularities in his account against the bank, he found it in order. He further stated that, he did not hold bank or any of its employees liable for his misconception. In addition, he undertook to indemnify the bank and its employees from anything that arises out of his misconception. Having said this in his letter written to the bank on 15.07.2019, the defendant again raised this issue in his both affidavits filed in this matter in this year. This letter not only makes his cross-claim baseless, but also seriously attacks his credibility.
17. Even though his own letter ("C") discredits his own claim, the court should consider as to whether existence of any such cross-claim will defeat the right to possession enjoyed by a mortgagee? The court in **National Westminster Bank PLC v. Skelton and Another** [1993] 1 All ER 242 established the general rule that, a mortgagee under a legal charge is, subject to contractual or statutory limitations, entitled to possession of mortgaged property at any time after the mortgage is executed, and that existence of any counter-claim, even if it exceeds the amount of mortgage debt, would not by itself defeat the right to possession enjoyed by the mortgagee. This is applicable to both where the cross-claim is mere counter-claim, or where it is a cross-claim for unliquidated damages which, if established, would give rise to a right by way of equitable set-off. Slade LJ held at page 249 that:

If then the mortgage does not itself restrict the bank's right to take immediate possession of the property as legal mortgagee, the defendants have to submit and do submit that these rights have been abrogated by virtue of the events alleged in the disputed paragraphs of their pleadings. One formidable obstacle in the way of such submission is the line of authority which clearly establishes the principle that the existence of a cross-claim,

even if it exceeds the amount of mortgage debt, will not by itself defeat a right to possession enjoyed by a legal charge. I refer in particular to decision of Nourse J in *Mobil Oil Co Ltd v Rawlinson* (1981) 43 P &CR 221, the unreported decision of this court in *Barclays Bank plc v Tennet* [1984] CA Transcript 242, and the decision of Mervyn Davies J in *Citibank Trust Ltd v Ayivor* [1987] 3 All ER 241, [1987] 1 WLR 1157.

18. The mortgage in this matter does not restrict the plaintiff bank's right to take immediate possession of the subject property as the legal mortgagee. Therefore, the alleged counter-claim by the defendant will not give any right to him to restrain the plaintiff from taking immediate possession of the subject property, even though his alleged claim is considered to be valid. It is a well-established rule that, if the debt has not been actually paid, the Court will not, at any rate, interfere to deprive the mortgagee of the benefit of his security, unless an equivalent safeguard is provided to him, by bringing in an amount sufficient to meet what is claimed by the mortgagee to be due [see: **Inglis v Commonwealth Trading Bank of Australia** [1972] HCA 74; (1972) 126 CLR 161 (28 April 1972)]. W D Calanchini J (as he then was) held in **Housing Authority v Delana** [2010] FJHC 277; HBC283.2006 (30 April 2010) that:

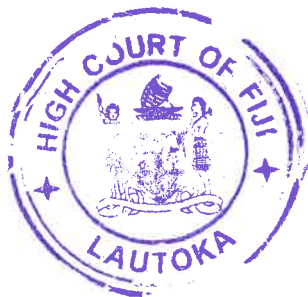
This Court has long held the view that failing payment into Court of the amount sworn by the Mortgagee as due and owing under the Mortgage, no restraint should be placed on the exercise of the Mortgagee's powers of sale under the mortgage (see **Westpac Banking Corporation Ltd -v- Adi Mahesh Prasad** (1999) 45 FLR 1; **NBF Asset Management Bank -v- Kolinio Bulivakanua and Selina Mau Bulibakarua** Civil Action No. 97 of 1999 unreported decision of Byrne J (as he then was) delivered on 30 November 1999; **NBF Asset Management Bank -v- Donald Thomas Pickering and Eileen Pickering** Civil Action No. 170 of 1999 unreported decision of Byrne J (as he then was) delivered on 19 May 2000 and **NBF Asset Management Bank -v- Naipote Vere and Another** Civil Action No. 323 of 2001 delivered 10 November 2003 unreported per Scott J). (Emphasis is original).

19. The defendant neither settled the full amount due under the mortgage, nor did he bring in an amount sufficient to meet what is claimed by the mortgagee to be due. As the result, this court cannot interfere to deprive the plaintiff of the benefits of its security. The plaintiff also moved the court for an order preventing the defendant from removing any improvement to the subject property in a way so as to deplete the value of the property. Buckley LJ in **Western Bank Limited v. Schindler** [1976] 2 All ER 393 said at page 396 that:

A legal mortgagee's right to possession is a common law right which is an incident of his estate in the land. It should not, in my opinion, be lightly treated as abrogated or restricted. Although it is perhaps most commonly exercised as a preliminary step to an exercise of the mortgagee's power of sale, so that the sale may be made with vacant possession, this is not its only value to the mortgagee. The mortgagee may wish to protect his security: see *Ex parte Wickens*<sup>4</sup>. If, for instance, the mortgagor were to vacate the

property, the mortgagee might wish to take possession to protect the place from vandalism. He might wish to take possession for the purpose of carrying out repairs or to prevent waste. Where the contractual date for repayment is so unusually long delayed as it was in this case, a power of this nature to protect his security might well be regarded as of particular value to the mortgagee.

20. The above dictum of Buckley LJ clearly recognizes the right of the mortgagee to protect the security and prevent it from being vandalized and or wasted. The underlying rationale is to maintain the value of the mortgaged property in order to recover all the amount due under the mortgage. The Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 32 states in paragraph 559 that, the power of the mortgagor while in the possession to exercise all the rights of ownership is subject to limitation that, he may not diminish the security so as to render it insufficient. Waste by a mortgagor in possession for example by felling timber or pulling down a house will be restrained by injunction on proof that, the security is being deficient, or after order for foreclosure without such proof. Accordingly, the plaintiff is entitled for an order by this court restraining the defendant and or his family members and or agents and or servants and employees from removing any improvement to the subject property in a way so as to deplete its value.
21. In result, I make the following orders:
- a. the defendant and or his agent and or servant and or all his family members are to deliver the vacant possession of the subject property to the plaintiff immediately,
  - b. the defendant and or his agent and or servant and or all his family members are restrained from removing the improvement of the subject property in a way so as to deplete its value,
  - c. the police assistance is granted for execution of writ and for peaceful handing over of possession of the subject property to the plaintiff, and
  - d. the defendant should pay a summarily assessed cost in sum of \$ 2,000 to the plaintiff within a month from today.



  
**U.L. Mohamed Azhar**  
**Master of the High Court**

**At Lautoka**  
**25.11.2021**