

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 197 of 2021**

**BETWEEN**

**KAMAL CHAND** of Nasau, Nadi,

Joiner.

**PLAINTIFF**

**AND**

**KHEM SINGH** of 20 Johnson Street, Toorak, Suva,

Businessman.

**DEFENDANT**

**Counsel**

: Mr. Chandra V. for the Plaintiff

Mr. Singh K. for the Defendant

**Date of Hearing** : 14<sup>th</sup> June 2022

**Date of Ruling** : 30<sup>th</sup> June 2022

## **RULING**

**(Summary Judgment & Application to Strike out the Defendant's Counter Claim)**

- [1] The Plaintiff on 28.09.2021 filed Writ of Summons and Summons seeking injunctive orders.
- [2] The Defendant filed its Statement of Defence and Counter Claim on 28.10.2021. He also responded to the injunction application.
- [3] Before the hearing and determination of the injunction application, on 12<sup>th</sup> November 2021 the Plaintiff filed this Summons for Summary Judgment and Application to Strike out the Defendant's Counter Claim pursuant to Order 14 Rule 1 and Order 18 Rule 18 of the High Court Rules 1988.
- [4] The Defendant filed the Affidavit in Response and the Plaintiff thereafter filed an Affidavit in Reply.
- [5] Order 14 Rule 1 for Summary Judgment can be invoked in an action made pursuant to the High Court Rules and that the statement of claim has been served on the Defendant and the defendant has given notice of intention to defend the action. The plaintiff on the ground that the defendant has no defence to the claim included in the Writ may apply to the Court for judgment against the defendant.
- [6] The Rule applies to every action begun by Writ other than an action includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment or a claim based on allegation of fraud or any action which Order 86 has application.
- [7] In **Sunila Devi Chandra v Fiji Care Insurance Ltd** (2001) 1 FLR 73 it was stated, the procedure for summary judgment is well established. Plaintiff's claim is duly proved by affidavit evidence and defendant is unable to set up a good defence or raise an issue which ought to be tried. Court has to be mindful that genuine claims are not frustrated by procedure. Here, questions and issues to be tried, such as who

made the decision on overseas medical treatment, and to establish the material facts which the affidavits did not do.

- [8] In **Fiji Development Bank v Inoke Moto, Keresoni Rarawa & Sisiana Mate** [1995] HBC 55/95 it was held that Rules cast onus on Plaintiff to convince the Court that defendant has no fairly arguable defence by verifying the allegations in the statement of claim and oath that he believes defendant has no defence to a claim. If defence is not evident on plaintiff's pleading, defendant must file an affidavit raising issue of fact or law and give reasonable particulars of matters which he claims to be put in issue and does not require findings on disputed facts or ascertainment of further facts. Where defence raises questions of fact on which the outcome of the case may turn, it would not often be right to enter summary judgment.
- [9] The Law on Strike out applications is mentioned in Order 18 Rule 18 of the High Court Rules 1988. The Court at any stage of the proceedings order to be struck out or amended any pleading on the ground that -
- a. It discloses no reasonable cause of action or defence, as the case may be; or
  - b. It is scandalous, frivolous or vexatious; or
  - c. It may prejudice, embarrass or delay the fair trial of the action; or
  - d. It is otherwise an abuse of process of the Court.
- [10] According to the Statement of Claim in 2013 the Defendant approached the Plaintiff to invest in Kanishka Food Pte Ltd (Kanishka Foods) trading as Yellow Chilli which was duly registered, having its registered office at 53, Carnarvon Street, Suva.
- [11] After several negotiations it was agreed by the parties that the Plaintiff to purchase 50% of the shares in Kanishka Foods. They entered in to an agreement on 22.09.2015.
- [12] The Plaintiff says that he carried out works for the improvement of the property and provides capital injections at his own cost approximately worth of \$62,059.16
- [13] Around July 2020 the Defendant's Solicitors wrote to the Plaintiff's Solicitor informing the business problems mainly caused by the Covid 19 Pandemic and suggested to purchase Plaintiff's shares in Kanishka Foods. The Plaintiff rejected the offer.

- [14] Subsequently the Defendant's Solicitors wrote to the Plaintiff's Solicitors informing the advice from the landlord to close Yellow Chilli as there was no contract for renewal and to allow the landlord to carry out the renovations. The Defendant proposed to closing Yellow Chilli and to store the equipment and movables to another secure. After several discussions and meetings the issue remained unresolved.
- [15] In April 2021 the Plaintiff became aware that the Defendant has established a new company under the name of Rajdhani Multicuisine Restaurant Pte Ltd (Rajdhani). The Defendant was the 100% shareholder and operations carried out from the same place as Kanishka Foods registration.
- [16] The Plaintiff's Solicitors requested the Defendant to confirm that the Plaintiff had a beneficial interest in Rajdhani. But this was refused by the Defendant.
- [17] The Defendant states that the Plaintiff approached him to invest as a profit return creditor and he agreed due to the family relationship and the defendant's financial difficulties. He further states that he reluctantly agreed to transfer 50%of shares in Kanishka Foods due to the continued pressure by the Plaintiff. That is for a sum of \$ 40,000. Although the transfer of shares has taken place, the Defendant says that the agreed sum has not been paid to date. Hence there is a counter claim by the Defendant.
- [18] The Defendant says when he informed that the tenancy agreement is about to expire and lack of business the Plaintiff has asked him to close down the business. He says when the Plaintiff refused to inject money in order to keep the business running, he closed the operations and stored the assets of Kanishka Foods in a container until a resolution is arrived between the shareholders.
- [19] The Counsel for the Plaintiff during hearing of this Summons made submissions on the issue of Locus Standi and draw the attention of the Court to sections 176, 177 and 178 of the Companies Act 2015.
- [20] The Court notes the said sections of the Companies Act are there under the 'Member's rights and remedies'. The action before this Court has not been brought against a Company. The Summons filed on 12.11.2021 was pursuant to the High Court Rules and therefore the Court will not consider the submissions made under the Companies Act.

- [21] In order to make a determination on whether to grant a Summary Judgment in favour of the Plaintiff the Court needs to consider whether the Plaintiff has been successful in establishing his claim through affidavit evidence. Further to that the Court needs to be satisfied that the Defendant has no realistic defence which has any prospects of success.
- [22] According to the affidavit evidence of the Plaintiff it is clear that the Plaintiff has 50% shares of Kanishka Foods. The transfer of shares has been done on 28.09.2016. The annexure marked as KC-2 of the Plaintiff's affidavit shows that the transfer consideration of \$40,000.00 'has been already paid or to be paid to the transferor'. The subsequent company search marked as KC-3 shows that the Plaintiff has been appointed as a director on 16.02.2017 and held 50% of shares. The Plaintiff has averred that he has contributed to several improvements of the property in the sum of \$62,059.16. However, the issue of whether he paid \$40,000 to the defendant at the time of the transfer of shares remains disputed.
- [23] The Plaintiff's involvement with the Defendant limits to the affairs of Kanishka Foods. Both Kanishka Foods and Rajdhani operated from the same business location. The Defendant states that the tenancy agreement Kanishka Foods expired on 26.07.2020 and not renewed therefore the business was not in a position to operate. The Defendant's request to the Plaintiff to inject money to keep the business running was turned down by the Plaintiff asking the Defendant to close down the business. On 26.07.2020 the Defendant registered Rajdhani as a private company being the 100% shareholder.
- [24] Since the business operation location of Rajdhani is same as Kanishka Foods the Plaintiff claims that his money was used by the Defendant to improve the property and the business and thereafter allowing the tenancy agreement to lapse in order to move in his new business Rajdhani.
- [25] The Court notes from the affidavit of the Defendant, that the legal entity Kanishka Foods is still in existence and all assets of Yellow Chilli estimated value of \$35,772 VEP has been stored for further adjudication.
- [26] The Plaintiff by bringing this action seeks a declaration by this Court that he has a beneficial interest in Rajdhani and to have an account of statement of accounts of Rajdhani. Further he seeks General and Special damages together with legal costs of this action.

[27] The Court is of the view that the determination on the issues of whether the Plaintiff has a beneficial interest in Rajdhani, whether he can demand for a statement of account of another legal entity (Rajdhani), whether this action was brought against the proper parties and whether the Defendant has valid a counter claim against the Plaintiff, should be done through a proper trial process.

[28] As earlier stated in paragraph 9 the Court may at any stage of the proceedings order to strike out or amend any pleading on four grounds mentioned therein. It is settled law that powers given to the Court under Order 18 rule 18 is discretionary jurisdiction that should be very sparingly exercised only in exceptional cases.

[29] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)** [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held;

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In the case of **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761 it was held:

It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

In **Narawa v Native Land Trust Board** [2003] FJHC 302; HBC0232d.1995s (11 July 2003) the court made the following observations:

In the context of this case I find the following statement of Megarry V.C. in **Gleeson v J. Wippell & Co.** [1971] 1 W.L.R. 510 at 518 apt:

“First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial”.

[30] The Court notes that the Plaintiff had an agreement with the Defendant entered in September 2015 to allow 50% of the shares of the company for a consideration of \$40,000. In 2 (a) of the agreement it states “that the parties agree that the date of the settlement of this agreement will depend on and upon the granting of his bank loan and will be the day of execution of this agreement, hereof as the date mutually agreed between the parties”. In 2(b) it states “Kamal Chand will immediately handover to Khem Singh the full amount agreed with receipts to be sufficient evidence of this transaction and immediate transfer of shares to include Kamal Chand and shareholder to the company”.

[1] According to the hand written amendment under the heading ‘Consideration’ in annexure KC-2, it appears that on 28<sup>th</sup> September 2016 the consideration of \$40,000 remained outstanding.

[31] Therefore if it had been paid as stated by Plaintiff then the Court will have to decide how to interpret these two documents of the Plaintiff. If it wasn’t paid as there were no supporting documentation, stated by the Defendant then the Court will have a factual issue to make a determination. In conclusion the Court is of the view that the counter claim has a triable issue that needs determination.

[32] The Counsel for Plaintiff raised an issue of conflict of interest by the Counsel for the Defendant at the hearing of this summons. The issue was raised without giving proper notice to the other party. This proposition was opposed by the Counsel for the Defendant. The Court would not deal with this statement at this stage, leaving the party to make a formal application if they wish to do so.

[33] For the reasons aforesaid the court makes the following orders.

**ORDERS**

1. The Summons filed 12<sup>th</sup> November 2021 by the Plaintiff seeking Summary Judgment and to Strike out the Defendant's Counterclaim is dismissed and struck out.
2. The Plaintiff is ordered to pay the Defendant \$1000.00 as costs within 14 days of this ruling.



A handwritten signature in blue ink, appearing to be "Yohan Liyanage". The signature is stylized and fluid, written over a horizontal line.

Yohan Liyanage

**JUDGE**

30<sup>th</sup> June 2022