IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 373 OF 2007

BETWEEN	:	**SHARMILA DEVI** of Viseisei Village, Lautoka **PLAINTIFF**
AND	:	**ROHAN PRASAD** of Lautoka City, Lautoka **1ST DEFENDANT**
AND	:	**CHANDRA KUMAR** of Velovelo, Lautoka **2ND DEFENDANT**
AND	:	**SHRI LAKSHMI** Viseisei, Lautoka **3RD DEFENDANT**
BEFORE	:	Mr. Justice Mohamed Mackie- J.
APPEARANCES	:	Mr. P. Chauhan, for the Plaintiff Ms. Radhia, for the 1st & 2nd Defendants
DATE OF DECISION	:	09th September, 2022

RULING

1. The Plaintiff commenced this action by way of her writ of Summons dated and filed on 11th December 2007, together with the Statement of claim, initially against the 1st and the 2nd Defendants, claiming damages on account of libelous, slanderous and defamatory statements, allegedly, made by the Defendants on or about 30th January 2003.

2. Subsequently, by an amended writ and the Statement of claim dated and filed on 17th June 2008, the 3rd Defendant was brought in on the same allegation, against whom a default judgment dated 06th August 2008 was entered. However, summons to set aside the same being filed on 29th January 2009, the impugned judgment against the 3rd Defendant was vacated and accordingly, her statement of defence dated 24th February 2009 was filed on 25th February 2009 by Messrs. Young & Associates.

3. A joint statement of defence dated 25th August 2008 , on behalf of the 1st and 2nd Defendants, also being filed by the same Solicitors on 29th January 2009, the pre-trial formalities also being duly complied with , pursuant to two days trial held on 09th and 11th February 2015, Hon. Lal Abeygunaratne-J, by his judgment dated 25th August 2015 made the following Orders;

a. *Judgment is hereby entered against <u>each</u> of the Defendants severally and jointly to pay the Plaintiff a sum of $20,000.00 together with the interest thereon at the rate of 6% per annum from 30th January 2003 till date of judgment and thereafter together with the same interest of 6% per annum on the aggregate sum of this judgment till payment in full.*
b. *Each of the Defendants to pay costs summarily assessed in a sum of $2000.00 to the Plaintiff.*

4. Subsequently, a Writ of Fieri Facias dated 3rd July 2018 being issued for a total sum of $55,488.06, made of the adjudged sum, the interest and the total costs, certain household goods belonging to the 2nd Defendant were seized by the Sheriff on 16th July 2018 and those goods are said to be still lying under the custody of the Plaintiff's former solicitors, without same being auctioned to recover the amount due.

5. The plaintiff's attempt to recover the due amount through the auctioning of the goods seized has failed. The subsequent attempt to recover by way of a Judgment Debtor Summons (JDS), at the Magistrate's Court of Lautoka, also said to have failed due to the alleged delay in the process.

6. Thus, the plaintiff by way of her Ex-parte Notice Motion dated 10th March 2020, supported by her affidavit sworn on 03rd March 2020, moved for an Order Nisi to impose charge on certain lands owned by the 1st and the 2nd Defendants and same being supported before Hon. A. Stuart –J on 13th March 2020, an Order Nisi on it being entered and, reportedly, served on the 1st and the 2nd Defendants, the same has now been made absolute with effective from 05th August 2020.

7. However, prior to moving further on the aforesaid recovery mechanism, a Means Test hearing being moved for on behalf of the Plaintiff, the 1st and 2nd Defendants, as directed by Hon. Stuart –J on 21st August 2021, have filed their respective Affidavits on 02nd September, 2020, supported by certain documents, declaring their, purported, sources of income and then financial positions of them in terms of their respective bank accounts.

8. Additionally, as per the further direction made by the same judge on 24th November 2020, subsequent to the Mean Test hearing, the 2nd Defendant, having inspected the then conditions of his seized goods, has filed an Affidavit on 23rd February 2021, giving an approximate value thereof as $16,480.00. Accordingly, he has taken up a position that his seized goods should cover the amount that he owes to the Plaintiff.

9. Though, the plaintiff was allowed to file Affidavit in response to the said Affidavits filed by both the Defendants on their respective financial position and the source of income, no such an affidavit was filed by the Plaintiff.

10. As the 1st Defendant had already, admittedly, paid a substantial amount ($18,456.65) in satisfaction of the judgment, only the 2nd Defendant went through the Means Test hearing before Hon. A. Stuart –J on 24t November, 2020.

11. When the matter came up before me for the first time on 17th May 2022, Counsel for the Plaintiff moved for ruling to be pronounced by me relying on the transcripts of the Mean Test hearing held before Stuart –J on 24th November 2020 and considering the written submissions to be filed. Conversely, the junior Counsel for the Defendants moved for a De-Novo hearing before me, which was objected to by the counsel for the Plaintiff. Accordingly, further time was granted to obtain instruction on the necessity for a De-Novo hearing and the matter was adjourned for 6th June 2022.

12. Accordingly, when the matter came up on 06th June 2022, counsel for both parties agreed to have the matter disposed relying on the hearing transcripts dated 24th November 2020 and the written submissions to be filed, instead of going for a De-Novo hearing. Thus, 21 days' time period was given for both the parties to file written submissions and fixed the matter for ruling 27th July 2022.

13. As none of the parties had filed written submissions, within the time period granted, further 21 days' time was granted enabling them to file written submissions and fixed the matter for ruling on 25th August 2022. However, as only the Plaintiff's submissions was filed, just prior to the commencement of the proceedings on 25th August 2022, the court, in fairness to the 1st and 2nd Defendants granted further 7 days' time to file their written submissions and fixed the matter for ruling for today 9th September 2022. But, I find that till the dawn of this day, no written submissions had come in on behalf of the 1st and 2nd Defendants.

14. Accordingly, I pronounce this ruling relying on the contents of the record in relation to matter in hand, particularly, the Affidavits of the Defendants on their purported income and the financial positions, the contents of the transcript of the Mean Test hearing held before Hon. Stuart-J on 24th November 2020 and those in the written submissions filed so far.

15. It is evident from the record as per the transcript dated 24th November 2020 that the 1st Defendant had already deposited a sum of $18,456.65 in satisfaction of the judgment and the balance yet to be recovered jointly and severally from the Defendants was only $36,913.31. It is also on record that the 1st Defendant on 24th November 2020, has undertaken to pay a further sum of $ 9,000.00 on or before 30th November 2020, which I find to have been observed in breach by the 1st Defendant till date.

16. On behalf of the Plaintiff, It is stated that though the judgment binds the 3rd Defendant too, it cannot be implemented against her as her whereabout is not known to the Plaintiff. Accordingly, the Plaintiff moves to execute the same against the 1st and 2nd Defendants since the judgment binds the Defendants jointly and severally.

17. At the Mean Test hearing, the 2nd Defendant has testified under oath before the Court on his purported source of income and his then financial position.

According to the evidence, that has been given by the 2nd Defendant at the Means Test hearing on 24th November 2020, he is a businessman at the age of 55, dealing in Aluminum goods. He continues to engage in the said business by purchasing the

necessary materials on payment of cash. He also owns a Hyundai Carrier Vehicle bearing Registration # IU-797, for which he was making a monthly installment payment of $ 736.70 to the BSP on account of the Bill of Sale.

He has not come out with any other major commitments or liabilities on his earning. According to him, his daughter is married and settled in America. It is he who has spent for the wedding of his daughter and for the related expenses. Though, he spoke about his ailments and illnesses, no evidence has been placed before the court to prove that those are permanent illness or ailments sufficient enough to disable or disqualify him from engaging in his business or any other earning activities.

According to his own evidence, he had purchased the goods that were subsequently seized about one year prior to the date of seizure and after the judgment against him. Accordingly, I find that he is not a pauper or a person with no means to avoid the payment unto the plaintiff.

18. Both the Defendants in their respective Affidavits have not given any acceptable reason for non-payment, while they have had substantial funds in their respective accounts and particularly when the 1st Defendant was receiving rental income of $400, 00 per month.

19. If the 2nd Defendant was really keen and wanted to settle the due, he could have easily done so, even on part payment basis, with the sanction of the court. The goods seized from him seem to be not in a sufficiently good condition for auction in order to fetch a reasonable price. He cannot absolve himself from his liability to pay the Plaintiff by relying on the ground that his seized goods are of enough value for recovery.

20. As a way out, , subject to the consent of the Plaintiff and the sanction of the Court, the 2nd Defendant could have purchased back his seized goods for the value assessed by him and regained his seized goods and relieved himself from the liability to some extent, if the goods cannot be auctioned at the expected price.

21. The 1st Defendant, who on the hearing date, agreed and undertook to pay $9,000.00 on or before 30th November 2020, has not fulfilled his undertaking given to the court. This shows his disregard to the court order, his own undertaking and his motive to avoid the payment.

22. On the outcome of the Mean Test hearing, this Court is satisfied that the 2nd Defendant is in a sufficient financial position and/or in a capacity to earn and pay the adjudicated amount, after giving credit to the amount already deposited by the 1st Defendant.

23. The judgment entered in this action remains intact. What is left to be done is the execution of it, for which the Plaintiff is now at liberty to resort to her last recourse of selling of the properties owned by the 1st and the 2nd Defendants, on which the order *Nisi* entered now stands made absolute. However, considering the circumstances, this court is of the view that the Defendants should be given a final grace period to pay and settle the total amount due on 2 installments before the plaintiff could move for her said last resort for the recovery.

24. This Court is satisfied that both the 1st and 2nd Defendants are deliberately avoiding the payment unto the Plaintiff in spite of the fact that both of them are with sufficient income and financial position to do so.

25. As per the judgment, all the Defendants are liable to pay the Plaintiff jointly and severally and none of them can evade the liability by apportioning it between the 1st and 2nd Defendant or among all 3 Defendants. The 1st Defendant has already demonstrated his capacity to pay, by payment of a substantial amount ($18,456.65) at the initial stage.

26. Accordingly, considering the evidence adduced by way of Affidavit and orally at the mean test hearing, I make the following orders.

a. It is the finding of this Court that the Defendants are in sufficient financial position and with earning capacity to honor the judgment given in favor of the Plaintiff.

b. The remaining amount shall be recovered from the Defendants jointly and severally.

c. The Defendants are ordered to pay the Plaintiff a minimum sum of $ 25,000.00, jointly and severally, on or before 30th October, 2022.

d. The balance sum, together with the interest and costs, shall be paid on or before the 31st December 2022.

e. In the event, the Defendants fail and/or neglect to pay as stipulated above, the Plaintiff shall be at liberty to proceed with the intended recovery mechanism.

f. The matter is hereby terminated, subject the Plaintiff's right to move for and have the writ executed as aforesaid.

g. No costs ordered and the parties shall bear their own costs.

HIGH COURT OF FIJI LAUTOKA

A.M. Mohamed Mackie
Judge

At High Court Lautoka, on this 9th day of September, 2022.

SOLICITORS:
For the Plaintiff: **Messrs; Krishna & Co.**
For the Defendants: **Messrs; Siddiq Koya Lawyers**