

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 170 of 2022

IN THE MATTER of Order 7 and 113 of
the High Court Rules, 1988

BETWEEN **NAIRS TRANSPORT COMPANY PTE LTD** a limited liability company having
its registered office at Lot 81, 9 Miles, Nasinu (alongside Kings Road —
Wainibuku Road Junction)

PLAINTIFF

AND **SARITA DEVI NAIR** of Lot 81 Wainibuku (pt. of) R1679, Naitasiri,
unemployed

DEFENDANT

Appearance : Mr. Damodaran Nair for the plaintiff.
 Ms. Aradhna Singh for the defendant

Hearing : Thursday, 11th August, 2022 at 9.00am

Decision : Thursday, 06th October 2022 at 9.00am.

Decision

(A) INTRODUCTION

[1]. The matter before me stems from the plaintiff's Originating Summons dated 20.5.2022 filed pursuant to Order 113 of the High Court Rules, 1988 seeking the grant of the following orders:

1. *That the within named defendant give up immediate vacant possession of the land described under the Approval Notice of Lease dated 23/06/2010*

as LD referenced 4/16/1226 being Lot 8 – Wainibuku (pt.of) R1679, Naitasiri,

2. *That the cost of this application be paid by the said defendant.*

[2]. The originating summons is supported by an affidavit of Shorene Shabina Kant a director of the plaintiff company sworn on 20.5.2022.

[3]. The application is opposed. The defendant filed an affidavit in opposition followed by an affidavit in reply thereto.

(B) THE FACTUAL BACKGROUND

[4]. What are the facts here? It is necessary to approach the case through its pleadings/affidavits.

[5]. The plaintiff in her affidavit in support deposed inter alia that:

1. *I am one of the Directors of the within named Plaintiff and depose this affidavit, the contents of which are true in so far as they are within my personal knowledge. Where the contents are not within my personal knowledge, they are true to the best of my knowledge, information and belief.*

ANNEXED HEREIN AND MARKED AS ANNEXURE “S1” IS THE CONFIRMATION OF MY DIRECTORSHIP AND THE AUTHORITY TO DEPOSE THE WITHIN AFFIDAVIT.

THE LAND

2. *That on 23rd June, 2010 the Plaintiff was issued with an Approval Notice of Lease in respect of the land comprised and described under reference LD 4/16/1226, Lot 81 - Wainibuku (pt. of) R1679, Naitasiri Heavy Industrial purpose (Bus Depot) situated in the District of Naitasiri in the Island of Vitilevu containing .3681 ha [“the land”].*

3. *The term of the lease is 99 years and is a protected lease under the provisions of the Crown Lands Act.*

ANNEXED HEREIN AND MARKED AS ANNEXURE “SN2” IS A COPY OF THE APPROVAL TO LEASE.

4. *The Defendant had entered into the subject land and continued to occupy after the issuance of the Approval to Lease of the land as Heavy Industrial for the purpose of Bus Depot to the Plaintiff on 23rd June, 2010. This lease is consistent with the purpose for which the land is being used, that is a bus depot where heavy industrial works are carried out.*
5. *The Defendant was served with the Notice to Vacate and give vacant possession of the subject land dated 27th July, 2021, despite which has continued to occupy the land without the licence and consent of the Plaintiff and or the lessor.*
6. *The illegality and safety risks associated with the continued occupation of the land on which residential living is not permissible as the Plaintiff has been issued with statutory demand notices by the Government regulatory bodies that shall be discussed below.*

ANNEXED HEREIN AND MARKED AS ANNEXURE "S3" IS A COPY OF VACANT POSSESSION.

7. *The Director of Town and Country Planning vide their letter dated 8th August, 2019 informed the Nausori Town Council that the subject property should not be utilized for residential purposes. However, due to the continued illegal occupation of the property by the Defendant for residential purposes, they have put their health at risk and the imminent threat of an accident from the frequent transiting of the 32 busses from the Depot.*

ANNEXED HEREIN AND MARKED AS ANNEXURE "S4" IS A COPY OF THE SAID LETTER

8. *On 8th December, 2021, the Director of Town and Country Planning issued another letter reaffirming that the subject land is zoned as Heavy Industrial that is consistent with the purpose for which the approval notice of lease has been issued.*

ANNEXED HEREIN AND MARKED AS ANNEXURE "S5" IS A COPY OF THE SAID LETTER.

9. *That on 26th July, 2021 the Nausori Town Council served a statutory demand notice on the Plaintiff that residential living is not permissible on the subject land that is rezoned as Heavy Industrial.*
10. *On 26th November, 2021 the Nausori Town Council issued further zoning verification letter to confirm that the subject land is zoned as heavy*

industrial that is consistent with the Purpose for which the approval notice of lease has been issued.

ANNEXED HEREIN AND MARKED AS ANNEXURE "S6" AND "S7" ARE COPIES OF THE SAID NOTICE.

- 11. That the Defendant has been occupying the land without the consent and licence of the Plaintiff that operates a bus depot and has 32 buses three official transport vehicles, fuel bowser and office of the Company within which the Defendants are the illegal occupants occupying the depleted buildings. Her continued occupation has further impeded in the development of the land and to upgrade the depleted building structure. This has impeached on the right of the Plaintiff as the lessee to fully utilize the subject land for the purpose for which it has been issued with the Approval Notice of Lease.*
- 12. There are hazardous liquids and inflammable substance kept and used on a regular basis, therefore residential living is not permissible due to the high risk of fire and the safety of the Plaintiff.*
- 13. In addition, under the Nausori Town Planning General Scheme General Provisions as stated in the letters referred above, residential living in any industrial zoned property land is not permissible more so when there is activity of industrial works and garaging of busses.*
- 14. That the defendant if not evicted will continue to occupy the subject land unlawfully and constructively obstruct the development of the land and compromise their own health and safety in view of the purpose for which the subject land is being used.*
- 15. That the Defendant has remained on the land after the approval notice to lease was issued to the Plaintiff as Heavy Industrial and has continued to remain on the property after the Notice to vacate was served on her by the Plaintiff through its Solicitors; therefore the continued occupation is without the consent and licence of the Plaintiff.*
- 16. That the Plaintiff seeks possession of the entire land to be solely occupied by the Plaintiff and I am advised and verily believe that this Honourable Court has the jurisdiction to grant the relief sought in the Summons filed herein in the interest of justice and to allow the normal operations of the bus industry which is one of the essential services that the Plaintiff operates from the subject land.*

(C) **THE LAW**

[6]. In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

[7]. The Order 113 rule (1) of the High Court Rules is in these terms:

“ Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

[8]. Justice Pathik in **Baiju v Kumar**¹ succinctly stated the scope of the order as follows;

“The question for (the) Courts determination is whether the plaintiff is entitled to possession under this Order. To decide this Court has to consider the scope of the Order. This aspect is covered in detail in the Supreme Court Practice. 1993 Vol 1, O.113/108/1 at page 1602 and I state hereunder the relevant portions in this regard:

This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers.

As to the application of this Order it is further stated thus:

The application of this order is narrowly confined to the particular circumstances described in r.1 i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this

¹ (1999) FJHC 20, HBC 298 j 98

*Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee hold over after the determination of the licence (**Bristol Corp. v. Persons Unknown**) [1974] 1. W.L.R. 365; **[1974] 1 All E.R. 593***

[9]. In “**Wiltshire CC v Frazer**”² Stephenson LJ said that for a party to avail himself of the Order 113 he must bring himself within its words. If he does so, the court has no discretion to refuse him possession. Stephenson LJ [at para 77] went on to consider what the words of the rule require. They require:

- (1) *Of the plaintiff, that he should have a right to possession of the land in question and claim possession of the land which he alleges to be occupied solely by the defendant.*
- (2) *That the defendant, whom he seeks to evict from his land [the land], should be persons who have entered into or have remained in occupation of it without his licence or consent.*

[10]. Have those requirements met in this case? Does the plaintiff have a right to possession of the land which meets the first of the requirement set out by Stephenson LJ and the defendant has no right which she can pray in aid to justify her continued possession.

(D) CONSIDERATION

[11]. The plaintiff seeks an order that it recover vacant possession of the land comprised in Approval Notice of Lease, LD Ref: 4/16/1226 being BAL. Lot 81 – Wainibuku Pt of JR 1679, Naitasiri situated in the district of Naitasiri having an area of 0.3681 ha (annexure S-2) on the ground that it is the lessee of the land and the defendant is in occupation without the plaintiffs’ licence or consent.

² [1983] 47 P & CR 69 at 76

- [12]. The Approval Notice of Lease was granted to the plaintiff for 99 years with effect from 01.01.2010. The Approval Notice of Lease is an instrument that granted the plaintiff the right to possession. [See clause (4) of the Approval Notice of Lease at annexure S-2 referred to in the affidavit of Shorene Shabina Kant sworn on 20.05.2022].
- [13]. Therefore, I am satisfied that the plaintiff has a right to possession of the land in question and claim possession of the land.
- [14]. I will turn to the defendant now. The defendant in the forefront of the argument, says that she came into occupation of the premises upon her marriage on 05.05.1977 and since then she remained in occupation of the premises with her husband Rajaishwar Nair. She says that her late husband, Nair is one of the shareholders of the plaintiff company and therefore she has a right to reside on the land. She says that her late husband made his last Will and Testament in her favour [Annexure D].
- [15]. In paragraph (7), (8), (9) and (10) of her affidavit sworn on 08.07.2022, she alleges that:
7. *THAT there is an ongoing High Court Action known as HBE 364 OF 2017 which will have a huge impact on the outcome in this current proceedings. This ongoing case is against Nairs Transport Company Pte Limited and its director Mr Ritesh Nair as he had unlawfully removed the original six (6) shareholders of the business.*
 8. *THAT despite these ongoing cases, the Director of the Plaintiff Company, Mr Ritesh Nair is misusing his powers as a director to unlawfully remove me and the other shareholders from our homes.*
 9. *THAT the director of the Plaintiff Company had fraudently registered 100% shares in the Plaintiff Company in both (NAIRS TRANSPORT COMPANY PTE LIMITED and NAKASI DAVUILEVU BUSES LTD), through a loophole created by the Registrar of Companies Office, online Registration System. I had lodged a complaint with the Companies Office on the same. Messrs Parshotam Lawyers who represent the Plaintiff in HBE. 364 of 2017 also made a complaint on this fraud after which the Registry of Companies called for an internal investigation to take place. Copies of letters are annexed hereto and is marked with a Letter "B".*
 10. *THAT in order to show and proof that I am one of the shareholders of the Plaintiff Company, copies of the last will and testament of my late father*

and mother in law clearly shows that my husband the late Mr. Rajaishwar Nair is entitled to equal shares as the other shareholders of the Plaintiff Company. Copies of their last will and testament is annexed hereto and is marked with a Letter "C".

[16]. In reply, the plaintiff says [Reference is made to paragraphs (4), (5) and (6) of the affidavit in reply of Shorene Shabina Kant sworn on 03.08.2022]

4. *In reply to paragraph 4, I say that the Defendant has misconceived the within proceeding that is for her to show cause why she should be allowed to remain on the property that is designated as Bus Depot where heavy industrial works are carried out. I am not aware of the last Will of late Rajeshwar Nair but am mindful of the fact that the deceased had abandoned the Defendant and was living with one Malti Devi on defacto relationship and their relationship was within the knowledge of all family members, friends and neighbours.*

5. *In reply to paragraphs 5 and 6, annex the rectified confirmation from the Registrar of Companies that shows the officers of the Company. Copy of the said confirmation is annexed as annexure **AN1**.*

6. *In reply to paragraphs 7 to 12, I say that the Defendant is under gross misconception that her late husband was a shareholder in the Company and she has the right to reside on the land. The pending dispute in HBC 364 of 2017 is not relevant to the within action and in any event I annex the notice of rectification dated 4 March, 2022 from the Registrar of Companies on the shareholding of the Company that negates her claim. Copy of the notice is annexed as annexure **AN2**.*

[17]. I turn to pending Action HBC 364/2017. The plaintiff in the matter before me is the first defendant in HBC 364/ 2017 and the defendant in the matter before me is the fourth defendant in HBC 364/2017. The first and the second plaintiffs in HBC 364/2017 are the Executors and Trustees of the estate of Narayan Nair. Narayan Nair was a shareholder of the plaintiff in the matter before me. The third and fourth plaintiffs in HBC 364/2017 are shareholders of the plaintiff in the matter before me. What is this Action Number HBC 364/2017 about?

[1]. In HBC 364/2017 the plaintiffs have filed an originating summons on 22 February 2018 where they have sought the following orders;

- A. *That the register of members of the First Defendant be rectified to the following;*
- (a) 1 share to Kunjan Nair*
 - (b) 1 share to Vinod Nair*
 - (c) 1 share to Naraini Nair*
 - (d) 1 share to Vasu Dewan Nair*
 - (e) 1 share to the Estate of Sarda Devi Nair*
 - (f) 1 share to the Estate of Narayan Nair*
 - (g) 1 share to the Estate of Rajeshwar Nair*
- B. *A declaration that the purported resolution of directors of the First Defendant dated 1 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 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 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 Defendant's:*
- (a) Members register*
 - (b) Minutes of Annual General Meetings held from 1 January 2002*
 - (c) Financial books and/or statements from 1 January 2002*

[2]. The grounds on which the plaintiffs seek the orders in their originating summons is as follows:

- 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;*
- (a) 1 share to Kunjan Nair*
 - (b) 1 share to Vinod Nair*
 - (c) 1 share to Narain Nair*
 - (d) 1 share to Vasu Dewan Nair*
 - (e) 1 share to the Estate of Sarda Devi Nair*
 - (f) 1 share to the Estate of Narayan Nair*
 - (g) 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 Association 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.*

- [18]. The plaintiff company has satisfied this court that it has a right to possession of the land in question. Its right to possession rested on Approval Notice of Lease [Annexure S-2].
- [19]. The defendant has alleged a basis to remain in occupation because her late husband is one of the directors and shareholders of the plaintiff company. She says that her late husband did bequeath interest in the plaintiff to her by the last Will dated 05.03.2004 [Annexure D].
- [20]. In HBC 364/2017 [the pending action in court] it is alleged that Kunjan Nair [one of the shareholders of the plaintiff] has unilaterally acted in changing the shareholding of the plaintiff and diluted the interest of other shareholders [including the plaintiff's late husband] in breach of Articles of Association of the plaintiff company. The primary order sought in HBC 364/2017 is the rectification of the register pursuant to Section 87 of the Companies Act. The register of members may be rectified by the court if the name of any person is, without sufficient cause, entered in or omitted from the register. **What is the shareholding of the plaintiff company? This is to be determined in HBC 364/2017.**
- [21]. The defendant's alleged basis for occupation is **contentious** and will depend on the determination in HBC 364/2017
- [22]. The plaintiff's application for vacant possession cannot be determined summarily for reasons referred to above.

ORDERS

- [1]. The application for vacant possession is refused.
- [2]. The plaintiff to pay the defendant's costs of this action summarily assessed in the sum of \$ 1,000.00 which is to be paid within seven (07) days hereof.




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Jude Nanayakkara
JUDGE

High Court - Suva
Thursday, 06th October, 2022.