

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 41 of 2013

BETWEEN : **ARSHAD HUSSAIN SAHU KHAN** of Sydney, Australia, Businessman.

1ST PLAINTIFF

AND : **SHABINA SAHU KHAN** of Auckland, New Zealand, Legal Consultant.

2ND PLAINTIFF

AND : **MUHAMMED SHAMSUD-DEAN SAHU KHAN** presently of Auckland, New Zealand, Advisor.

3RD PLAINTIFF

AND : **ASHOK BALGOVIND** of Suva in the Republic of Fiji, Architect and Businessman.

1ST DEFENDANT

AND : **REGISTRAR OF TITLES**

2ND DEFENDANT

Counsel : **Mr Kapadia V. of Sherani & Co** for the **Plaintiffs**
Mr Maharaj V. of MC Lawyers for the **1st Defendant**
Mr Nair D. with Mr Pickering J. from the **Attorney General's Chambers** for the **2nd Defendant**

Date of Judgment: 30th August, 2013

JUDGMENT

1. Application for an urgent Injunction was filed by way of Ex-parte Notice of Motion by the Plaintiffs on 20th February 2013 with the a copy of supporting affidavit of Muhammed

Shamsud-Dean Sahu Khan sworn on 20th February 2013 and the said affidavit was filed marked as “A” to the affidavit dated 20th February 2013 sworn by Ritesh Chandra Singh Law Clerk of the Plaintiff’s solicitors firm. By the said Ex-parte Notice of Motion, the Plaintiffs sought:

- (i) *That the First Defendant be restrained by himself and/or through his servants and/or agents and/or howsoever from in any manner whatsoever accepting any tender for the sale of property comprised in Certificate of Title No. 16730 under the Judgment Caveat Number 762877; and*
- (ii) *From dealing with and/or transferring, selling, alienating or otherwise exercising any purported rights under the said Judgment Caveat on CT16730 until the hearing and determination of this action or until further order;*
- (iii) **AND** *that the costs of this application be costs in the cause.*

2. The application was heard ex-parte on 26th February 2013 and interim injunction orders were granted on 26th February 2013 and extended time to time which is extended up to 30th August 2013.
3. When the matter was mentioned on 18th March 2013, Mr Maharaj the counsel for the 1st Defendant had raised a preliminary issue as follows:

“There is an appeal pending in the High Court of Lautoka on the same issue and the Plaintiffs would not have filed this action for the stay”.

- 3.1 In replying to the said objection, Mr Nagin, counsel for the Plaintiff stated he was not instructed to this effect and requested for an extension of the restraining order. It is also noted with concern after the preliminary issue was raised Mr Nagin counsel refrained from appearing in this case and the reasons are not disclosed to this court.
- 3.2 There was no material before the court on 18th March 2013 to consider the preliminary objection and the court granted the extension of the restraining order up to 10th May 2013 and made the following directions:

- (a) *The Defendants to file and serve the affidavit in response before 3rd April 2013, on the preliminary issue;*
 - (b) *The Plaintiff to file and serve the affidavit in reply before 17th April 2013.*
4. At the outset, this court has to consider the preliminary issue and I summarize the issues to be decided upon as follows:
- (a) *As to whether the Plaintiffs had complied with the principles governing injunctions specifically drawing attention to non disclosure of the appeal filed in the High Court of Lautoka in Case No. 377 of 2006L?;*
 - (b) *As to whether the Plaintiffs purposely suppressed divulging the appeal in Case No. 377 of 2006L for the purpose of obtaining an interim relief from this Court?*
 - (c) *As to whether the Plaintiffs failure to file the Judgment of Case No. 377 of 2006L and failure to disclose the facts in the said case and as such non-disclosure and suppression of the facts were used to procure the Injunction against the Defendants?*

Once the above issues are addressed by this court depending on the conclusions the fate of this action could be decided, and I will only address this issue and if the findings is in affirmative there is no necessity for this court to consider any other issues to decide on dissolution of interim injunction.

5. This court granted interlocutory injunction on the ex-parte application filed, after considering supporting affidavit and on the submission made by Learned Counsel Mr Nagin. As such it is the duty of this court now to consider the opposing affidavit filed by the Defendant on the preliminary issue raised by the Learned Counsel Mr Maharaj detailed in paragraph 3 of this Judgment, which was supported by the Affidavit in Opposition and other documents filed by both parties.
6. The 1st Defendant in his Affidavit in opposition deposed inter-alia.
- 6.1 In Lautoka High Court in Civil Action No. 377 of 2006 which was commenced by Midland Beach estate Limited against the 1st Defendant Judgment was delivered against the Company, on 1st May 2012.

6.2 The High Court had pierced the Corporate Veil and given the Order against the 2nd and 3rd Defendants who were the Directors of the Company and both are solicitors. Order was annexed to the Affidavit marked “A” on perusal of the Order marked “A”. I find Hon. Justice Ms Wickramasinghe had made the following Orders:

“(i) The Plaintiff’s claim against the First Defendant is dismissed;

(ii) The Plaintiff and/or its Directors Dr Muhammed Shamsud Dean Sahu Khan (the 3rd Plaintiff in this case) and Mr Shabina Sahu Khan (2nd Plaintiff in this case) of PO Box 179 Ba Fiji; Barristers and Solicitors shall jointly and/or severally pay to the First Defendant (The First Defendant in this case) the sum of US \$50,000 as damages for breach of contract;

(iii) The Plaintiff and/or its directors the said Dr Muhammad Shamsud Dean Sahu Khan and Shabina Sahu Khan in addition shall jointly and/or severally pay to the First Defendant the sum of \$5,000.00 being interest at the rate of ten percentum per annum (10%) for the period of six (6) months;

(iv) The Plaintiff and/or its directors Dr Muhammad Shamsud Dean Sahu Khan and Shabina Sahu Khan shall jointly and/or severally pay to the First Defendant further interest on the amounts awarded at the rate of ten percentum(10%) per annum until payment of the full sum is paid by the Plaintiff to the First Defendant.

(v) The Plaintiff and/or its directors Dr Muhammad Shamsud Dean Sahu Khan and Shabina Sahu Khan shall jointly and/or severally shall pay to the First Defendant costs of the claim and counter claim on an indemnity basis.

6.3 It was deposed although the Judgment was entered against the Second and Third Plaintiffs in the said case had not appealed against the said order however, appeal being lodged by the Company.

6.4 The 1st Defendant had obtained the extension of the Judgment on Certificate of Title No. 16730 for execution.

7. Now I refer to the Affidavit in reply by the 3rd Plaintiff who had divulged the material facts after the issue was raised by the Defendant. In paragraph 5(iv) to (vi) of the Affidavit, the 3rd Plaintiff deposed the following:

*“(iv) This is particularly relevant and important to note as the Defendant herein had made a counterclaim for damages in the Said **Action only against the Said Plaintiff Company and not against the Second and Third Plaintiffs herein.***

(b) If the Defendant wanted to claim damages against them then he had to make them parties as such to the action or specifically pleaded that in the counterclaim that the company veil will be prayed to be uplifted and claimed against the Plaintiffs herein in the counter claim and informed them of the date of hearing. These were clearly not done.

(v) Accordingly, with respect, the Court had no jurisdiction to give judgment in the said Action against the Second and Third Plaintiffs by uplifting the company veil as had been done as stated in paragraph 3 of the Defendant’s Affidavit.

(vi) 6. Further the Said Plaintiff Company has appealed to the Fiji Court of Appeal against the said Judgment of the Said Action (“the Said Appeal”) and in that Appeal all the matters referred to in paragraph 5 above have been clearly and substantially raised in the Grounds of Appeal and annexed herein as Annexure “A” is a copy of the Notice and Grounds of Appeal.

7. That in the said appeal it can be clearly seen as to the relevant issues raised and which are in conformity with the matters referred to in paragraphs 5 and 6 above further matters referred hereinafter in this Affidavit.

8. Further very importantly the Learned Judge in paragraph 11 on page 3 of the Judgment very clearly stated:

*“leave was granted to Mr Krishna (the Receiver of my previous law firm who were Solicitors on record for the said Plaintiff Company) to withdraw as solicitors (for the Plaintiff Company). The **Plaintiff was not present and unrepresented on the date of hearing..... I***

therefore dismissed the Plaintiff's Action and proceeded to hear the First Defendant's Counter Claim"

(b) It is very relevant to note as stated in paragraph 5(iv) above that the Counter Claim of the Defendant was only against the Said Plaintiff Company ALONE and not against the Second and Third Plaintiffs at all in any capacity whatsoever.

9. *Further since the Second and Third Plaintiffs were not parties as such in the Action and accordingly obviously they could not directly appeal in that in their own right as such but very importantly the issues as to their purported liabilities in the Judgment are raised in the Notice and Grounds of Appeal in Said Appeal by the Plaintiff Company of which they were Directors.*

10. *Further very relevantly if the Defendant maintains that the Court had jurisdiction to give judgment against the two Plaintiffs because they were Directors albeit not directly parties as such to the said action then by the same contention it must be accepted that they were entitled to have raised through the Said Plaintiff Company in the Said Appeal by the Plaintiff Company matters in the judgment affecting them because they were its Directors".*

7.2 In my view, all the above matters are issues to be decided by the Court of Appeal and need not to be considered by this court. Removal of the corporate veil and holding 2nd and 3rd Defendants jointly and/or severally liable as adjudged by Hon. Justice Ms. Wickramasinghe and there is no jurisdiction for this court to address the grounds of appeal, in the present case. The said Judgment is clearly against the Plaintiff and the 2nd and 3rd Plaintiffs in this case (*Directors/shareholders of the Plaintiff Company*) and as such it's a matter the 2nd and 3rd Defendants should have taken up in the appeal.

7.3 The only conclusion this court can arrive at is, that until the 1st Defendant raise the issue detailed in para 5 of this Judgment and in the Affidavit of opposition by the 1st Defendant, the Plaintiffs had suppressed the appeal and not even tendered a copy of the Judgment to this court. A party seeking an injunction ex-parte should disclose all material facts to the determination of the application for injunction to the court. An

omission or suppression of the material facts are grounds for dissolution of an injunction. On perusal of the Affidavit in support, it is evidently clear to this court Plaintiffs had suppressed the material facts from this court, and not made full and frank disclosures.

7.4 It is also important to note the Judgment of the non disclosures by the Plaintiff and his counsel Mr Nagin as detailed below:

(a) *Firstly, I quote paragraph 20 of the Affidavit of the 3rd Plaintiff dated 20th February 2013:*

“20. That to the best of my knowledge information and belief, the only court proceedings, I am aware of where the First Defendant was involved was action No. 377 of 2006L brought by Midland Beach Estates Ltd (“the said actions”) where the Plaintiff Company had brought the action for damages against the First Defendant and the latter had counter claimed for damaged against the Plaintiff Company and obtained Judgment for USD 50,000.000 and costs (“the said Judgment”) and which Judgment is to be annexed to the Affidavit of Ritesh Singh to be filed herein and whom I have authorized to make any Affidavit on behalf of these proceedings”

7.5 The said Ritesh Singh had sworn and filed the Affidavit on 20th February 2013 and Ex-parte Notice of Motion was taken up for hearing on 26th February 2013, Orders were granted. I note Mr Nagin, counsel who appeared on that day never brought to the notice of this court reasons for not filing the copy of the Judgment in Case No. 377 of 2006L neither he made no application to file the said Judgment in future proceedings of this case as stated and undertaken by the 3rd Plaintiff in his Affidavit. The said Judgment was delivered on 12th May 2012 and this application was filed on 20th February 2013 and the Plaintiffs had ample time to obtain a copy of the said Judgment.

7.6 In the said circumstances, I find the Plaintiffs, his counsel Mr Nagin and the solicitors for the Plaintiff’s Sherani and Company concealed and suppressed the said Judgment in case number 377 of 2006L and the said material non disclosure is inexcusable and it is an abuse of the process of this court and used to obtain an interim injunction orders. Further the Plaintiffs had not disclosed the appeal in the said Judgment as admitted by the Plaintiff’s counsel Mr Nagin.

7.7 It is also noted the copy of the Judgment dated 1st May 2012 of the said Case No. 377 of 2006L not filed by the Plaintiff's to date, and it was brought to the notice of this court by the 1st Defendant's counsel in his skeletal submissions marked as Annexure "D3".

7.8 In the said Judgment, Hon. Justice Ms. Wickramasinghe had concluded (*since the case is in appeal the findings are only taken into consideration for the purpose of deciding on the material non disclosure in this case*):

- (a) The third Plaintiff in this case was the major shareholder of the Plaintiff in Case No. 377 of 2006L;
- (b) The Hon. Justice Ms Wickramasinghe in her Judgment pierced the corporate veil and concluded para 61 of the Judgment:

“ [61] Dr Sahu Khan is clearly the alter ego of both the plaintiff company and the law firm Messrs Sahu Khan and Sahu Khan. I have already concluded that Dr Sahu Khan had perpetrated the fraudulent act to induce the plaintiff to execute the agreement. As the first defendant's solicitor, Dr Sahu Khan had an overriding duty to protect his interest and advise accordingly. I have no doubt that Dr Sahu Khan the alter ego of the Plaintiff and he, as the dominant shareholder, abused the corporate form of the Plaintiff to advance his own interest by using the plaintiff company as vehicle to persuade the first defendant to execute the agreement. As Russel J. said in the case of *Jones v Lipman* (supra) it appears to me that Dr sahu Khan used the plaintiff as a 'device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. In the circumstances, I am convinced that this is a fit case for me to pierce the corporate veil and conclude that the shareholders of the plaintiff's company liable for damages.”

- (c) It is also noted, the following paragraphs from the said Judgment dated 1st May 2012:

“[40] There are several misrepresented statements, either as utterances or written by Dr Sahu Khan prior to the actual execution of the said agreement.

[41] Part of Clause 2 of the counter-claim sets out the non disclosed statements as follows:

- (a) The principals of Sahu Khan and Sahu Khan Solicitors were also the shareholders and directors of the plaintiff company;*
- (b) Did not advise the first defendant that there could be possible conflict of interest between the plaintiff and the first defendant by virtue of the fact that Sahu Khan and Sahu Khan were acting as Solicitors for both the plaintiff as vendors (or which they were shareholders and directors) and the first defendant as a purchaser;*
- (c) Failed to advise the first defendant to seek independent legal advice before signing the said sale and purchase agreement;*
- (d) Exerting undue influence on the first defendant in securing the signature of the first defendant on the agreement by having the said agreement pre signed by the purported co-purchaser (Eshad Ali) and duly witnessed by Sahu Khan and Sahu Khan before securing the signature of the first defendant;*
- (e) Falsely representing to the defendant that the beneficial owners of the plaintiff company were Canadian citizens without at any time disclosing who they were and implications of such sale by foreign owners may have in terms of Land Sales Act of Fiji and Reserve Bank and Income Tax Act of Fiji;*

- (f) Falsely representing to the first defendant that once the agreement was signed and said Sahu Khan will jointly with the first defendant look for potential buyers for the properties for a price in excess of USD4.5 million and to equally share any surplus profit;***
- (g) Causing the first defendant to pay the sum of FJD\$100,000.00 purported to be a deposit for the said lands into the personal bank account of Sahu Khan and Sabina Sahu Khan;***
- (h) Failed to disclose the true identity of the co purchaser (Eshad Ali) or details or any payments made by him in relation to the purchase.***

[42] The first defendant asserts that he found comfort by the long standing friendship with his lawyer friend Dr Sahu Khan. The representations that was given by Dr Sahu Khan that his own cousin will be the co-owner and that he will assist to sell the land and share the profits had further persuaded the first defendant to execute the agreement. Due to this comfort, he had not obtained independent legal advice.

[43] No sooner that the first defendant found out about the false representations he refused to perform the agreement. It therefore appears that the false statements made by Dr Sahu Khan affected the first defendant.

[44] I am convinced that Dr Sahu Khan was fully aware the representations were false. I am also satisfied that declaring, CT 26520 as a land belonging to vendor when it manifestly belonged to Shore View Limited, including the said land in the valuation report knowingly it did not belong to the Plaintiff, obtaining a loan at the eleventh hour when the property was offered for sale, not

permitting the first defendant to meet Eshad Ali thereby causing reasonable suspicion in the first defendant's mind about his existence, disclosing Canadian owned the land, were made deliberately with the defendant to enter into the contract. In terms of clause 15¹ of the agreement, Messrs Sahu Khan and Sahu Khan, also acted as solicitors for both parties. The courts in Fiji had in several authorities denounced this detrimental practice. To make matters worse, the sole directors and shareholders of the plaintiff were none other than the two lawyers of Messrs Sahu Khan & Sahu Khan i.e. Dr Sahu Khan and Shabina Sahu Khan, clearly conflict of interest.

[45] *Messrs Sahu Khan & Sahu Khan who undertook to provide legal advice to the first defendant had a fiduciary duty make a full disclosure of all material facts whether such facts were not the subject of specific queries. The fiduciary relationship also reposed trust and confidence in the mind of the first defendant. Dr Sahu Khan as the fiduciary had a legal obligation to act for the benefit and interest of the first defendant to enable the first defendant to make a fully informed decision before executing the contract on the terms that were being offered to him by the fiduciary. The first defendant says he later found out that section 6 of the Land Sales Act required mandatory compliance of obtaining the Minister's consent before the transaction was completed if the sellers were foreign nationals, but Dr Sahu Khan did not disclose the requirement to him. Manifestly Dr Sahu Khan acted detriment and to the interest of the first defendant and abused the trust both as fiduciary and on friendship.*

[46] *Fraud is often entwined with the concepts of moral culpability. Fraudulent misrepresentation is found when the representation is made (i) knowingly or (ii) without belief of its truth or (iii) recklessly, careless whether it is true or false. 'To succeed in fraud, a representee must*

¹ 15. "The Vendor and the Purchaser agree that Messrs Sahu Khan and Sahu Khan, Barristers and Solicitors of Ba to act as Sole Solicitors for the Vendor and the Purchasers in respect of the sale of the Said Lands."

prove, inter alia that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood'. Krakowski v. Eurolynx Properties (1994-1995) 183 CLR 563.

[47] *In the instant case, the plaintiff through Dr Sahu Khan, I am convinced for the aforesaid reasons that he fraudulently induced the first defendant to believe that the plaintiff owned all four properties when in fact one property did not belong to it and secondly made representations that the land belonged to Canadians when at all times he had full knowledge that it was a fraudulent statement. Thirdly, a land not belonging to the plaintiff was included in a valuation thereby fraudulently enhancing its value. Dr Sahu Khan clearly breached his fiduciary duties as the solicitor of the first defendant. I therefore, conclude that the agreement executed by the first defendant contained fraudulently misrepresented statements, not made independently by the first defendant. Therefore, I find that the agreement is ab initio invalid.*

[48] *The defendant convinces me for the same reasons that I have set out above that Dr Sahu Khan and plaintiff through Dr Sahu Khan are also liable for unconscionable conduct, undue influence, and conflict of interest as alleged. However, as I have already found that the agreement dated 15th April 2006, is ab initio invalid I do not wish to give detailed reasoning on them."*

8. I am satisfied that the Plaintiff and his counsel/solicitors are guilty of non disclosure of the material facts and find such non disclosures had been used to obtain the interim injunction. Further the Plaintiff's not only failed to annex the Judgment in Case No. 377 of 2006L and stated that the Judgment entered on the counter claim was \$50,000.00 only against the Plaintiff Company and failed to disclose the Judgment was against the company and the 2nd and 3rd Plaintiff's jointly and/or severally which is abruptly clear. I note with concern the statement made by Mr Nagin. Mr Nagin who failed to disclose the true facts to this court merely stating that he was not instructed. The position taken up by Mr Nagin is unacceptable to this court and there is no justification of his action, being a Senior Counsel in this jurisdiction. He failed to inform the court that the said Judgment was in appeal. The reason given by him was that he was not instructed. It was the duty of the counsel

when he was aware of the Judgment to find out whether there was an appeal. Mere statement saying that he was not instructed is not an excusable reasoning.

9. In the circumstances, I conclude the Plaintiff's their counsel/solicitors are guilty of material non disclosure and my conclusion is in line with the seven principles enumerated in case of *Brink's Mat Ltd v. Elcombe* (1988) 1 WLR 1350 at 1356. It was stated:

"In considering whether there has been relevant non disclosure and what consequences the court should attach to nay failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

- 1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* (1917) 1 K.B. 486, 514 per Scrutton L.J.
- 2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisors: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalgish v. Jarvie* (1980) 2 Mac. & G. 231 and Browne-Wilkinson J. in *Thermax Ltd v. Schott Industrial Glass Ltd* (1981) F.S.R. 289, 295.
- 3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* (1985) F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional as facts which he would have known if he had made such inquiries.
- 4) The extend of the inquiries which will held to be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the

defendant; see for example, the examination by Scott J. of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc. v. Robinson* (1987) Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries see per Slade L.J. in *Bank Mellat v. Nikpour* (1985) F.S.R. 87, 92-93.

- 5) If material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains (an ex parte injunction) without full disclosureis deprived of any advantage he may have derived by that breach of duty.” ‘se per Donaldson L.J. in *Bank Mellat v. Nikpour* at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioner*’ case (1917) 1 K.B. 486, 509.
 - 6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
 - 7) “When the whole of the facts, including that of the original non-disclosure, are before (the court, it) may well grant a second injunction if the original non-disclosure was innocent and if an injunction could be granted even had the facts been disclosed.” per Glidewell L.J. in *Lloyds Bowmaker Ltd v. Britannia Arrow Holding Plc.*, ante. Pp. 1343H – 1344A”.
10. I also considered the non disclosures by the Plaintiffs in this case which were detailed in the 1st Defendant’s Affidavit and the supporting affidavits filed by Chandra Sen dated 4th April 2013 and 20th May 2013. The said affidavits disclose the orders made in Case Nos. HBC 061 of 2005 and 067 of 2005 which were directly relevant to this case, and the Plaintiffs have not divulged and suppressed the said cases from this court.

11. The Second Defendant's Statement of Defence did not support the Plaintiff's position and the Plaintiff's counsel had failed to make acceptable reasons for the non-disclosure and I find the Plaintiff had failed in this regard and try to bring other matters to deviate the attention of this court from the main issue.

Further Conclusions

12. At the time of granting interim injunction by this Court, the Plaintiffs have not given an undertaking for damages in the affidavit in support. When the matter was taken up for support on 26th February 2013 the Plaintiff's counsel Mr Nagin stated the Plaintiffs gave the undertaking for damages, making this court to believe the Plaintiffs have given a proper undertaking which now I find there was no sufficient assets declared to convince this court or no proper undertaking given. As such, "*in limine*" I reject the submissions filed by the Plaintiff's counsel on 24th July 2013. I hold there had been no acceptable undertaking for damages being provided by the Plaintiffs. In this regard I cite the following passage from the Supreme Court Judgment in the case of ***Wakaya Limited v. Kenneth Chambers and Another*** (unreported) Civil Appeal No. CBV0008 of 2001 decided on 9th May 2012:

"34. A further fact that emanated from the judgment of the Court of Appeal was the fact relating to an undertaking as to damages by the Petitioner which the Court stated that the Court was not aware of. The High Court in granting the interim injunction failed to obtain an undertaking regarding damages, which was erroneous as it is usual to obtain such an undertaking to safeguard the interests of a defendant against whom an injunction is obtained. In the affidavit filed on behalf of the Petitioner when seeking the interim injunction it was stated that the Petitioner was a viable company and has the ability to meet any award of damages, and also a Bank statement as at that date to show their financial viability, but this would not be sufficient to be considered as an undertaking to pay damages. As Justice Marshall stated in his judgment that if the cross-undertaking is not given, the loss suffering defendant should upon vindication at trial be awarded damages in respect of his loss. This would go on to show that the 1st Respondent could vindicate his rights at the trial into the main case before the High Court."

13. I have stated the preliminary issues in paragraph 4 of this Judgment and I answer the issues as follows:

- (a) *The Plaintiffs had not complied with the principles governing injunctions;*
- (b) *The Plaintiffs purposely suppressed the appeal made in the Case No. 277 of 2006L and wrongfully obtained the interim injunction from this court;*
- (c) *The Plaintiffs purposely and deliberately suppressed the Judgment in Case No. 277 of 2006L by suppression and concealment of the said Judgment from this court and the said non disclosure was used to procure interim injunction from this court.*

Accordingly, the Plaintiffs are guilty for non disclosure of material facts and as such the interim injunction shall be dissolved forthwith.

14. **Further Analysis of Submissions and Conclusions**

14.1 The 1st Defendant also submitted that this court does not have the jurisdiction to hear this matter and stated inter alia:

- (a) The subject matter of this writ i.e. CT16730 is situated at Varadoli Ba (in the Western province);
- (b) The counsel also had referred to Order 4(1) –

“proceedings must ordinarily be commenced in the High Court Registry located in the Division in which the cause of action arises”

- (c) It was referred to 2 affidavits filed by Chandra Sen in Lautoka High Court Case No. 67 of 2013 in respect of CT 16730 preventing Chandra Sen proceeding with the sale. The two affidavits sworn by Chandra Sen which were filed in this case dated 4/4/2013 and 17/5/2013, it was revealed the application for Ex parte injunction to prevent the sale of CT16730 was dismissed. The said case was filed by 2nd and 3rd Plaintiffs. The said application was dismissed by Hon. Justice Nawana on the

grounds of material non disclosure and also there being no proper undertaking to damages;

- (d) The Plaintiff's counsel in reply to the above submissions stated by referring to paragraph 19 of the Affidavit dated 27th May 2013 and I am not in favour of the Plaintiff's submissions and it is the conclusion of this court the plaintiff purposely invoked jurisdiction of this court with ulterior motive of obtaining injunction by suppressing Case No. 67 of 2013. It is evident by the Affidavits filed by Chandra Sen. The question arises why the Plaintiffs failed and didn't file this case in Lautoka whilst Case No. 67 of 2013 was being filed in Lautoka on CT16730. As such this court is convinced that discretion of this court had to be used with regard to jurisdiction issue in favour of the Defendants;
- (e) The Plaintiff's counsel also had submitted that Order 2 Rule 1 of the High Court Rules non compliance shall be treated as an irregularity and should not nullify the proceedings. However, considering the Plaintiffs and Plaintiffs' counsel/solicitors conduct of concealment of facts including evasion of filing the Judgments in High Court of Lautoka Case No. 377 of 2006L and High Court of Lautoka Case No. 67 of 2013 and the conclusions in preceding paragraphs, the Plaintiffs had abused the process of this court and this court cannot consider the request to cure the irregularities. The Plaintiffs conduct does not warrant to use the courts discretion in favour of the Plaintiffs and Plaintiff submissions fails;
- (f) The 1st Defendant's counsel Mr Maharaj submitted referring to paragraph 5(vi) of the Affidavit sworn by the 3rd Plaintiff on 15/4/2013 the Notice and Grounds of Appeal which was filed as Annexure "A" to the said affidavit. The 3rd Plaintiff further stated he had instructed Natasha Khan to lodge an appeal. The Grounds of Appeal was filed by the company in Case No. 377/2006L. Although it was filed by the Plaintiff Company the grounds stated therein was to pursue against the Judgment delivered against the 2nd and 3rd Plaintiff's in this case. I quote the following paragraphs in the Grounds of Appeal:

“1.The learned trial Judge erred in law and in fact in making orders against the Director the Shareholder of the Appellant Company in that:

- (i) Dr M. S. Sahu Khan was not a party to the proceedings;*
- (ii) Even if Dr M. S. Sahu Khan was made a party, which he was not, he would have to have been personally served with all the papers and been informed of the trial date by way of personal service on him;*
- (iii) Lifting of the corporate veil also requires service and/or noticed to the Director and/or Subscriber for him/her to answer the charges being levied upon him;*
- (iv) There was no request for interrogatories and interrogation made upon Dr. M. S. Sahu Khan;*
- (v) Dr. M. S. Sahu Khan was denied natural justice in not being given an opportunity to file a defence and to defend himself at trial;*
- (vi) The learned trial Judge could not have entertained a claim based only on submissions by Counsel for the Respondent M S Sahu Khan; and*
- (vii) No order for damages can be made against a person who is not a party to the proceedings.”*

The above grounds of appeal clearly shows that although the appeal was lodged by the Company it also challenges the Judgment made against the 2nd and 3rd Defendants in this case; and I conclude the appeal was made against the orders made against the 2nd and 3rd Plaintiffs in this case. It is also noted the

email annexed as “B” to the said Affidavit the instructions for the appeal was given by the 3rd Plaintiff. I quote the email dated 9th April 2013:

”Dear Natasha,

I shall be very grateful if you could just inform me urgently today as to the status of the Appeal matter as there is a Action in Suva High Court between Balgovind and us as he is trying to sell my house in Ba under the Lautoka High Court Judgment and we have applied for an injunction. Nagin is helping me in that Action”

It is evident by the said email that the 3rd Plaintiff was well aware of the appeal at the time he deposed the affidavit in support dated 20th February 2013. As such I further find that the appeal was suppressed deliberately by the Plaintiffs to obtain the interim injunction orders;

- (g) Having stated above, I am convinced that the Plaintiff Company lodged the appeal against the Judgment of 377 of 2006L challenging the decision made against the 2nd and 3rd Plaintiffs in this case. The Plaintiffs submitted to this court that they were not parties to Action No. 377 of 2006. By perusing the Grounds of Appeal it is clear the 2nd and 3rd Plaintiff’s have challenged the Judgment through the company. As far as the 1st Plaintiff is concerned, although there is no Judgment delivered against him he had come in as a Plaintiff because of the alleged Title in question CT16730 he was a joint owner with the 2nd Plaintiff. As such the Plaintiff’s submission that Plaintiffs were not parties or privies to the appeal fails;
- (h) I agree with the submission made by Mr Maharaj that the Plaintiffs failed to apply for a Stay of Execution of the Judgment succeeds;

- (i) I too agree that as I stated earlier in this Judgment the injunction application was an attempt to abuse the process of this court without applying for a stay of execution of the Judgment pending the appeal. Section 34 of the Court of Appeal states that:

“Except so far as the Court below or the Court of Appeal may otherwise direct:

(a) *An Appeal shall not operate as a stay of execution or proceedings under the decision of court below;*

(b) *No immediate act or proceeding shall be invalidated by an appeal.”*

I concur with the submission made by the counsel for the 1st Defendant that the Plaintiffs have failed to comply with the rules and abused the process of court applying for an injunction and filing of Writ of Summons. I concur with the 1st Defendant that the proper procedure would have been the Plaintiffs to apply for a Stay as the Judgment in Case No. 377 of 2006L was against the 2nd and 3rd Plaintiffs. The first Plaintiff would have joined in the action as the alleged joint owner of the property in CT16730. Accordingly, I conclude the application for the injunction and the Writ of Summons are bad in law.

15. Having made the above mentioned conclusions in the preceding paragraphs, I make the following orders:

(a) *The Interim Injunction orders made on 26th February 2013 and sealed on 5th March 2013 dissolved;*

(b) *Application for Injunction dismissed;*

(c) *Writ of Summons filed on 19th February 2013 dismissed;*

(d) The Plaintiffs should pay summarily assessed costs of FJ\$5,000 to the 1st Defendant and FJ\$1,000 to the 2nd Defendant within 14 days of this Judgment.

Delivered at Suva this 30th Day of August, 2013.

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C. Kotigalage
JUDGE