

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

**HBC 158 of 2011**

**BETWEEN** : **KRISTAMMA GOUNDAR** normally of Martintar, Nadi, Retired but presently of Sydney, Australia as the Executrix and Trustee of the Estate of Muttamma.

**First Plaintiff**

: **NATRAJAN PILLAI** of 396 Princess Highway, Blakehurst, NSW 2221, Businessman.

**2<sup>nd</sup> Plaintiff**

**AND** : **MOHAMMED SAMSUDEAN SAHU KHAN**, address unknown, formerly a Legal Practitioner.

**Defendant**

Counsel : Anil J. Singh for the Plaintiffs  
Nacolawa & Company for the Defendants

## **R U L I N G**

### **INTRODUCTION**

1. On 20 December 2011, Anil J Singh Lawyers filed a Summons pursuant to Order 14 Rule 2 of the High Court Rules 1988 seeking the following Orders:
  1. judgment in this action against the Defendants for the sum of FJ387, 216. 33 (Three Hundred Eighty Seven Thousand Two Hundred Sixteen Dollars and Thirty Three Cents) being the sum claimed in favour of the Plaintiffs: or
  2. in the alternative Judgment in the sum of \$421, 614. 83 (Four Hundred Twenty One Thousand Six Hundred Fourteen Dollars and Eighty Three Cents).
  3. interest at the rate of 10%.
  4. that the Defendants pay costs of this application.
2. The Summons is supported by an affidavit sworn on 19 December 2011 by the second defendant, Natraj Pillay.
3. The defendant opposes the application by an affidavit he swore on 17 January 2012 in Auckland, New Zealand.

### **COMMENTS**

4. Even though the statement of claim is rather patchy and incoherent, not much of the basic facts are in dispute as one would gather from the statement of defence and the affidavit sworn and filed by the defendant. The plaintiffs' claim pertains to various monies they purportedly paid to the defendant in the former's capacity as their solicitor. The plaintiffs allege that the defendant has misappropriated the monies.

5. Except for two instances of payment of which the plaintiffs have no recollection of the exact date, every other alleged payment made by the plaintiffs to the defendant and/or some third party is admitted by the defendant. However, for each of these other payments, the defendant has an explanation which, as he would profess, exonerates him from any liability.

### **BACKGROUND**

6. The first plaintiff has been residing in Australia for many years now. He once held a mortgage over a certain property comprised in CT 11507 which is situated in Martintar in Nadi. The second plaintiff was, at all material times, the first plaintiff's lawful attorney in Fiji<sup>1</sup>.
7. The defendant is a former Fiji solicitor who once ran a thriving practice in Fiji. He was disbarred from practice here in Fiji by the Independent Legal Services Commission several years ago. This happened after the Commission found him guilty of having committed some serious professional misconduct in his handling of a case. That case is unrelated to the one before me now. I shall not delve into this at this time.
8. Suffice it to say that, pursuant to the relevant provisions of the Legal Practitioners Decree 2009, the defendant's practicing certificate was suspended accordingly - and a Receiver was appointed to his practice and to the funds in his trust account. The defendant now plies his trade in New Zealand where he has been residing for the past several years.

### **MONIES GIVEN TO THE DEFENDANT BY THE PLAINTIFFS**

9. The monies given by the plaintiffs to the defendant - (and/or to some third parties at the defendant's request) - may be classed into four general instances:
  - (i) first, the \$650,000 proceeds from the mortgagee sale which the plaintiffs entrusted to the defendant. Out of this, the defendant was to have settled the mortgagor's debt to the first plaintiff (mortgagee) and then pay the balance (if any) to the mortgagor.
  - (ii) apart from and unrelated to (i) above, there were other monies which the plaintiffs allegedly deposited into the defendant's solicitors' trust account.

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<sup>1</sup> Sahu Khan also admits that the plaintiff had retained him with regards to the mortgagee sale in question over property comprised in Certificate of Title 11507. One Kristamma Gounder was the mortgagee who had instructed him. Sahu Khan deposes that the "Plaintiff held power of Attorney from the mortgagee" and "all the relevant transactions were carried out in the name of the said mortgagee".

- (iii) apart from (and totally unrelated to) (i) and (ii) above, monies were also paid by the plaintiffs upon the request of the defendant to various third parties. These, the plaintiffs have a clear record of.
- (iv) in addition to (iii) above, two instances of payment to third parties which are not clearly accounted for.

### *\$650,000 Proceeds From Mortgagee Sale*

- 10. It is not in dispute that the first plaintiff held a mortgage over CT 11507, and that he did retain the defendant when his power of sale became exercisable<sup>2</sup>. It is also common ground that the property was eventually sold for \$650,000 and that the sale proceeds were paid into the defendant's trust account so he could attend to all matters incidental.
- 11. The plaintiffs believe that the defendant has misappropriated part of the proceeds. They assert that the defendant was to have paid the mortgagor the sum of \$150,000 which was the balance left after the mortgagee (plaintiffs) have been paid. However, the defendant did not do so. This resulted in the mortgagor suing the plaintiffs in a separate action which is pending in the Court of Appeal Case No. 32 of 2010<sup>3</sup>.
- 12. The plaintiffs, of course, are not seeking to recover that \$150,000 from the defendant. They appear to suggest that some dispute arose after the mortgagee sale but are not clear as to whether it was between the plaintiffs and the mortgagor and/or between the plaintiffs and the defendant, and/or between the defendant and the mortgagor. The relevance of this is not very clear from the statement of claim.
- 13. The defendant sets out some details of how the sale proceeds were distributed<sup>4</sup>. He says that there were certain liabilities that had to be

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<sup>2</sup> The 2<sup>nd</sup> plaintiff deposes as follows in his affidavit:

In paragraph 6 of the statement of claim, the plaintiffs plead as follows:

The main area of work that the Defendant undertook for the Plaintiffs were in regards to an alleged "bogus" Mortgagee's Sale that the Plaintiff's previous Solicitor arranged with one of his own clients, without authority.

Why the plaintiffs call the mortgagee sale "bogus" is not at all explained in the pleadings.

<sup>3</sup> As the plaintiffs depose:

- 11. The property referred to in paragraph 5 above was sold for \$650,000.00 (Six Hundred and Fifty Thousand Dollars) which the defendant received, from this amount he retained \$150,000.00, which was to be paid to the mortgagor, this sum is not subject of the Writ of Summons.
- 12. The defendant did not pay the mortgagor this amount and as a result, I am being sued for the amount and the matter is pending in Court of Appeal Case No. 32 of 2010.

<sup>4</sup> He deposes:

following are some examples of some of the payments made from the Sale Price received on the sum of \$631, 513.89 to show that the plaintiff is not telling the truth when he said no payments received by them from the monies received by Sahu Khan and Sahu Khan in respect of the purchase price.

- i. Annexed herein and marked as Annexure "A" is a copy of the Trust Account cheque dated 6<sup>th</sup> October 2008 for \$500,000 paid to the account of Kristamma Goundar the mortgagee on whose behalf the mortgagee sale took place.
- ii. a. the said Kristamma Goundar gave written authority dated 2<sup>nd</sup> December 2008 to Sahu Khan and Sahu Khan and to pay the further following sums from the Trust Account of the firm and a copy of the authority is annexed herein as Annexure "B"
  - b. very significantly that authority was witnessed by the Plaintiff

settled out of the sale proceeds<sup>5</sup>. He also denies that the sum of \$150,000 was payable to the mortgagor:

- iv. It is certainly not correct that \$150,000 was payable to the mortgagor and as can be seen above the whole amount of purchase price received had been accounted for and paid out and accounted for.

#### *Other Monies Deposited Into Defendant's Solicitors' Trust Account*

14. The "other monies" allegedly paid by the plaintiffs to the defendant's trust account are not quantified in the statement of claim or in the affidavit filed by the plaintiffs. There is, but a mere fleeting reference to this, as follows, in the statement of claim:

The Defendant requested that the Plaintiffs deposits money into his Trust Account and other accounts upon his instruction.

The Defendant also requested the Plaintiffs to pay him money in Australia which he promised to remit to Fiji and deposit in his Trust Account and provide a proper statement.

15. The plaintiffs say that the defendant "began asking for moneys to be given to him". It appears that the plaintiffs did comply. Why the defendant was asking for money and why the plaintiffs chose to oblige, is not at all clear from the pleadings. The plaintiffs merely plead as follows:

13. As a result of the matter concerning mortgagee sale and the disputes arising the defendant began asking for moneys to be given to him.

14. I trusted the defendant as he was a lawyer and he was acting for us and I honestly believe that he would account for the moneys and advise on all legal requirement and obligations.

16. They allege that the Receiver of the defendant's firm had informed them that there was no trust account record available with regards to monies given by the plaintiff to the defendant<sup>6</sup>.

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- c. Annexed herein and marked as Annexures "C" "D" and "E" are copies of the Trust Account cheques of Sahu Khan and Sahu Khan confirming payments made out of the Trust Account monies held on behalf of Kristamma Goundar.
  - iii a. On 9<sup>th</sup> May 2008 a Progressive Bill of Costs was made in respect of the Action No. 061 of 2005 where Sahu Khan and Sahu Khan acted for Kristamma Goundar and Hari Krishna and which was sent to the Plaintiff who held power of Attorney from both of them and annexed herein on Annexure "F" is a copy of the bill of costs.  
b. The cheque was made for this amount and banked and a receipt was issued by the office Account of Sahu and Sahu on 23/0508 Annexure "F1" herein.
  - iv. a. A further sum of \$19,383.50 as cost was deducted from the monies held in the Trust Account of Sahu Khan and Sahu Khan and annexed herein as Annexure "G" is a copy of the Office Account receipt of Sahu Khan and Sahu Khan for the sum of \$19,383.50 issued to the Plaintiff and a copy of which is annexed herein as Annexure "H".  
b. The Plaintiff requested for the Bill of Costs and one was Issued in respect of the sum and annexed herein as Annexure "I" in a copy of the Bill of Costs for the same.

<sup>5</sup> He deposes:

- 12.i. The Property was sold for \$650,000 but there were certain liabilities in respect thereof such as the Nadi Town Council rates and the total net amount received by Sahu Khan and Sahu Khan in their Trust account from the Solicitors of the Purchaser under the mortgage sale was "631, 513.89 and,  
a. Annexed herein as Annexure "J" is a copy of the letter dated 17 June 2008 from the solicitors of the purchaser confirming payment of \$600,000 by bank cheques.  
b. Annexed herein as Annexure "K" is a copy of the letter of the Solicitors of the purchaser enclosing the cheque for the balance sum of \$31,513.89 out of the balance of \$50,000.  
ii. Accordingly ultimately the sum of \$631, 531.89 was received by the firm of Sahu Khan and Sahu Khan for the sale of the property in question and not \$650,000 as alleged.  
iii. The full sum payable to Kristamma Goundar was paid out by Sahu Khan and Sahu Khan from its Trust Account.

<sup>6</sup> As the second plaintiff deposes:

".....there was no trust account record available in regards to money given by the Plaintiff to the Defendant".

17. The defendant does not deny that monies were paid into his trust account. He counters though that there were clear records<sup>7</sup> in his Trust Account about the monies deposited which were all utilized in accordance with the plaintiff's instructions<sup>8</sup>.
18. The defendant refutes the allegation that he had asked for monies from the plaintiffs. The monies he demanded of the plaintiffs were on account of his "progressive costs" concerning the High Court claim as well as the Fiji Court of Appeal matter. He says his firm had accounted for all the monies<sup>9</sup>.
19. The defendant further deposes that he had invested the balance sum on their behalf "under the security of a mortgage and accordingly neither the firm of Sahu Khan and Sahu Khan nor he had unlawfully kept the funds as such"<sup>10</sup>.

#### *Monies Paid By Plaintiffs To Various Third- Parties*

20. At paragraph 12 of the statement of claim, the plaintiffs set out the details of all monies they paid into various accounts as directed by the defendant.
21. The details of all monies paid by the plaintiffs to the various third parties, which includes the defendant's daughter, are set out in both the statement of claim and at paragraph 15 (see below) of the affidavit sworn by Pillai.

15. The plaintiffs upon defendant's request deposited moneys into various accounts details of which were supplied by the defendant. The details of the deposits are as follows:

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<sup>7</sup> Sahu Khan deposes:

10.As to paragraph 9 of the said Affidavit:

- i. There were clear records kept in the trust Account of Sahu Khan and Sahu Khan the monies deposited and utilized on behalf of the Plaintiff and,
- ii. I deny categorically the alleged information given by the Receiver and if the receiver cannot locate the record then it is not my fault.
- iii. At the trial proper there will be clear evidence (both documentary and witnesses evidence) produced in this regard and this substantiate and my very strong contention that this Honourable Court at this stage cannot determine the issues of the fact and evidence in conflict by means of the affidavit alone without the opportunity given to the parties to challenge the evidence in dispute by means of cross examination and after producing all the relevant evidence.

<sup>8</sup> He deposes:

11.As to paragraph 10 of the said affidavit I very strongly deny each and every allegation contained therein and all the monies received by the firm Sahu Khan and Sahu Khan in its trust account were rightly utilized on specific instructions of Kristamma Goundar and/or the Plaintiff and except for the part costs payable were deducted from the amount held in trust on behalf of the said Kristamma Goundar and/or the Plaintiff and the.....

<sup>9</sup> He deposes:

13. As to paragraph 13 of the said Affidavit I deny that I asked for monies as such but Sahu Khan and Sahu Khan asked for more costs to be paid by the Plaintiff & Kristamma Goundar in respect of the progressive costs concerning the new proceedings in the High Court and the Court of Appeal of Fiji.
14. That Sahu Khan and Sahu Khan had accounted for all the monies and I had given all the legal advices to the Plaintiff & Kristamma Goundar as required.

<sup>10</sup> The defendant deposes:

- vi. As to the payments made in the Sahu Khan and Sahu Khan Trust Account the said firm with the Authority of the Plaintiff & Kristamma Goundar had invested the balance sum on their behalf under the Security of a Mortgage and accordingly the firm of Sahu Khan and Sahu Khan nor I have unlawfully kept the funds as such.

<b>Date</b>	<b>Account Name</b>	<b>Amount</b>
11/01/08	Shabina Sahu Khan Account – Sydney	AUD \$5000.00 FJ \$8,409.01
Annexed hereto and marked with letter "A1" is a copy of the my bank statement, which shows transactions dated 11/01/08 and annexed hereto marked "A2" is an email dated 20/01/08 from Shabina Sahu Khan confirming receipt.		
16/01/08	Zarsha Pty Limited, West Bank Sydney	AUD \$5,821.00 FJ \$9789.77
Annexed hereto and marked with letter "B" is NAB statement dated 16/01/09 (date 16/01/08 is an error) which show the transaction amount.		
30/01/08	Shabina Sahu Khan Account – Sydney	AUD2,000.00 FJ\$3,363.60
Annexed hereto and marked with letter "C" is a copy of email dated 13/02/08 confirming receipt of money by Sabina.		
11/02/08	Sahu Khan & Sahu Khan Trust Account	AUD\$14,621.62 FJ \$19,398.50
Annexed hereto and marked with letter "D" is telegraphic transfer receipt dated 11/02/08.		
30/05/08	Tanaar Pty Ltd, Westpac Bank, Sydney	AUD\$15,030.75 FJ\$25,278.76
Annexed hereto and marked with letter "E" is a copy of deposit slip dated 30/05/2008.		
19/09/08	Dr Manish Agarwal Account, Brisbane Metway Bank Ltd, Brisbane.	AUD\$5,500.00 FJ\$9,249.92
Annexed hereto and marked with letter "F" is a copy of telegraphic transfer receipt dated 19/09/08.		
? /01/09	Zarsha Pty Ltd, Westpac Bank Sydney	AUD8000.00 FJ\$13,454.42
Reference is made to annexure "G" and an entry dated 12/12/08 in lieu of date on Writ of 01/09.		
30/04/10	MS Khan & N Khan, St George Bank	AUD\$3,000.00 FJ\$5,045.40
Annexed hereto and marked with letter "H" is a deposit slip dated 30/04/10.		
07/05/10	Aarisha Pty Ltd	AUD\$8,756.00 FJ\$14,725.87
Annexed hereto and marked with letter "I" is the bank statement showing withdrawal dated 20/05/11 in lieu of 07/05/10 as in Writ of Summons.		
13/09/10	Arshad S Khan, Westpac Bank	AUD3,000.00 FJ\$5,045.40
Annexed hereto and marked with letter "J" is bank statement showing withdrawal dated 13/09/10.		
30/09/10	Sahu Khan & Sahu Khan, Trust Account	AUD\$62,433.00 FJ\$105,000.00
Annexed hereto and marked with letter "K" is a letter giving Bank Authority dated 25 August, 2010.		
01/10/10	Sahu Khan & Sahu Khan, Trust Account	AUD\$59,972.21 FJ\$100,861.44

Annexed hereto and marked with letter "L" is a deposit slip dated 01/10/10 and Bank of Baroda Cheque dated 1 October, 2010.		
20/12/10	Zarsha Pty Ltd, West Bank, Sydney	AUD\$5,000.00 FJ\$8,409.01
Annexed hereto and marked with letter "M" is a Bank Statement of the transaction dated 20/12/10.		
04/03/11	Aarisha Pty Ltd, ANZ Bank, Sydney	AUD\$3,000.00 FJ\$5,045.41
Annexed hereto and marked with letter "N" is an email instructions by email dated 04/03/11.		
04/05/11	Aarisha Pty Ltd	AUD16, 175.00 FJ\$27,203.16
Annexed herein before is Annexure "I" which shows withdrawal dated 4/5/11.		
Unknown date Sahu Khan & Sahu Khan Trust Account		AUD\$16,016.54 FJ\$26,936.66
Unknown date	Zarsha Pty Ltd, West Bank Sydney	AUD\$13,821.00 FJ\$18,43600

22. The defendant does not deny that the above payments were made by the plaintiffs. However, he denies that the payments were made on his request<sup>11</sup>. In the same breath, he concedes though that he did request the plaintiffs to assist the various payees (as per table above) "*with certain loans*" and to which request the plaintiffs did oblige.
23. As if to explain the difference between "*requesting*" in the sense alleged by the plaintiffs on the one hand and "*requesting the plaintiffs to assist these third parties with certain loans*" in the sense that he means, the defendant asserts that he is not liable personally for the said loans to the third parties as the loans were not made personally to him. He also asserts that he cannot be held liable as he did not guarantee the said loans:
- There is no written memorandum signed by me that the monies paid to the Third parties were guaranteed and/or agreed to be repaid by me and I respectfully refer to the Indemnity Guarantee and Bailment Act.
24. The defendant then goes on to argue that if the court were to find that the payments were made for him personally, the payments were illegal and made in breach of the Reserve Bank Act and the Exchange Control Act<sup>12</sup>.

<sup>11</sup> At paragraph 15(ii) of his affidavit, the defendant deposes:

ii. As to the payments made to Shabina Sahu Khan, Zarsha PTY Ltd, Tanaar PT Ltd, and Manish Agrawal, MS Khan and N Khan, Aarisha PTY Ltd, Arshad S. Khan in Australia I deny that the payments were made on my request as such,

<sup>12</sup> The defendant pleads as follows at paragraph 15 (iii) and (iv):

## Two Other Instances Of Payment To Third Parties

25. In addition to the above, the plaintiffs also allege that they made two further payments to the defendant as follows:

17. There were two further amounts paid to the Defendant the particulars of which we did not know on date of filing of Writ of Summons the details are as follows:-

- (i) Sum of FJ\$15,000.00 paid on 22 May, 2008 and
- (ii) Sum of FJ\$19,398.50 paid to the Defendant on 11/02/08

18. The Plaintiffs are also claiming this amount totaling \$34,498.50.

Annexed hereto is annexure marked "O" and "P" of Bank Statements dated 22/05/08 and 11/02/08.

26. The plaintiffs seek judgment in the sum of \$387, 216.33 plus \$34, 498.50 making a total of \$42, 614.83 plus interest at the rate of 10% and costs on Solicitor client indemnity basis.

27. As regards the plaintiffs' allegation in paragraph 22 above concerning the additional payment totaling \$34,498.50, the defendant refutes this simply as follows:

As to paragraph 17 of the said affidavit no such payments as such were made to me and if the payments were made to Sahu Khan and Sahu Khan until some proofs are given I cannot admit or deny the same but certainly no payments were made to me personally as such.

## OBSERVATIONS

28. The defendant does not deny that the plaintiffs did pay him the monies. He argues though that there are substantive issues of illegality involved<sup>13</sup> in terms of the Reserve Bank Act and the Exchange Control Act, but does not care to say what they are, let alone, how these would favour him and/or how they would disfavour the plaintiff<sup>14</sup>. He urges that there are triable issues in this case but does not really say what the issues are<sup>15</sup>.

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- iii. However, I did request if they could assist the said Payees with certain loans and he agreed to do so but the payments were not so made on my behalf as such and accordingly I deny liability thereof. [my emphasis]
  - iv. In any event if eventually after full hearing of the evidence and coming to a decision by the Honourable Court that all the payments in (ii) above in Australia were made for me at the relevant time then the same were illegal and made in breach of the Reserve Bank Act and the Exchange Control Act and as pleaded in paragraph 12 (iv).

<sup>13</sup> He asserts as follows in his affidavit:

- As to paragraph 18 and the Prayers and Orders sought I say that this Honourable Court must dismiss the summons with substantive costs for the following reasons,
  - i. There are substantial questions of law involved in the action having regard to the pleadings and particularly as to the clear issue of illegality involved in view of the provisions of the Reserve Bank Act and the Exchange Control Act as pleaded specifically in paragraph 12 of the Statement of Defence filed herein as the payments were alleged to be made to the parties in Australia on my behalf when I had been resident of Fiji at all material times.

<sup>14</sup> He deposes:

- 3. As to paragraph 2 of the said Affidavit I say as follows:-
  - iv. There are substantive issues of illegality involved and in particular the Reserve Bank Act and the Exchange Control Act and that alone show that there are substantive issues of law and facts to be determined by this Honourable Court after hearing all the relevant evidence.

<sup>15</sup> He deposes:

- 4. As to paragraph 3 of the said Affidavit the defence filed herein discloses facts that I have a good and valid defence to this action and further:-



29. The defendant concludes by saying that the issues involved cannot be determined summarily<sup>16</sup>.

30. The second plaintiff, in an affidavit in reply that he swore on 07 March 2012 and filed on 21 March 2012, opines as follows in paragraph 19:

I believe the Defendant should attend the Court on the hearing of this application and I so require him so that he can be cross-examined on his evidence as contained in his affidavit.

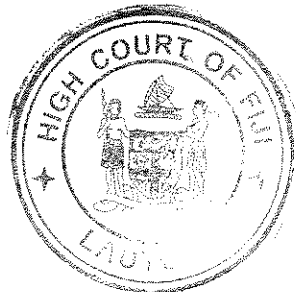
### THE LAW

31. The summary judgment procedure under Order 14<sup>17</sup> is available to any plaintiff who desires a quick judgment on his or her claim where there is no defence to a claim, or, if a defence is raised, it either fails to set up a bona fide defence or discloses no triable issues and will merely have the effect of delaying a judgement in favour of the Plaintiff. The Court's task is to determine whether there ought to be a trial.

32. While I think the plaintiffs themselves do concede (see paragraph 31 above) that there are triable issues involved in this case.

### CONCLUSION

33. Accordingly, I refuse the plaintiffs application. Parties to bear their own costs. Case Adjourned to **17 August 2016** for mention at 10.30 a.m.



Anare Tuilevuka

**JUDGE**

12 July 2016

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- i. Since the Issues of fact raised are disputed the principals applied by the Courts in application for summary judgment is clear that the Court cannot determine the issues of fact on conflicting affidavits alone but instead these must be a trial on Issues of fact.
  - ii. The Court can only determine where the truth lies after the cross examination of the parties and witnesses on oath at the trial and after witnesses have been heard and cross examined to determine where the truth lies.

<sup>16</sup> As he deposes:

- iii. There are clear conflicting evidence of facts as the Plaintiff on the one hand and me on the other and until the issues of fact are tested by cross examination of the witnesses and after hearing all the relevant evidence this Honourable Court will not be able to make findings of fact.
- iv. A hearing in chambers by affidavit evidence alone cannot determine the findings of fact as to where the truth lies.
- v. The courts have repeatedly held that any chamber hearings to determine facts can only be done where no purpose will be served to have proper hearing of evidence and such cases are reserved for straightforward matters where the evidence is not much in dispute.
- vi. However, in the present application the facts as alleged by the Plaintiff are almost diagonally opposite to the facts as alleged by the Defendant.

<sup>17</sup> Order 14 Rule 1(1) states as follows:

1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgement against that defendant.