

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 56 of 2017

**BETWEEN** : **SHANTI HARILAL RAMA** also known as **SHANTI RAMA** also known as **SHANTI LAL** of 135A Donovan Road, Blockhouse Bay, Auckland, New Zealand, Widow.

PLAINTIFF

**AND** : **BHAGWAT HARILAL RAMA** also known as **BHAWAT RAMA** also known as **BHAGVATRAI HARI LAL** also known as **BHAGWAT HARI LAL** of Samabula, Suva, Fiji, Company Director.

FIRST DEFENDANT

**AND** : **JOSHIKA SAMUJH** of Samabula, Suva, Fiji, Company Director and Secretary.

SECOND DEFENDANT

**AND** : **RAMA & SONS LIMITED** a duly incorporated company having its registered office situate at Naidu Law, Level 2, Central Rentals Building, 292 Victoria Parade, Suva, Fiji.

SECOND DEFENDANT

**BEFORE** : Master Vishwa Datt Sharma

**COUNSELS** : Mr. Nilesh Prasad - for the Plaintiff  
Mr. Ritesh Naidu - for the Defendant

Date of Hearing: 21<sup>st</sup> November, 2017

Date of Ruling : 19<sup>th</sup> March, 2018

**RULING**

*[1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Application for Security for Costs pursuant to Order 23 of the High Court Rules, 1988 and the Inherent Jurisdiction of the Court]*

**A. Introduction**

1. On 12<sup>th</sup> April, 2017, the **Defendants** filed a **Summons for Security for Costs** against the Plaintiff and sought for the following Order-

(a) *That the Plaintiff do within 7 days give security for the Defendant's Costs in the sum of \$35,000 to the satisfaction of the Master on the ground that the Plaintiff is a non-resident and that in the meantime all further proceedings be stayed.*

2. This application is made pursuant to **Order 23 Rule 1 (a) and Order 25 Rule 2 of the High Court Amendment Rules, 1993 and the Inherent Jurisdiction of this Court.**

3. The **Defendants** rely on the Affidavit in Support and Answer deposed by the Defendant Bhagwat Rama.

4. The **Plaintiff** relies on the Affidavit in Support deposed by Shanti Harilal Rama and the Affidavit in Opposition deposed by the Plaintiff's duly constituted attorney Kishore Lal Dahya.

**B. The Law on Security for Costs**

5. ***Security for costs of action, etc. (O.23, r.1)***

*(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) .....

(c) .....

(d) .....

*Then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.*

The Rule states that "having regard to all circumstances of the case, the Court think, it just to do so, it may order" confers upon the Court a discretion whether or not to order security for costs.

**C. Analysis and Determination**

6. The issue for this court to determine is 'Whether the **Defendants** are entitled to **Security for Costs**' as sought for in their application?

7. The **Plaintiff's** Affidavit in Opposition is deposed by Kishore Lal Dahya in his capacity as a duly constituted attorney of the Plaintiff. He is the registered and beneficial owner of the property comprised in State Lease No. 15686 and has by virtue of his appointment agreed to place this property as security for costs in this proceedings.
8. The **assets** described within the Plaintiff's written submissions at paragraph 9 to which the Plaintiff is entitled to, have been dealt with and thus the Plaintiff confirms that he does not **own** anything in Fiji under his personal name.
9. However, the Plaintiff deposed that the property comprised in CL 1994 has also been fraudulently transferred by forging his signature by the 1<sup>st</sup> Defendant in his favour. He added that he is unable to provide the "usual" undertaking except to say that as a beneficial owner of 90% of the Company and the property comprised in CL 1994, he gives his interest as an undertaking as to damages.
10. The **Plaintiff** also stated that he has reviewed the **Pro-forma Bill of costs** in the sum of **\$35,000** which is totally and manifestly unreasonable in light of the claim pending before this Court.
11. The **Defendant's** contention is that the Plaintiff resides in Auckland, New Zealand. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants reside in Fiji. The 3<sup>rd</sup> Defendant is a company incorporated in Fiji. The Defendants are seeking security for costs on the ground that the Plaintiff is ordinarily resident out of jurisdiction.
12. M. Kishore Lal Dhaya is one of the two Executors and Trustees of the deceased's Will and the Plaintiff has filed this action in her personal capacity and also confirms that the Plaintiff does not own any assets in Fiji.
13. The **Defendants** submitted that following matters are of significance:-
  - *Mr. Dahya is not the Plaintiff. He is a third party to this proceeding.*
  - *The property which Mr. Dahya wishes to give as security for costs can be transferred/sold/charged at any time over which this Honourable Court will have no control.*
  - *Mr. Dahya holds a power of attorney from the Plaintiff. The power of attorney can be revoked at any time.*
14. The **Defendants** concern is that security offered by Mr. Dahya should not be accepted.
15. **Security for Costs** is not ordered because a Plaintiff is ordinarily resident outside of Fiji, the Court must consider other facts incidental to the proceedings.

16. Reference is made to the case of *Inspired Destinations (Inc) Ltd v Bayleys Real Estate (Fiji) Ltd [2015] FJHC 812; HBC180.2013 (20 October, 2015) wherein the issue of security for costs was discussed and observed as follows:*

*"That the Plaintiff is a non-resident and has no assets in Fiji is a circumstance of great weight favouring a security order. I am of course mindful to the fact that the making of an Order for **security for costs** is discretionary and the Courts no longer adapt a rigid rule. [see, M. J. Raine, "In locals we trust - Foreigners pay cash: rethinking security for costs against Foreign Residents (2012) 1 JCIVP 210 at 214P]."*

*'Returning to the instant case, although the grounds for **security for costs** have been proved by the Defendants, I am not bound to make an order.'*

17. In the High Court of Fiji in Furuuchi Susian Company Limited v Hiroshi Tokuhisa and Others Civil Action No.95 of 2009, Justice Byrne ordered Security for Costs against a Plaintiff company incorporated and operating in Japan as the Plaintiff was ordinarily resident out of the jurisdiction. In reaching this decision, Justice Byrne relied on what Sir Nicolas Brown Wilkinson V.C said in Porzelack KG v Porzelack (UK) Limited 1987 1 All ER 1074 at p.1076

*"That the purpose of ordering **security for costs** against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce a judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a Plaintiff who lacks funds. The risk of defending a case brought by a penurious Plaintiff is as applicable to Plaintiffs resident within the jurisdiction".*

18. The **Defendant** will only be entitled to costs if the **Plaintiff's** claim is ultimately dismissed with costs.
19. The Defendant is not entitled to security for costs as of right. If the Court feels that the Plaintiff has a good claim with good prospects for success, it may not be inclined to make any order for security for costs.
20. In *Ali v Chandra [2014] FJHC 710; HBA14.2013 (30 September 2014)*, Judge Kumar also saw fit to highlight a portion from *Porzelack K.G v. Porzelack* (supra) and further enunciated as follows;:

3.26 The threshold for exercise of discretion is that Respondent (Plaintiff) "does not ordinarily reside in Fiji".

3.27 The term "resident" or "ordinarily resident" cannot be given a precise definition.

3.28 Whether a person is resident or ordinarily resident will depend on various factors such as person's address, type of employment, duration of stay at a particular address, ownership of real properties and so on.

3.29 Once the Court determines that the Respondent (Plaintiff) "does not reside" or "does not ordinarily reside" in the country then Court has to exercise its discretion as to whether to make an Order for security for costs or not.

3.30 Of course in exercising discretion whether to make an Order for security costs, Court needs to take various factors into account. Some of the factors which Court may take into account are available funds within jurisdiction properties owned by the Respondent within jurisdiction and their values; (*Sharma v. Registrar of Titles*) chances of Plaintiff's claim succeeding (*Para 25.13.1 White Book. Vol 1, 2011*).

3.31 It must be made clear that the factors listed in preceding paragraph are not exhaustive and Court is free in exercise of its discretion to take into consideration any relevant factors.

21. As reported in the White Book (1997) at page 407 (23/1-3/2) on Security for Costs it states that:

*"Discretionarily power to order security for costs (rr1 - 3). The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs 'if, having regard to all the circumstances of the case, the Court thinks it just to do so' These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, and inflexible or rigid rule that Plaintiff resident abroad should provide security for costs. In particular, the former Order 65 r 6B which had provided that the power to require a Plaintiff resident abroad, suing on a judgment or Order or on a bill of exchange or other negotiable instrument, to give security for cost was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).*

22. Lord Denning as reported in Sir Lidsy Parkinson & Co Ltd v Farringham Ltd [1973] 2 A.E.R. 273 at 285-286.

*.....'If there is a reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular*

case. ....The court might also consider whether the application for security was being used oppressively-so as to try and stifle a genuine claim."

23. An exception applies if it is established that a foreign **Plaintiff** has **substantial assets within the Jurisdiction which are available to satisfy a costs order**. In that exceptional case, security for costs will not be ordered.
24. In *Babu Bhai Patel v Moanohan Aluminium Glass (Fiji) Ltd, Civil Appeal 19/1997*, an appeal from the Magistrates Court, Chief Justice Fatiaki held to the effect that to come within the exception a non- resident Plaintiff has the onus to prove that he has suitable property within Fiji.

'Once it is established that the Plaintiff was not ordinarily resident in Fiji, **as in this case they are resident in Australia**, the 'onus' then shifted to the Plaintiffs to satisfy Court that they have property within the Jurisdiction which can be made the subject to the process of this court. However, even if the Plaintiffs have no assets in Fiji, they may still avoid having to pay security for costs if they are able to convince the court pursuant to Order 23 of the High Court Rules, 1988, that having regards to all the circumstances of the case, it would not be just and fair to order security for costs or that it would be oppressive to do so in the circumstances.'
25. In the current case before this Court, the **Plaintiff** has confirmed that he does not **own any asset in Fiji**.
26. Upon the perusal of the entire court record, it can be ascertained from the Plaintiff's submissions and affidavit in another **interlocutory application** seeking an injunctive relief that he stated he is unable to provide the "usual" **undertaking** except to say that as a **beneficial owner of 90% of the Company** and the **property comprised in CL 1994**, he gives his **interest as an undertaking as to damages**. In any event if this submission is taken on board to determine the **security for costs** issue, still the beneficial interest of the Plaintiff cannot be converted into security for costs in this circumstances.
27. It is also noted that the **Plaintiff** has sued the **Defendants** in his **personal capacity**. The **Defendants** have not been sued by the **Power of Attorney** holder, Mr. Kishore Dahya. **However, he** is not the **Plaintiff** rather a **third party** to this proceeding.
28. The property which Mr. Dahya wishes to give as **security for costs** can be transferred, sold, mortgaged and/or charged at any time over which this Honourable Court will have no control. Further, Mr. Dahya holds a power of attorney from the Plaintiff. The power of attorney can be revoked at any time.

29. It is noted from the Writ of Summons and the Statement of Claim that the **Plaintiff's address of abode is 135A Donovan Road, Blockhouse Bay Auckland, New Zealand.**
30. The Affidavit evidence together with the written submissions without any doubt confirms two (2) things-
- Firstly**, the Plaintiff is resident in Auckland, New Zealand, outside the Fiji Jurisdiction; and **Secondly**, the Plaintiff admitted and confirmed by the Power of Attorney Holder, Mr. Dahya that he neither has nor owns any **assets** in **Fiji Jurisdiction**.
31. Therefore, the Plaintiff falls in the category in terms of *Order 23 Rule 1 of the High Court Rules, 1988, that the plaintiff is ordinarily resident out of the jurisdiction. I am further satisfied that the Plaintiff does not have or own any assets in Fiji.*
32. The Plaintiffs filed a **Writ of Summons and the Statement of Claim** on 07<sup>th</sup> March, 2017. The Defendants filed their Statement of Defence on 28<sup>th</sup> March, 2017.
33. **Reply to Defence** was filed as per the requirements of the High Court Rules on 02<sup>nd</sup> May, 2017.
34. Thereafter, Summons for Directions (SFD) was filed and because the **interlocutory applications** seeking **injunctive relief** and **security for costs** were impending determination by this Court, the summons for directions was put at an abeyance and hence no orders were made as such.
35. Now that we have reached a stage where both applications would have been dealt with that the Court needs to relist the Summons for Directions and make the orders for the parties to comply with accordingly. Thereafter, the parties need to move on with the next cause of Discovery and the **Pre-Trial Conference** and not unnecessarily delay the proceedings because of any pending interlocutory application made by any party in the circumstances.
36. **Prima facie**, bearing in mind the Defendants contention as based hereinabove together with his Defence, and the Statement of Claim of the Plaintiff as set out within the Statement of Claim, and upon a careful consideration, the **Plaintiff may** have an arguable case with good prospects of success on the impending substantive issue. Likewise, the **Defendant may** also have a good prospect of defending otherwise.

**However**, this court at this stage of the proceedings cannot delve itself into the merits of the parties' case, since that would be determined upon a proper hearing accordingly. Evidence of both sides need to be investigated and put to a test.

37. In '*Kadavu Shipping Company Ltd v Dominion Insurance Ltd*' 2009 HBC 508 Master Udit said in relation to the 'Strength or bona fides of a claim'

*'Under this criterion, the respondent is to show that it has a prima facie regular claim, which disclosed a reasonable cause of action. It is not the court's duty to divulge into a detailed analysis of the merits of the case unless it can be clearly demonstrated that there is a relatively high degree of success or failure. Once it is established, the Court is to proceed on the basis that the claim is bona fide.'*

38. In '*Allan v Hill View Limited* [2003] HBC 366, Connors J said:

*'.....another matter of importance for the Court is exercising its discretion is the Plaintiff's prospect of success in the action and of course as in any such situation that does not require the Court at this point in time to make any detailed determination of the likelihood of success but merely to do so based on the pleadings as they appear before the court.'*

39. The **balance of convenience** lies in the Court accepting that the Plaintiff has a regular bona-fide claim which has a chance of success without making any detailed determination as to the likelihood of success.
40. The **Defendant's** main thrust is that since the Plaintiff is resident in Auckland, New Zealand, out of this Jurisdiction, he should be required to pay security for costs. On the other hand, the **Defendants** will only be entitled to costs if the **Plaintiff's claim** is dismissed.
41. The Plaintiff has initiated this proceeding and he has the prosecution of the case to ensure he brings it to its conclusion on the balance of probabilities. And it is for the Defendant to counter the claim in terms of his Defence.
42. However, it is obvious in the circumstances that **expenses in terms of costs** will be incurred and therefore the parties to the proceedings must be ready to cater for the costs. In this case the **Defendant** has sought for **security for costs** against the Plaintiff.

#### Quantum of Costs

43. No formula for ascertaining the quantum of the security for costs was furnished to court by any of the Counsels. However, a very helpful guide is provided for in *Halsbury's Law of England (4<sup>th</sup> edition) Vol. 37 para 307, which states as follows-*

*'The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs*



*on a full party and party, still less on an indemnity basis. In the case of a Plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up the stage of the proceedings for which security is ordered, but there is no hard and fast rule.'*

44. Reference is made to the New Zealand Court of Appeal case of *Mclachlan & Others v. Mel Network Limited [2002] NZCA 215 (29 August 2002)* at paragraph 27 of the Judgment wherein His Lordship, Mr. Justice Gault said-

*'[27] The amount of security is not necessarily to be fixed by reference to likely costs awards: National Bank of New Zealand Ltd v Donald Export Trading Ltd [1980] 1 NZLR 97, at 103- 'It is rather to be what the court thinks fit in all the circumstances..'*

45. Further, parties must understand that any orders made in respect of the **Security for Costs** will be directed to be deposited into the **Chief Registrar's interest bearing account** and will only be released once the entire case is heard and determined by the Court.
46. Not only that, the **Defendant** may at liberty to make a second or consequent application and seek any additional Security for Costs if any costs ordered is insufficient to cover for the actual costs that will be incurred in the final determination of this case.
47. Taking into consideration the following, I am satisfied and accordingly grant a sum of **\$12,500** as **security for costs** in favour of the **Defendants**. The same to be paid into the Chief Registrars interest bearing account within 14 days' time frame.

- *nature of the Plaintiff's claim and the defence;*
- *oral and written submissions;*
- *applicable law Order 23 Rule of the High Court Rules, 1988;*
- *case authorities and the Pro-forma Bill of Costs,*

48. For the abovementioned rationale, I **grant the Defendant's application** and proceed to confirm the following orders.

**D. Orders**

- (i) The Plaintiff is hereby ordered to pay the Defendants a sum of \$12,500 as security for costs.
- (ii) The sum to be paid into the Chief Registrar's interest bearing account within 14 days.

- (iii) Cost of this application is summarily assessed at \$650 against the Plaintiff and to be paid to the Defendants within 14 days.
- (iv) The Plaintiff's Writ of Summons and the Statement of Claim will be struck out upon the non-payment of the ordered security for costs together with the costs of \$650 within the set time frame of 14 days.
- (v) Parties to proceed with the next appropriate cause of action in terms of the substantive claim.
- (vi) The case will now be scheduled for further directions accordingly.

DATED AT SUVA THIS 19<sup>TH</sup> DAY OF MARCH 2018



  
.....  
MR VISHWA DATT SHARMA  
Master of the High Court

cc. Mitchell Keil, Suva  
Naidu Law, Suva.