

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
AT LABASA

Civil Action: HBC No. 34 of 2013

BETWEEN: **VUNIMOLI SAWMILLS LIMITED** a duly registered limited liability company having its registered office at 15 Jaduram Street, Labasa.

1ST PLAINTIFF

AND: **BASHIR KHAN** of 15 Jaduram Street, Labasa, Businessman and Company Director.

2ND PLAINTIFF

AND: **MOHAMMED SHAMSHOOD** t/a **SAM CIVIL SERVICE** of Labasa, Businessman.

1ST DEFENDANT

AND: **HOME FINANCE COMPANY LIMITED** a financial institution in Fiji.

2ND DEFENDANT

BEFORE: **Hon. Justice Kamal Kumar**

COUNSELS: **Mr F. Hanif for Plaintiffs**
Mr A. Kohli and Mr A. Sen for 1st Defendant
Mr A. Ram for 2nd Defendant

**DATE OF HEARING: 8, 9, 10 February 2017
22 to 26 May 2017**

DATE OF JUDGMENT: 22 March 2019

JUDGMENT

Introduction/Chronology of Events

1. On 28 October 2013, Plaintiff caused Writ of Summons to be filed with Statement of Claim for damages for breach of contract and conversion.
2. On 8 and 18 November 2013, 2nd and 1st Defendant filed Acknowledgement of Service respectively.
3. On 20 November 2013, Judgment by Default was entered against 1st Defendant for damages to be assessed and on the same day Plaintiff filed Summons for Assessment of Damages which was returnable on 29 November, 2013.
4. On 26 November 2013, 2nd Defendant filed Statement of Defence.
5. On 29 November 2013, Default Judgment against 1st Defendant was set-aside by consent when 1st Defendant was directed to file Statement of Defence by 2 December 2013, with Plaintiff to file Reply to Defence within fourteen days from thereafter and this matter was adjourned to 28 January 2014.
6. On 3 December 2013, 1st Defendant filed Statement of Defence.
7. On 28 January 2014, Plaintiffs were directed to file Reply to Statement of Defence within fourteen (14) days and this matter was adjourned to 25 February 2014, on which date time for filing of Reply to Statement of Defence

was extended by further fourteen (14) days and this matter was adjourned to 14 March 2014.

8. On 25 February 2014, Plaintiffs filed Reply to Statement of Defence.
9. On 14 March 2014, this matter was adjourned to 25 April 2014, for Plaintiff to file Summons for Directions ("**SD**").
10. On 25 April 2014, Plaintiff informed Court that there is a Receiving Order against 1st Defendant and Plaintiff needs to make Application to join Official Receiver and as such this matter was adjourned to 25 May 2014.
11. On 25 April 2014, Plaintiffs filed Application by Summons to continue this proceedings against the Defendants on terms and conditions that Official Receiver be added as party to this proceedings and on 23 May 2014, being returnable date of the Application by consent Order in terms of the Application was made by the then Master of the Court.
12. On 4 July 2014, this matter was adjourned to 6 August 2014, for Plaintiffs to file SD.
13. On 5 August 2014, Plaintiffs filed SD and on 18 August 2014, Orders in Terms of SD was made by consent.
14. On 26 September 2014, parties sought further time to comply with Order on Summons for Directions.
15. On 16 October 2014, parties sought further time to comply with Order on Summons for Directions.
16. On 19 November 2014, Haniff Tuitoga filed Notice of Change of Solicitors on behalf of Plaintiffs in place of Esvee Legal.
17. On 19 November 2014, parties were directed to file Affidavit Verifying List of Documents ("**AVLD**") and this matter was adjourned to 22 January 2015.
18. On 24 December 2014, 1st Defendant filed AVLD.

19. On 24 December 2014, 1st Defendant filed Application by Notice of Motion seeking an Order to strike out Plaintiffs Claim.
20. On 22 January 2015, 2nd Defendant filed AVLD.
21. On 22 January 2015, Plaintiffs were directed to file AVLD within seven (7) days and this Strike Out Application was adjourned to 27 January 2015.
22. On 27 January 2015, parties were directed to file Affidavits in respect to Strike Out Application and it was adjourned to 6 March 2015, to fix hearing date and thereafter adjourned to 17 April 2015, for hearing.
23. On 17 April 2015, parties were directed to file Submissions and this Application was adjourned to 15 May 2015, to fix hearing date.
24. On 4 and 5 May 2015, Plaintiffs and 1st Defendant filed Submissions.
25. On 11 May 2015, Plaintiffs were directed to serve Submissions on 2nd Defendant with 2nd Defendant to file and serve Submissions by 29 May 2015, and the Application was adjourned to 8 June 2015, to fix hearing date.
26. On 27 May 2015, 2nd Defendant filed Submissions.
27. On 8 June 2015, 1st Defendant was directed to file Reply to Plaintiffs' Submission and the Application was adjourned to 12 June 2015, to fix hearing date.
28. On 12 June 2015, the Application was set down for hearing on 13 July 2015.
29. The Application was next called on 16 June 2015, and adjourned to 13 July 2015, for hearing.
30. The Application was heard on 13 July 2015, and adjourned for Ruling on Notice.
31. On 15 July 2015, the Application to Strike Out Plaintiff's claim was dismissed with costs.

32. On 30 July 2015, 1st Defendant filed Application by Summons for Leave to amend his Statement of Defence.
33. On 31 July 2015, Plaintiff was directed to file AVL D and this matter was adjourned to 24 August 2015, being returnable date of 1st Defendant's Application to Amend Statement of Defence.
34. On 12 August 2015, Plaintiff filed AVL D.
35. On 24 August 2015, by consent 1st Defendant was granted Leave to file Amended Statement of Defence within seven (7) days with liberty for Plaintiff to file Reply to Defence (if any) within seven (7) days from thereafter and this matter was adjourned to 8 September 2015, for further direction.
36. On 31 August 2015, 1st Defendant filed Amended Statement of Defence.
37. On 8 September 2015, Plaintiff was granted further three (3) days to file Reply to 1st Defendant's Amended Statement of Defence and this matter was adjourned to 14 September 2015.
38. On 10 September 2015, Plaintiff filed Reply to 1st Defendant's Statement of Defence.
39. On 14 September 2015, Plaintiff and 1st Defendant were directed to exchange documents within seven (7) days and this matter was adjourned to 25 September 2015.
40. On 25 September 2015, parties were directed to convene Pre-Trial Conference ("**PTC**") and file Minutes within fourteen (14) days and this matter was adjourned to 9 October 2015, for further directions.
41. On 9 October 2015, Court directed parties to hold PTC at place convenient to all parties failing which PTC was to be conducted before Master on 13 November 2015, and this matter was adjourned to 13 November 2015.

42. On 13 November 2015, parties were directed to convene PTC and file Minutes within seven (7) days and this matter was adjourned to 26 November 2015, for further directions.
43. On 26 November 2015, parties were granted final adjournment to file PTC Minutes and this matter was adjourned to 3 December 2015.
44. On 3 December 2015, parties were granted time until 9.00am on 4 December 2015, to file PTC Minutes.
45. On 4 December 2015, Court directed Plaintiffs and 1st Defendant to file PTC Minutes by close of business on that day with Plaintiff and 2nd Defendant to file PTC Minutes by 8 December 2015, and adjourned this matter to 9 December 2015.
46. On 9 December 2015, 2nd Defendant was granted Leave to file Supplementary AVLD and this matter was adjourned to 1 February 2016.
47. On 20 January 2016, 2nd Defendant filed Supplementary AVLD.
48. On 1 February 2016, parties were directed to file PTC Minutes within fourteen (14) days and this matter was adjourned to 19 February 2016.
49. On 19 February 2016, Plaintiffs and 1st Defendant were directed to file PTC Minutes by 24 February 2016, and this matter was adjourned to 26 February 2016.
50. On 26 February 2016, parties were directed to file PTC Minutes by close of business on that day and this matter was adjourned to 8 March 2016.
51. On 26 February 2016, Plaintiffs filed PTC Minutes.
52. On 8 March 2016, Court directed Plaintiffs to file Order 34 Summons, Copy Pleadings and Agreed Bundle of Documents (if any) and adjourned this matter to 22 March 2016.

53. On 22 March 2016, time for compliance with Courts direction of 8 March 2016, was extended to seven (7) days and the matter was adjourned to 6 April 2016.
54. On 6 April 2016, Plaintiffs were directed to comply with Court's direction by close of business on that day and this matter was adjourned to 15 April 2016.
55. On 8 April 2016, Plaintiffs filed Summons to Enter Action for Trial.
56. On 15 April 2016, Plaintiffs were directed to file Copy Pleadings within seven (7) days and this matter was adjourned to 25 April 2016, to fix trial date.
57. On 25 April 2016, Plaintiffs were directed to file Copy Pleadings by close of business on that day and Order 34 Summons was adjourned to 26 April 2016.
58. On 26 April 2016, this matter was adjourned to 13, 14 June 2016, for trial and Plaintiffs were directed to file Copy Pleadings by 5 May 2016.
59. On 2 May 2016, Plaintiffs filed Supplementary AVLD.
60. On 6 May 2016, Plaintiffs filed Application to vacate trial dates.
61. On 11 May 2016, being returnable date of the Application trial dates were vacated and this matter was adjourned to 14, 15, 16 November 2016, for trial.
62. On 14 November 2016, this action was struck out due to non-appearance of the Plaintiff and/or his Counsel after Plaintiffs name was called out both inside and outside of Court.
63. One the same day, Plaintiff filed Application to re-list this matter to cause list which was called on 15 November 2016.
64. On 15 November 2016, this matter was re-listed to the cause list and adjourned to 24 November 2016, to fix fresh trial dates.
65. On 24 November 2016, this matter was adjourned to 8, 9 and 10 February 2017, for trial.

66. On 8 December 2016, 2nd Defendant filed Application for Leave to file Further Supplementary AVLD which leave was granted on 20 December 2016.
67. On 23 December 2016, 2nd Defendant filed Further Supplementary AVLD.
68. At the commencement of trial on 8 February 2017, 1st Defendant raised preliminary issue that Plaintiff is a creditor within the provision of Banks Act and this action commenced without Leave of the Court.
69. This Court after hearing Counsel for the parties held that Plaintiffs did not fall within definition of creditor as in s9 of Bankruptcy Act 1944 with reason to be given when judgment is pronounced in respect to substantive matter.
70. The trial proceeded on 8 February 2017, and on 10 February 2017, was adjourned to 22 to 26 May 2017, for continuation.
71. Trial concluded on 26 May 2017, when parties were directed to file Submissions by 14 July 2017, with Judgment to be delivered on notice.

Plaintiff's Case

72. 2nd Plaintiff (PW8) gave evidence on his behalf and the 1st Plaintiff called following witnesses:-
 - (i) Setoki Qalubau of Government Qtrs 27, Cakobau Road, Nausori, Court Officer (**PW1**);
 - (ii) Ashok Maharaj of Namara Labasa, Manager (**PW2**);
 - (iii) Kaushal Nath of Narere, Nasinu, Sales Assistant (**PW3**);
 - (iv) Sunny Deo of Batanikama, Labasa, Manager (**PW4**);
 - (v) Sudama Nand of Qalewaqa, Labasa, Retired (**PW5**);
 - (vi) Low Hai Huat of Kuata Street, Simla, Lautoka, Saw Doctor (**PW6**);
 - (vii) Rakesh Sharma, Senior Court Officer (**PW7**).

73. PW1 during examination in chief gave evidence that:-

- (i) He is based at Nausori Magistrates Court as Senior Court Officer and has been in Judicial Department for nineteen (19) years;
- (ii) He worked in various Departments including Family Court, Small Claims Tribunal, Magistrates Court and High Court;
- (iii) In 2008, he was working at Family Court;
- (iv) In 2012, he was appointed Acting Senior Court Officer, Magistrates Court Labasa and in 2013, was appointed Senior Court Officer;
- (v) In 2013, he attended to execution of FIFA upon request from Sheriff Officer when he had difficulty in executing FIFA;
- (vi) In this instance, Sheriff Officer sought his assistance to execute FIFA given to him by High Court Registry because they could not locate the 1st Defendant as he was not at his place and was evading them;
- (vii) He told Sheriff Officer to go 1st Defendant's house at Basoga and he crossed the road and waited beside the office when Sheriff Officer called and informed him that he saw 1st Defendant's car going towards FSC;
- (viii) They followed 1st Defendant to a house at Vunivou, when he showed FIFA to 1st Defendant and told him about the FIFA;
- (ix) 1st Defendant cooperated with them and asked them to go to his Mill in Vunimoli when he told Sheriff Officer to go with him in 1st Defendant's car and he went by taxi;
- (x) At Vunimoli he told 1st Defendant that they were there to take possession of the place and they need to take inventory of items in the mill to which 1st Defendant agreed;

- (xi) The main road runs between the mill area with house like office, manager's quarters and mill where they process logs on the right side with big open house where they keep timber and boiler on the left;
- (xii) They did not take inventory because there was nothing in the mill and there was not any bench saw or trolley;
- (xiii) They went into Manager's quarters and there was nothing inside with wiring in a mess with electric wires cut;
- (xiv) There was no power box in the mill;
- (xv) 1st Defendant was with them and when asked he stated that everyone has access to that place which is not fenced;
- (xvi) 1st Defendant did not say where the machines were;
- (xvii) They saw the treatment plant and 1st Defendant took them and opened door to boiler where there was nothing for them to take inventory;
- (xviii) They then took possession of the place, returned and reported to High Court that there was nothing there and they took possession of the land;
- (xix) After one or two days they were informed by Rakesh, Senior Court Officer that some assets of Sam Civil Services was at 1st Defendant's place some items belonged to Plaintiffs when they approached 1st Defendant who invited them to his place at Basoga and at their request for list of assets of Sam Civil Services he gave list of vehicle numbers;
- (xx) They returned and conducted search at Land Transport Authority and found that some of the vehicle were under Bill of Sale to Carpenters and Bank whose name he could not recall;

- (xxi) After search he was informed through Rakesh that some items are in Sam Civil Services timber yard in Namara and that Rakesh got that information from Bashir Khan;
- (xxii) They then proceeded to Namara with Sheriff Officer (“SO”) and told 1st Defendant that some items in the mill belong to VSL when he responded by saying that we have to go through HFC Bank;
- (xxiii) He returned and sent an e-mail to Najab, Manager, HFC Bank listing items allegedly belonging to VSL and requesting them to confirm whether those items were there when they gave mill to 1st Defendant;
- (xxiv) Najab responded by stating that a bench saw and two (2) trolleys were not theirs;
- (xxv) They had few meetings with 1st Defendant when they requested him to provide documentary evidence to show the bench saw and two trolleys were his which he did not provide;
- (xxvi) They went to Namara Mill with Najab who told 1st Defendant that the Bench saw, two (2) trolleys and some blades were not part of the inventory when they gave the mill to 1st Defendant and told them that they can remove bench saw together with two trolleys;
- (xxvii) They took inventory and removed the bench saw together with two trolleys;
- (xxviii) They did not attempt to go back to Namara Mill to take another inventory because Najab told him that CEO of HFC Bank said that they are not to go back to Sam Civil Service;
- (xxix) They only took items which Najab said did not form part of Bank inventory;
- (xxx) The blades were given to them by 1st Defendant and 1st Defendant got an expert to remove the bench saw by using gas cutter in the presence of Najab;

(xxxix) 1st Defendant stated that the motor in the bench saw belonged to him but could not provide any documentary evidence to prove it and as such they also brought the motor.

74. During cross-examination by Counsel (Mr A. Sen) for 1st Defendant, PW1:-

- (i) Stated that FIFA commands them to take good and chattels which can be sold by auction to recover the debt;
- (ii) Stated that he does not know what was the Order upon which FIFA was filed and at time of executing the FIFA he did not know whether there was an Order or not;
- (iii) Stated that he was assisting in execution of FIFA against 1st Defendant;
- (iv) Stated that the right to execute FIFA came from FIFA received which directs them and if there is Court Seal on it they executed it;
- (v) Stated that amount in FIFA is \$795,000.00 which is pursuant to a Judgment in Civil Action No. 8 of 2009 with Bashir Khan, 2nd Plaintiff as Judgment Creditor is against 1st Defendant;
- (vi) When asked if Court Officer should scrutinize FIFA before execution he stated that FIFA was sent by High Court;
- (vii) Stated that he was not picked to execute FIFA but assisted the SO who asked for assistance and works under him and he is the first person in contact;
- (viii) They went to see Rakesh Sharma who told him to execute the FIFA and he relied on what Sharma told him;
- (ix) Confirmed that Sharma gave information where Plaintiffs items were and they were looking for Plaintiffs items;

- (x) Stated that you cannot execute FIFA against a person who has Receiving Order against him and they executed FIFA because he did not know about Receiving Order against 1st Defendant;
- (xi) Denied that 1st Defendant kept on telling him that there is a Receiving Order made against him in 2012;
- (xii) Stated that Labasa Court received Gazettes and they should know about Receiving Orders;
- (xiii) Stated that execution of FIFA may be unlawful because of Receiving Order against 1st Defendant made in 2012;
- (xiv) Stated that they took pictures of places where they went which was with Sharma;
- (xv) Stated at Vunimoli, there are two (2) staff quarters and Managers residence on the right;
- (xvi) Stated that 2nd Plaintiff or 1st Plaintiff's representative did not come to identify the place to them;
- (xvii) He did not record his visit in diary note but did progress reports;
- (xviii) Stated that Sharma told him that 1st Plaintiff's machines are at Namara and he went there with 1st Defendant;
- (xiv) Stated that he did not take 2nd Plaintiff with him;
- (xx) Stated that he did not ask Sharma for list of items belonging to Plaintiffs upon which they were going to execute FIFA;
- (xxi) Denied that he asked 1st Defendant for evidence of ownership of items they were going to execute FIFA on;
- (xxii) Stated that 1st Defendant was only asked for evidence of ownership of the motor and because 1st Defendant did not provide the evidence

they took it and if 1st Defendant had given evidence of ownership they would not have seized it;

- (xxiii) Stated that when they identified items belonging to 2nd Planted (Bashir Khan) Sharma contacted Bashir Khan to arrange for removal;
- (xxiv) Stated that the inventory is with Sharma and items were kept at Court premises which is not there anymore;
- (xxv) Stated the process after execution of FIFA is that items are auctioned after advertisement;
- (xxvi) Stated that in this instance items were never advertised and never auctioned;
- (xxvii) Stated that items were taken by Bashir Khan as directed by Official Receiver;
- (xxviii) Stated that he does not know how all of a sudden Official Receiver came into the picture;
- (xxix) Stated that they went to 1st Defendant's place three times and inventory taken by the SO is with Sharma;
- (xxx) They took inventory for further investigation and did not seize anything;
- (xxxi) Stated that they did not take inventory of sleeping beds, pots and pans;
- (xxxii) Agreed that they did not take inventory of anything;
- (xxxiii) Denied that they were only interested in seizing items told by Sharma that belonged to Bashir Khan and VSL;
- (xxxiv) Stated inventories were not taken because 1st Defendant told them that the items are not his;

- (xxxv) Stated that they did not investigate;
- (xxxvi) Agreed that officers are to do their job honestly and stated that Bashir Khan did not pay him anything;
- (xxxvii) Denied that he executed FIFA for VSL and Bashir Khan, the person who wanted to execute FIFA on his own chattels;
- (xxxviii) When it was put to him that he took Bashir Khan's items and gave to Bashir Khan and asked if he was working for Bashir Khan or Court he stated Court;
- (xxxix) When asked what powers Official Receiver had over items seized he stated Sharma advised him;
- (xl) Denied that if Sharma told him to do something unlawful he would do it;
- (xli) Denied that Sharma asked him to execute FIFA on Judgment Creditors items;
- (xlii) When asked if Sharma asked Bashir Khan why he did not get assistance of Police then to get it under guise of FIFA he stated that they executed FIFA according to FIFA;
- (xliii) Stated that they did not recover any money from 1st Defendant after execution of FIFA;
- (xliv) Denied that they used FIFA to get Bashir Khan and VSL's items.

75. During cross-examination by Counsel for 2nd Defendant PW1:-

- (i) Agreed that FIFA is issued for money judgment for certain amount and if there is no judgment for \$759,000.00, FIFA cannot be properly issued;
- (ii) Stated that they did not have list of 1st Plaintiff's items, they were looking for and they would normally take inventories;

- (iii) Stated that they knew VSL and Bashir Khan items were with 1st Defendant when HFC Manager told them that those items were not on HFC list;
- (iv) Stated that they asked 1st Defendant if those items did belong to him;
- (v) Stated that 1st Defendant did not give receipt for those items and they seized the items because it was on his property;
- (vi) Stated that the bench saw and motor were given to Bashir Khan and Bashir Khan did not show any receipt;
- (vii) Stated items were released to Bashir Khan after Sharma told them to release after receiving letter from Official Receiver;
- (viii) Stated that apart from bench-saw, trolleys and motor, saw blades were seized;
- (ix) Stated that in executing FIFA they were seizing Mohammed Shamshood and Razia Bano's items;
- (x) Stated that FIFA did not authorise them to seize Bashir Khan or VSL's items;
- (xi) Stated that they took possession of the land that there was nothing in the Order about taking possession of the land;
- (xii) Stated they took possession of the land because there were properties such as mill and tramline;
- (xiii) Stated that he does not know who occupies Vunimoli property now;
- (xiv) Stated that Bashir Khan went to that place in Vunimoli;
- (xv) When it was put to him that without Writ of Possession, he let Bashir Khan take over his property he stated that after execution they informed Sharma;

- (xvi) Stated that they did not obtain securities from HFC;
- (xvii) Agreed that, that would have clarified as to what is under HFC and that if items were under security they could not levy FIFA;
- (xviii) Stated that Official Receiver sent e-mail which is in Court file and he has seen it.

76. PW2 during examination in chief gave evidence that:-

- (i) He is employed as Manager at Carpenters Motors;
- (ii) He gave quotation dated 25 April 2016, to VSL for 10 wheeler truck for \$192,000.00 and \$24,000.00 for fabrication which Bashir Khan requested which would take total cost to \$216,000.00 (Exhibit 'P1');
- (iii) He gave quotation dated 26 April 2016 to VSL for Isuzu Truck for \$60,000.00 and three (3) sided tray with wood cost \$9,000.00 to \$69,000.00 for fabrication as requested by Bashir Khan (Exhibit 'P2').

77. During cross-examination by Counsel (Mr Kohli) for 1st Defendant PW2 stated that:-

- (i) Quotation he gave was for brand new truck;
- (ii) Stated that they also deal in second hand trucks;
- (iii) Stated that for new trucks the guarantee they give is for 20,000 km or one year whichever comes first and for private vehicle it is 100,000 km or three years whichever comes first;
- (iv) Stated that the value of 20 year old truck which is not in operation will depend on lot of factors like condition of truck, mileage and defects;
- (v) Stated that he cannot give value of twenty year old truck unless he sees it.

78. During cross-examination by Counsel (Mr Ram) for 2nd Defendant PW2:-

- (i) Stated that he was in motor industry for more than six years and he was not in motor industry when CI Registration came out;
- (ii) In reference to Exhibit P1 he stated that when trays are fitted with fabrication the weight of the vehicle would be seven (7) tonnes;
- (iii) Stated that their company used to sell Nissan Trucks but not anymore;
- (iv) When asked if there is three ton truck he stated that it will depend on tray and materials used to build the truck.

79. In re-examination PW2:-

- (i) When it was put to him that without tray truck weight for Truck in Exhibit P2 effectively would be three ton he stated that it depends on what is fitted;
- (ii) Stated that seven (7) ton truck (Exhibit P2) was with tray.

80. PW3 during examination in chief gave evidence that:-

- (i) He does administration work such as preparation of quote and registration of vehicles at LTA at Carptrac;
- (ii) He prepared quotation for VSL on 26 April 2016 and 26 April 2016 (Exhibit 'P3' and 'P4'), for following machines:-
 - a) Caterpillar 930 Loader (\$690,000.00)
 - b) Caterpillar 920 Loader (\$630,000.00)
 - c) Caterpillar 520 Loader (\$1.2m)
 - d) Caterpillar 528 Skidder (\$1.1m)
 - e) Caterpillar 6 ton Forklift (\$89,000.00)
 - f) Caterpillar 4 ton Forklift (\$69,000.00)
 - g) Caterpillar 2 ton Forklift (\$53,000.00)

81. During cross-examination by Counsel (Mr A. Sen) for 1st Defendant PW3:-

- (i) When asked if in 2006, he was requested by Bashir Khan or VSL to value certain machines he stated he was not because he started work in 2016 and was not there in 2006;
- (ii) When it was put to him that value of D6 which is forty years old with blown up engine would be nothing or few dollars he stated he cannot say anything as experts value it;
- (iii) Stated that he does not know how 920 loader not working could be valued or the value of 520 skidder with engine not working or value of forklift with engine not working;
- (iv) Agreed that his quotation referred to new loader;
- (v) Agreed that he was not in Court to tell value of forty (40) year old junk sitting in bush.

82. During cross-examination by Counsel (Mr Ram) for 2nd Defendant PW3:-

- (i) Stated that difference between D6K and D6D is that DSD was manufactured in 1980s and 1990s whereas D6K is new model and fully electronic machine;
- (ii) Stated that he does not know when BV registration came out;
- (iii) Stated all machines he quoted was brand new and current one;
- (iv) Agreed that he is a Sales Assistant and does not know what is inside the machine and certain people look at machines and come up figures;
- (v) Agreed that he does not know how amount in quotation was worked out and he has to refer to his supervisor for the price.

83. PW4 during examination in chief gave evidence that:-

- (i) He has been employed by Trade Supplies Ltd for nine (9) years and has been in Manager's position for seven (7) months;

- (ii) In 2016, he was employed as Salesman and his duties included counter services, giving quotation and looking after accounts;
- (iii) On 27 April 2016, he gave quotation to VSL for motor used in sawmill for \$52,496.95 (Exhibit 'P5') which was valid for thirty (30) days.

84. During cross-examination by Counsel (Mr Kohli) for 1st Defendant PW4:-

- (i) Stated that he prepared the quotation at request of then Branch Manager, Shalend Kumar who received fax from VSL;
- (ii) Stated that he never met Bashir Khan personally and there was never any request for him to visit any sawmill in Labasa and do valuation or motor brought to his office for valuation;
- (iii) Stated that he was never given any model or serial number and was only given kilowatt and RPM (speed of motor);
- (iv) Stated that if he was given 2006, 2005 or 2003 motors he would not know their cost because before 2010 his company was only selling electrical and air-condition items;
- (v) Stated that Bashir Khan did not purchase any items in the quotation.

85. PW5 during examination in chief gave evidence that:-

- (i) From 7 April 1992, and 14 May 2007, he worked at Public Works Department (PWD) where he started as an apprentice in Automotive Engineering and then became Mechanical Supervisor;
- (ii) He is mechanic by trade;
- (iii) After PWD he worked at Valebasoga Tropic Board and after 2011, he worked for Dalomo Holdings from 2 January 2012, to third week of June 2012;
- (iv) After that he did not work

- (v) 1st Defendant is the owner of Dalomo Holdings Limited;
- (vi) Recalled giving statement to Police on 19 January 2012;
- (vii) During that week of his work he was given a paper with name, model number for machines by 1st Defendant with instructions to grind engine and serial numbers and punch new numbers on number of machines including loader, digger and some trucks;
- (viii) He did not do it and he told him that he cannot do it as he worked for the Government and it was against the Land Transport Act;
- (ix) 1st Defendant then asked boys named Roneel and Yusuf to do it;
- (x) He saw them grinding Caterpillar D6, Caterpillar D4, Caterpillar loaders and Excavators;
- (xi) After grinding, they (Yusuf, Roneel and Sanjay) punched new numbers;
- (xii) He saw them punch new numbers because when you punch new numbers you have to remove water pipes comprising of engine oil cooler and transmission oil cooler;
- (xiii) They removed the water pipes and after that he assembled it;
- (xiv) They punched new numbers by using special number puncher;
- (xv) Apart from grinding and punching new numbers they dismantled a loader and D5;
- (xvi) All the work was done at 1st Defendants garage at Namara Mill and the works started at 5pm and finished at 3.00am;
- (xvii) Sometimes they worked overnight;
- (xviii) He installed bench saw at Namara Mill and he was told that the bench-saw was from VSL;
- (xix) He could not recall about Police Investigation against 1st Defendant;

(xx) Confirmed giving Statement to Police on 19 July 2012 (Exhibit 'P6').

86. During cross-examination by 1st Defendant's Counsel (A. Kohli) PW5:-

- (i) Stated that he left Valebasoga Tropik after Bahadur Ali died and he was not getting well with new boss;
- (ii) Stated that he was asked by 1st Defendant to punch numbers in first week of his job in 2012;
- (iii) From 2012, till he left job he did not have any disagreement with 1st Defendant and that he was a State Witness in case against Yusuf and after that he quit;
- (iv) Stated that there was allegation against him and Yusuf but later Police found that he was not involved in it;
- (v) Denied that that was the reason he chose to leave;
- (vi) Stated that after the case 1st Defendant asked him to come back to work but he declined because his body could not do the job;
- (vii) Stated that 1st Defendant asked him at Police compound but could not remember when;
- (viii) Stated that he slept at Police Station for a night and when he was released 1st Defendant called him to work at which time he was employed;
- (ix) When it was put to him that he stole parts he stated that Police investigated and found that he did not steal;
- (x) When it was put to him that he gave statement in favour of Yusuf he stated that his statement was there, they investigated and found the fact;
- (xi) Agreed that he was investigated and after investigation he was locked up;

- (xii) When it was put to him that after he chose to be State witness he was released he stated that he never chose;
- (xiii) Stated that from January 2012, until he left job he did not inform anybody but informed the mechanics that it was wrong;
- (xiv) Stated that he told Police about 1st Defendant doing things when he was at Police Station and the Police Officer told him not to tell that now and they will deal with 1st Defendant's report first;
- (xv) Agreed that he complained against 1st Defendant because 1st Defendant made complaint against him and Yusuf to Police;
- (xvi) Stated that he was not informant and 1st Defendant asked him to come back but he said it is enough for him;
- (xvii) Stated that he could not remember make and model and colour of truck that was being grinded;
- (xviii) Stated that there were ten (10) wheeler trucks and Toyota Hilux van;
- (xix) Stated that he could not remember colour or number of vehicles on which numbers were punched;
- (xx) Stated that Hilux van was a junk, 10 wheeler truck was running, some caterpillars were junk with only chassis there and some machines were running;
- (xxi) Stated that roughly 3 or 4 10 wheeler trucks were running and were operational and they go out of yard when need arises;
- (xxii) Stated that he cannot remember truck numbers with one being of green colour;
- (xxiii) Agreed that when vehicles are repaired they are identified by numbers;

- (xxiv) When it was put to him that he did not know any number when he gave Statement to Police he stated when vehicles come for repair they see numbers and cannot remember or maybe he could not recall;
- (xxv) Stated diggers had number but he cannot recall;
- (xxvi) Stated some D6 and D4 had numbers and some did not and had chassis only;
- (xxvii) Stated that he mentioned D6 and D4 to Police;
- (xxviii) Stated that grinding and punching of number he saw only on one occasion;
- (xxix) Stated that he declined to work and told the boys that it was wrong;
- (xxx) Stated that he was told by 1st Defendant and Police which is in his Police Statement;
- (xxxi) Stated that 1st Defendant got another mechanic to punch numbers which was done in the garage and in 1st Defendant's yard;
- (xxxii) Stated that grinding and punching numbers was done on one occasion only and took nearly one (1) week;
- (xxxiii) Stated that he assembled the parts, they removed;
- (xxxiv) When asked as why didn't he resign when he saw something legally and morally wrong he stated that that is why he never punch.

87. During cross-examination by Counsel for 2nd Defendant (A. Ram) PW5:-

- (i) Agreed that all vehicles belonging to Dalomo or 1st Defendant was grinded and changed and that he cannot tell number of vehicles that were punched;
- (ii) Stated that he did not know VSL was operating machine in 2006, as he was not working there at that time;

- (iii) Stated that he was told by 1st Defendant that bench-saw fitted was from VSL and did the fitting;
- (iv) Stated that Sanjay and them were brought by Police for questioning;
- (v) When it was put to him that no such thing happened, he stated that it happened in front of him and he was there;
- (vi) Denied that only after he was taken by Police then only he made allegations against 1st Defendant;
- (vii) When it was put to him that after he was cleared by Police and chose to give Statement to Police, he made allegation against 1st Defendant he stated "Completely wrong";
- (viii) Agreed that he only installed bench-saw in Namara and no other items.

88. During re-examination PW5:-

- (i) Stated that investigation regarding him and Yusuf took place in June 2012;
- (ii) Stated that he went to Police, gave statement and complained against 1st Defendant.

89. PW6 during examination in chief gave evidence that:-

- (i) He has been a saw doctor for forty (40) years and saw doctors repair saw in sawmills;
- (ii) Confirmed giving quotation to Bashir Khan and VSL for brand new sawmill for fully running a mill for \$400,743.20 (Exhibit 'P7');
- (iii) In reference to list of equipment on page of Sale & Purchase Agreement dated 2 September 2006, (Exhibit P...) stated that Bashir Khan did ask him to provide quotation for those equipment and that he would not be able to provide because they are old machines of which he could not see the number;

(iv) He does not know if those machines would be available.

90. During cross-examination by Counsel for 1st Defendant, PW6:-

(i) Stated that Bashir Khan did not purchase a single item in the quotation and he asked him to run the mill;

(ii) Agreed that it was quotation and stated that the reason for quotation was that Bashir Khan wanted him to run the mill and Bashir Khan bought bench-saw blade, 1 sharpener, roller and swagging machine;

(iii) Agreed that bench-saw blade is changed continuously;

(iv) Stated that blades were to be fitted to main break-bench;

(v) Stated that it is right to say that Bashir Khan had break-bench

(vi) Stated that other items were not to be used;

(vii) Stated that blades and sharpener were to be used;

(viii) Stated that he did not know that Bashir Khan was running sawmill from 2013.

91. In re-examination PW6:-

(i) Stated that the reason Bashir Khan asked him for quotation was that Bashir Khan asked him to run the mill to which he said he cannot do it because blade always cracks and said when he gave up Bashir Khan asked for quotation;

(ii) Stated that it showed he could not run the mill and he came to Bashir Khan's mill in January 2014.

92. PW7 during examination in chief gave evidence that:-

(i) He has been in Judicial Department for twenty-six (26) years and has been Senior Court Officer, Labasa High Court for past six (6) years;

- (ii) FIFA and Writ of Possession was filed on 28 May 2013;
- (iii) FIFA was executed by SO with information given to his office and he handled the paper work;
- (iv) He had experience handling FIFA in past twenty-six (26) years;
- (v) Process of executing FIFA is that SO goes on site to recover debt and seize items to recover amount and takes inventory of assets, search is conducted for motor vehicles to see if it is under Bill of Sale, items seized are kept in Court custody, after five (5) days if debt is not paid or no one claims items seized, then items go for auction;
- (vi) For auction, they get approval from Chief Registrar, then engage auctioneer, place posters in town with venue, date and time of auction for awareness;
- (vii) Inventory list was provided to him for following six (6) items:-
 - a) No. 2 Size bench-saw;
 - b) 15 HP Motor
 - c) 2 Trolleys
 - d) Switch Board
 - e) 16 Saw Blades
 - f) Old Gage
- (viii) He has list of inventory dated 10 July 2013, and 8 July 2013 (Exhibit P8) given to him by SO;
- (ix) There is another inventory list dated 10 June 2013, which is not signed by SO and only SO knows why it is not signed;
- (x) Items 1 and 2 on the 1st page and items 1, 2, 3, 4 on the 2nd page were seized;
- (xi) "Items not to be removed" on 1st page is directive by SO to owner to not to remove items;

- (xii) Subsequently items seized were released to Bashir Khan;
- (xiii) He does not know what was condition of 50 HP motor;
- (xiv) After those items were seized (Exhibit "P9") it was kept in custody of SO at Plaintiffs building at Nasekula Road ;
- (xv) Writ of Possession was issued on 20 May 2013, at High Court Registry Suva (Exhibit P10) in respect to Lot 1 on T9503 Waidamudamu (LD 4/9/5074) and SO 5367 NLTB Ref 4/9/8008 which was executed on 28 May 2013, and possession was given to Bashir Khan;
- (xvi) He received letter from Esvee Legal about Writ of Possession and as for letter from Solicitors they handled possession to Bashir Khan;
- (xvii) Writ of Possession was executed on 28 May 2013, and Mill was handed over to Bashir Khan on 31 May 2013;
- (xviii) When Mill was handed over to Bashir Khan he did not sign anything but Court wrote to Esvee Legal on 31 May 2013 (Exhibit P12);
- (xix) SO prepared execution papers which is not dated, Exhibit P13;
- (xx) He seen two other reports mentioned in Exhibit 12 which he does not have;
- (xxi) There was various correspondence between Court and Najab of HFC and tendered the emails as Exhibit P14;
- (xxii) Received e-mail dated 8 July 2013, from Valenitabua to which he did not respond and tendered it as Exhibit P15;
- (xxiii) In e-mail dated 11 October 2013, from Sumit Nand of Official Receiver's (OR) Office (Exhibit P16) OR gave consent for release of items seized to Bashir Khan.

93. During cross-examination by Counsel for 1st Defendant PW7:-

- (i) Agreed that he was entrusted with execution of FIFA which was filed in Suva Registry;
- (ii) Stated that they look at documents and rules to see if documents are within rules and copy of Madam Justice Wati's Judgment is in Court file (Exhibit P17);
- (iii) Stated that he has not read the Judgment or the Order of her Ladyship and it was not required;
- (iv) Stated the Order needs to be filed if filed with FIFA and Writ of Possession at the time of issuing which in this case was at Suva Registry;
- (v) Stated that he got the Judgment now and after execution he started putting documents together;
- (vi) In reference to FIFA (Exhibit P10) he agreed that it says Mohammed Shamshood and Rozina Bano and Central Manufacturing Co. Ltd (CML) as is stated that there is no connection between VSL, Bashir Khan and CML;
- (vii) Stated that his duty as Officer in Charge was to ensure that enforcement is in order;
- (viii) Stated that a person can stop execution of FIFA by applying for a stay;
- (ix) Agreed that FIFA on its face is inappropriate;
- (x) Stated Judgment in CA No. 8 of 2007, allowed Plaintiff to enforce Order for recovery of \$795,000.00 against 1st Defendant;
- (xi) Read paragraph 50(a) of the Judgment which was in following terms:-

“50(a) The plaintiffs have breached the sale and purchase agreement by terminating the same on the 23rd day of

December 2006. The said termination was unlawful and of no legal effect. As such, the only remedy that the plaintiffs are entitled to is the purchase price which calculates to \$795,000.”

- (xii) Stated that according to paragraph 50(a) of Judgment Plaintiff was at fault (breach);
- (xiii) Read paragraph 50(b) of the Judgment which is in following terms:-

“50(b) The defendants must pay this sum of \$795,000 to the plaintiffs, in lump sum, in exchange of the transfer of all the properties agreed to be sold vide the sale and purchase agreement.”
- (xiv) Stated that Plaintiff was entitled to \$795,000.00 in exchange for transfer of all properties;
- (xv) Stated that Bashir Khan or Valenitabua did not give transfer of property;
- (xvi) Agreed that Plaintiffs were not entitled to recovery of \$795,000.00;
- (xvii) Agreed you cannot enforce FIFA against person whom Receiving Order is made;
- (xviii) Stated that he did not know that Receiving Order was made against 1st Defendant;
- (xix) Agreed that if there is then entire process of execution of FIFA was a nullity;
- (xx) Stated nowhere in her Ladyships Order, there is an Order for vacant possession;

- (xxi) When it was put to him that Bashir Khan filed fraudulent document he deceived Court and everybody he stated that he cannot say anything;
- (xxii) When asked that if any client had no Order for possession but he filed Writ of Possession then is it not deception he stated that the office where document was issued should have rectified;
- (xxiii) When he was asked that if a person filed document to get something he is not entitled to do it amounts to deception and dishonesty he remained silent;
- (xxiv) Stated that if documents were prescribed to him he would not have issued;
- (xxv) When asked if he did not think it proper to ascertain validity of process is regular or irregular he stated that he just came in Labasa and it was just a slip on their checking at whatever was issued;
- (xxvi) Agreed that any prudent officer taking such a big action should have done it;
- (xxvii) Agreed that after perusing Judgment he can say execution of FIFA was wrong and unlawful;
- (xxviii) Agreed that Setoki, Court Officer assisted in execution of FIFA;
- (xxix) Agreed that Setoki gave him report dated 17 July 2013, but did not give any specific report on visit to Vunimoli Sawmill, taking possession of the site or any pictures;
- (xxx) When he was told that Setoki had said he asked Setoki to assist SO because 1st Defendant was dodging and asked that if there was anything on file to suggest 1st Defendant was dodging he stated "No";
- (xxxi) When he was told that Setoki said Bashir Khan visited him and said that Bashir Khan had knowledge that his items were in Namara Mill

he directed Setoki to go to Namara and executed FIFA on those items he denied and stated they were only after 1st Defendant's items;

- (xxxii) Stated that he cannot think why Setoki said that FIFA was to be executed on Bashir Khan's items;
- (xxxiii) When asked as to when Setoki went to Vunimoli Sawmill what was he looking for there he stated that they were trying to get hold of 1st Defendant's items and that is why SO was on field;
- (xxxiv) When it was put to him that if it is true, then why they only seized Bashir Khan's items from Namara he stated that nothing as such was discussed in their office and they were only concerned with 1st Defendant's items and they were not looking for Bashir Khan's items;
- (xxxv) When it was put to him that Bashir Khan went with SO to get assistance of Police to execute FIFA he stated that he had no knowledge;
- (xxxvi) Agreed that from Namara 1st Defendants items should have been removed;
- (xxxvii) Stated that they had three keys for the lock to the gate to the compound where seized items were stored and all keys were kept in Court;
- (xxxviii) Stated that he did not know if rooms had no other access;
- (xxxix) When it was put to him that Setoki lied to Court when he said all items were brought to Court, he stated he cannot recall;
- (xl) Stated that there is no sealed Order on his file and that FIFA was issued by Registry in Suva who had to check the Order;
- (xli) Agreed that sealed Order is to be produced to assess if FIFA is properly filed;

- (xlii) Stated that first Name of Debtor on FIFA was Central Manufacturing Limited and after he contacted Senior Court Officer, Suva another FIFA was issued on 19 July 2013, with Writ of Possession;
- (xliii) New FIFA was received by them at Labasa Registry while they were in the process of executing the first FIFA like conducting search of vehicle;
- (xliv) Agreed that after getting all information he is of view FIFA was unlawful as there was no monetary judgment in Plaintiffs favour;
- (xlv) Stated that they did not complete execution of FIFA because certain information was gathered later;
- (xlvi) When it was put to him that they were looking for Bashir Khan's property he stated that they were looking for Shamshood's property;
- (xlvii) When it was put to him that only items they seized was a bench saw which belonged to Bashir Khan he stated that items seized were not under Bill of Sale and was in custody and ownership of Shamshood;
- (xlviii) Agreed that items seized were of Bashir Khan that were with Shamshood;
- (xlix) Denied that Bashir Khan was constantly liaising with the Registry and stated that he would deal with their Solicitor, Mr Valenitabua;
- (l) Stated that items were seized prior to them becoming aware of Receiving Order against Mohammed Shamshood and they found out about it when they were drafting advertisement for sale of these items;
- (li) Items seized were placed at property owned by Bashir Khan and the items were released to Bashir Khan;
- (lii) Denied that Court Officer was assisting Bashir Khan to do illegal enforcement;

- (liii) Agreed that Writ of Possession was executed illegally when Plaintiff was not entitled to possession under Madam Justice Wati's Order.
94. PW7 was also cross-examined by Counsel for 2nd Defendant and the question asked were mostly related to what has already been asked by Counsel for 1st Defendant and answered by PW7.
95. In addition to what has been stated by PW7 during cross-examination by Counsel for 1st Defendant, PW7:-
- (i) Stated that items seized were in custody of 1st Defendant and not under Bill of Sale or Mortgage;
 - (ii) Agreed that all properties attached to land like building is covered under mortgage;
 - (iii) When it was put to him that Setoki (PW1) said that they seized one (1) item belonging to Bashir Khan he stated he did not know what Setoki mentioned;
 - (iv) When it was put to him that rest of the items were not Bashir Khan and as such they were not seized he stated that he does not know;
 - (v) Stated that their search revealed that vehicle No. DSL005 is under Bill of Sale to 2nd Defendant;
 - (vi) Stated that there is no search note in his list for vehicle No. FT219, FG506 and FF390 and he does not know if they were under Bill of Sale to 2nd Defendant;
 - (vii) Stated that end result was that FIFA was deemed to be unexecuted;
 - (viii) Stated that he did not know if any items with 1st Defendant belonged to Bashir Khan;
 - (ix) Agreed that whole execution process was wrong because the foundation was wrong.

96. During re-examination PW7:-

- (i) Stated that execution process was carried out by Sheriff Officer Iliesa Bakinaceva and assisted by Setoki;
- (ii) When it was put to him that Setoki's evidence was that he was looking for Bashir Khan's property he stated that he does not accept;
- (iii) Stated that items seized were:
 - a) No. 2 size bench;
 - b) 50 HP Motor
 - c) 2 Trolleys
 - d) Switchboard
 - e) 16 Saw Blades
 - f) Old Gage
- (iv) Stated that apart from those items no other items were seized;
- (v) Stated that he tried to enquire with Suva Registry to see if Order was sealed and no Order was sealed with only copy of Judgment given.

97. Plaintiff's next witness was Bashir Khan the 2nd Plaintiff (**PW8**).

98. In examination in chief PW8 gave evidence that:-

- (i) On 2 September 2006, Plaintiffs entered into a Sale and Purchase Agreement with 1st Defendant Mohammed Shamshood and Rozeena Bano trading as Sam Civil Services (**Exhibit "P18"**);
- (ii) Schedule "A" of the Agreement lists the real property whilst Schedule "B" lists items in the logging area;
- (iii) Prior to signing the Agreement Plaintiffs were running sawmill and timber mill from the property for twenty-five (25) years;

- (iv) 1st Defendant and Rozeena Bano (“**the Purchasers**”) took possession of the property at time of signing the Agreement and both Plaintiffs, Purchasers and their Solicitors were there at Vunimoli Sawmill;
- (v) Equipment listed as items 3 to 11 in Schedule B of the Agreement were in the mill, which they tested and those not working were marked as such in the Agreement;
- (vi) Purchasers had to pay purchase price in the manner written in the Agreement and if they paid cash price would be \$900,000.00 and if on account price would be \$1.1 million;
- (vii) Purchase price was apportioned as follows:-
 - (a) \$100,000.00 for land
 - (b) \$800,000.00 for machines
- (viii) 1st Defendant did not have money to pay straightaway and if he could not pay then he pay another \$250,000.00 taking total price to \$1.1 million with balance price of \$750,000.00 to be paid;
- (ix) He did not know if 1st Defendant secured finance to pay purchase price and he did not receive full payment;
- (x) He is aware about Judgment delivered by Madam Justice Wati and agreed with paragraph 50(a), (b) on 2nd last page when it was read out to him;
- (xi) No settlement took place within three (3) months, where he signed Transfer and 1st Defendant did pay;
- (xii) Next he tried to takeover the mill by going with some iTaukei men when 1st Defendant who had some iTaukei men on his side held his beard and told him to go away or else he will be killed;
- (xiii) When he tried to go into the mill they came and stood in front of his car and stopped him and after that he went back;

- (xiv) He reported matter to Police and other Departments, gave Statement to Police and Esvee Legal filed FIFA;
- (xv) He is aware that execution process was carried out in Labasa by Setoki and Iliesa who he assisted after they went to him and asked him for assistance;
- (xvi) He accompanied Setoki and Iliesa with Police Officers to 1st Defendants mill at Namara;
- (xvii) He went inside the mill but did nothing and he went to 1st Defendants sawmill only once;
- (xviii) 1st Defendant was closing them out when Setoki told 1st Defendant that he cannot close them out and asked him (PW8) to show items belonging to PW8;
- (xix) He saw that three quarter of items in the mill including 1 bench saw, sizing blade, circular saw, motor (all), switchboard and wires, Gage, Saw Doctor, Foreseller machine at 1st Defendant's mill;
- (xx) After that Setoki was taking him to Basoga to 1st Defendant's garage and he was afraid 1st Defendant might have someone to do something to him;
- (xxi) His mill is situated at Waidamudamu Road, Vunimoli which he took possession of;
- (xxii) Setoki helped him to get possession when he handed him letter dated 31 May 2013, and said this mill is his from today and he got possession on or about 31 May 2013;
- (xxiii) When he entered the mill he was shocked to see the condition of the mill, as everything was removed and machines were taken out by cutting with gas;

- (xxiv) In reference to Schedule B of Exhibit P18 stated that items listed in paragraph 3 to 11 was in the mill on date of Agreement;
- (xxv) When he took possession he prepared inventory list and items that were not in the mill were Tank Nos. 1, 2 and 3, Solar Tanks 1, 2, 3 (System was taken out with tank left behind) timber drying shed was damaged (damaged posts, louvres and roof);
- (xxvi) Condition of forklift on site was that, only front part (Fork) was left and everything was taken and for 10 wheeler logging truck only chassis and old cap was left;
- (xxvii) Confirmed his signature on the Inventory (Exhibit P19);
- (xxviii) On 31 May 2013, nothing was in the mill after 8 years and there was overgrown grass, jungle, sawdust on roof and was not looking like a mill;
- (xxix) He asked Setoki as to what should he do with the mill, when Setoki told him that possession is with him, and he had to decide what to do;
- (xxx) After he gave mill to 1st Defendant, Army Officers took him and Dr Sahu Khan to Suva and told them that if they enter the mill he will be locked in Naboro and when 1st Defendant was present;
- (xxxi) Army Officers told him not to interfere with the mill which he gave to 1st Defendant and if he did interfere then he will be locked up in Naboro;
- (xxxii) When he was assisting Setoki in execution of FIFA, no items of 1st Defendant was taken;
- (xxxiii) Setoki was with Police and said that he is looking for items belonging to Plaintiffs (VSL);

- (xxxiv) He reported matter to Police and gave Statement to Police on 19 July 2012 (Exhibit P20);
- (xxxv) Police seized certain items and wrote to him on 21 August 2012, listing items seized by them (Exhibit P21);
- (xxxvi) He received Minute from Police Department dated 26 June 2013 and 24 June 2013 (Exhibit P22 and P23);
- (xxxvii) On 15 July 2013, he wrote letter to Commissioner of Police;
- (xxxviii) On 19 July 2013, he wrote letter to Deputy Registrar ("**DR**") (Exhibit P25):-
- (xxxix) He wrote letter to DR because Najab told Setoki that he can take items belonging to Plaintiffs and then Rakesh Sharma received e-mail from 2nd Defendant's Head Office, Suva saying items are under mortgage and they cannot take them;
- (xl) Confirmed that No. 2 Sizing blade, 50HP Motor, 2 trolleys, Switchboard, 16 saw blades, Runner Saw blade were removed by Setoki from Namara;
- (xli) He saw e-mail exhibited as P14;
- (xlii) When he went to Namara on first occasion Najab was present who asked to be shown items belonging to 1st Plaintiff and he will not stop those things from being removed;
- (xliii) On 24 September 2013, he wrote to Commissioner of Police for release of DC Caterpillar frame, truck parts and mill accessories seized by Police (Exhibit P26);
- (xliv) Confirmed receiving items listed in Exhibit P9 from Setoki on 14 October 2013;

- (xlv) As for switchboard all parts were removed;
- (xlvi) Bench Saw cannot be used as it needs to be repaired as it was without gauge system and circuit breaker;
- (xlvii) 50HP Motor was not in working condition as it was operated for 7 to 8 years and had to be upgraded;
- (xlviii) 2 trolleys were not working as shaft and wheels were missing.

99. During cross-examination by Counsel for 1st Defendants PW8:-

- (i) Agreed that he is aware about proceedings No. 8 of 2001, in which central issue concerned rights of parts in respect to Sale and Purchase Agreement between Plaintiffs and 1st Defendant and the proceeding was determined on 15 December 2011, whereby her Ladyship concluded that 1st Plaintiff breached the Agreement by terminating it and Ordered 1st Defendant to pay \$795,000.00 in exchange for transfer;
- (ii) When asked to show one document to 1st Defendant saying that he will abide by Order of Court he stated that lawyer knows;
- (iii) When asked if he executed transfer he stated that 1st Defendant did not have the money so he could not transfer;
- (iv) Stated that he did not execute Application for Consent to Transfer because his lawyer said if they pay money he will sell and they said they did not have money;
- (v) When asked as where is that letter he stated all files are with Dr Sahu Khan and he had 2 or 3 lawyers;
- (vi) Stated that he is aware that money will be paid in exchange for transfer and that pay money and then transfer;
- (vii) Stated that his lawyer told him that to get money, FIFA is to be filed;

- (viii) When he was referred to the Order he stated that his lawyer explained Order to him and told him that FIFA will be issued for him to get all things back;
- (ix) When it was put to him that he was after the money he stated “no” and 1st Defendant had no money and 1st Defendant stole all his items;
- (x) Stated that his lawyer told him that by filing FIFA he get his things back;
- (xi) Stated that FIFA was issued not to get Shamshood’s (1st Defendant) but Plaintiffs items and Plaintiffs lawyer said that he will file FIFA and get Plaintiffs items back;
- (xii) Stated that Shamshood had to pay money and if cannot pay then give all Plaintiffs things back and he was not to remove any items from the mill;
- (xiii) When it was put to him that FIFA does not say that his items will be seized he stated that lawyer or High Court know and Setoki told him that they will seize Plaintiffs items and give it to him;
- (xiv) Stated that Rakesh Sharma did not tell him that but said that Setoki was dealing with FIFA;
- (xv) In reference to Indemnity signed by him he stated that his lawyer told him that all his things will be returned to him;
- (xvi) Stated that it is not written in FIFA that Court will seize his items and return it to him;
- (xvii) Stated that Central Manufacturing Co. Ltd’s name on FIFA filed on 20 March 2013, was lawyers mistake and should have been VSL and Bashir Khan;

- (xviii) When asked if he agreed that he was not entitled to FIFA he stated that what could he do, 1st Defendant did not pay and took his things and his lawyer advised him that they will seize his items and give it to him;
- (xix) Agreed that VSL is a large company but did not know its share capital;
- (xx) Stated that he does not know brand of 5 inch bench saw which was from Taiwan, was purchased 25 to 30 years ago and he does not know its book value which has to be checked with the Accountant;
- (xxi) Stated that 15 HP Motor is 30 years old and he does not its book value;
- (xxii) Stated that complete mill roller was second hand from New Zealand and was 12 to 15 years old;
- (xxiii) Stated that he has been operating mill for 25 to 30 years;
- (xxiv) Stated that complete circular sawmill with switchboard was English brand which was 20 years old and he cannot remember date of purchase and does not know its book value;
- (xxv) Stated that size bench No. 2 was bought from New Zealand before he sold the mill;
- (xxvi) Stated that he cannot remember book value of 3 HP cross cut machine;
- (xxvii) Stated that Automatic Sloping Machine was bought in 2005, was Chinese brand, does not remember how much he bought it for and cannot tell its book value;
- (xxviii) Stated that he does not know brand of Breakdown Roller Sloping Machine which was bought in 2004 and could not tell its book value;

- (xxix) Stated that Roller Machine was bought in 2005 and he does not know cost of purchase and its book value;
- (xxx) Stated that he does not know year of manufacture, cost of purchase and book value of Foresaw Hammer;
- (xxxi) In respect to 28 Second Hand Blade he stated that they last for 1 or 2 years;
- (xxxii) When asked that when he issued FIFA he expected 1st Defendant to be with the blades he stated that he wanted what he gave;
- (xxxiii) Stated that he purchased Circular Saw in 2004, and does not know its brand, cost of purchase or book value;
- (xxxiv) Stated that he does not know the brand, cost of purchase or book value of Welding Bench Saw;
- (xxxv) Stated that he does not know brand, cost of purchase or book value for Gutter, Grinder Machine;
- (xxxvi) Stated that he does not know brand, cost of purchase or book value of any items listed under the heading **“Saw Room”** in the Sale and Purchase Agreement;
- (xxxvii) When asked if he could show any documents that says he is the owner of those items he stated that the Agreement says so and when he sold the items it belonged to him and VSL and not others;
- (xxxviii) Agreed that he sold old sawmill to 1st Defendant which was not operative and not complete;
- (xxxix) Stated that he does not know make, date of manufacture, date of purchase, cost of purchase and book value for 100 HP Motor and stated that it was complete motor;

- (xl) Stated that Agriculture Department, OHS, FEA checks Motor before they give licence;
- (xli) Stated that he does not know make of, date of manufacture, cost of purchase and book value of 150 HP Motor;
- (xlii) Stated that sizing bench was 5 to 6 years old when he sold it and does not know its book value or cost of purchase;
- (xliii) Stated that either he cannot remember or does not know the brand, cost of purchase, date of manufacture and book value in respect to 6" Bench Saw Mill, Log Carrier, Log Turner, Pair Carriage, Track Loader D2, 5 Inch Bench Saw Mill, 12 Inch Bench Saw Mill, 6" Caterpillar Engine, 12 Bench Circular Saws, 40 Sawmill Spare Rollers, Bench Saw with 4 Manual Log Turner, Hydraulic Log Turner (bought with Mill), Log Carrier, 6" Bench Saw, Carriage Motor, 1 bench saw - 30 HP 1 Hydraulic Tractor with Motor and Switch, Saw Mill Roller, Trolleys with no wheels, 5 Trolleys with Wheels (purchased 2 to 3 years prior to sale) Vacuum Motor - 7 HP, Transformer Motor (bought 6 months, vacuum Motor - 7HP, Transformer Motor (bought 6 months before sale), 5 HP Transformer Motor (bought 6 or 7 months before sale), Pressure Pump with 5.5 HP Motor, Mixed Tank Motor (No. 1 - 2 HP No. 2 - 2 HP), Water Pump - 7 HP, Mixed Tank No. 1 - Mixed Tank No. 2, SOL Tank (3), Knife Grinder, Cross Cut Machine (bought 2 years before Agreement), 4 sider Machine with 3 Motors, 2 spare blowers, 2 Blower Fitters;
- (xliv) Stated that Caterpillar Engine was spare engine to light up Mill which he bought 5 years before he sold; cannot remember cost of purchase and does not know its book value;
- (xlv) Stated that he paid FEA \$60-\$70,000.00 for installation of 200kw Transformer and for which he will claim for transformer if 1st Defendant stole it;

- (xlvi) Stated that Switchboard was of a special standard for whole mill and he does not know as to number of circuit breakers with electrician and FEA knowing the amps;
- (xlvii) Stated that Reservoir was constructed 25 to 30 years ago, he does not know cost of construction and he did some repair works for which he has no evidence;
- (xlviii) Stated that 3 toilets were constructed 1 or 2 years before sale and he does not have evidence on cost of construction or repairs;
- (xlix) Stated that 16" bench saw in his claim should read 1 x 6";
- (l) Stated that for Switchboard in Mill No. 1 he does not know number and size of circuit breakers;
- (li) Stated that he does not have evidence or cost of repair, does not know quotation from electrician;
- (lii) Stated that he is claiming for missing items and 1st Defendant has taken everything;
- (liii) Stated that he does not have quotation on any missing items and that he is claiming only for missing items and not repairs done to items he got;
- (liv) Stated that the Toilet/Bathroom was constructed long time ago and he does not have quotation for its repair as he bought materials and gave to carpenter and that he is not claiming for Toilet and Bathroom but claiming for missing items only;
- (lv) When it was put to him that if he is claiming \$8,000.00 for repairs to Toilet and Bathroom he stated that it is damages but has not been repaired;
- (lvi) Denied that he concocted and falsified entire claim against 1st Defendant;

- (lvii) Stated that 4 Side Machine with 3 motors are his and evidence is that machines is his in the Agreement that is why he said;
- (lviii) Stated that he does not know book value of machines as he does not have the book;
- (lix) Stated that he does not have inventory of items with cost of items or evidence on value of parts;
- (lx) In respect to Bulk Room No. 2 stated that he does not have inventory of spare parts or evidence to show if he has anything of value there;
- (lxi) Stated that there were 4 doors to Toolroom and Office block with Office having secured doors which was costly;
- (lxii) Stated that he has no quotation or damages to doors and they said it would cost about \$10,000.00;
- (lxiii) When asked if he had evidence to show that doors were fixed and to show he spent \$2500 on each door he stated that doors were from overseas and now replaced with wooden doors;
- (lxiv) Stated that he got old doors from Australia 20 years ago and those doors were replaced with wooden doors;
- (lxv) Stated that he bought temporary wooden doors but does not have cost of each door;
- (lxvi) When it was put to him that where did he get \$2500 from which is what he claimed he stated he cannot get doors, had put temporary doors and when he will fix it, it may cost \$2500;
- (lxvii) When asked how he knows it without quotation he stated that he does not know how much it will cost him;
- (lxviii) Stated his claim is for \$10,000.00 is not for doors only but for Toolroom and Office damage;

- (lxix) Stated that he constructed working bench here with fittings from overseas which 1st Defendant took and is missing;
- (lxx) Stated that it cost him \$8-10,000.00 to construct working bench but does not have any evidence to show cost;
- (lxxi) Stated that he did not obtain quotation to repair garage but it will cost about \$10,000.00;
- (lxxii) For Ramp Shed only posts are left and he is claiming for roofing iron and only timber are missing with only posts left;
- (lxxiii) Stated that he does not know size of Ramp Shed;
- (lxxiv) Stated that he does not know the size of Managers Residence or number of louver blades and he is not only claiming for louver blades but also light switch, toilet pan/cistern and lights for which he does not have quotation;
- (lxxv) When it was put to him that 5 labour quarters are not in Inventory list but in the statement of Claim he stated that they took them and left 3;
- (lxxvi) When it was put to him that he is claiming \$8,000 for Quarters 1 he stated that they dismantled quarters;
- (lxxvii) Stated that he does not have quotation for replacement of base hole pump and have no evidence to show the value of the pump;
- (lxxviii) Agreed that he sold vehicles that were in-operational (not working);
- (lxxix) Stated D6 Registration No. DB439 with winch was in jungle in Koritare about 10 km from Mill, which he purchased 3 to 4 years before Agreement for \$300,000.00;
- (lxxx) He does not know when he purchased, date of manufacture, book value and that he bought it from Carptrac;

- (lxxxix) Stated he does know Registration Number of Inoperation 930 Loader which is dismantled, cannot say when the loader was purchased, cannot say how much he bought it for, does not have book value and that it was 20 years old;
- (lxxxii) Stated that he does not have Registration number for 920 Skidder;
- (lxxxiii) Stated 520 Log Grapper should not be part of claim;
- (lxxxiv) Stated that he does not know registration number, date of manufacture, cost of purchase and book value for 6 Ton Forklift, 4 Ton Forklift, 2 Ton Forklift, Truck Registration No. CI455, Van Registration No. CP810;
- (lxxxv) Stated that VSL makes account and pays tax and in 2014, Mill was not operating and 1st Defendant took everything;
- (lxxxvi) Stated that in 2006, he told Tax Department that he sold and after signing the Agreement he gave Mill to 1st Defendant who was responsible for its operation;
- (lxxxvii) Stated that not all project of VSL passed to 1st Defendant and only Sawmill;
- (lxxxviii) Stated that he cannot pass ownership to 1st Defendant and ownership would have been passed if transferred;
- (lxxxix) Stated that 1st Defendant did not give money so there was no transfer;
- (xc) When it was put to him that when he took over the mill 1st Defendant was still running the mill and had about 40 workers he stated that he took photos it was all big bush and there were iTaukei men and goats;

- (xci) Stated that 1st Defendant held his beard 3 months after the Agreement and in 2013 when Setoki gave him the mill 1st Defendant was not operating the mill;
- (xcii) When asked if he gave 1st Defendant signed Transfer he stated why should he and 1st Defendant's lawyer should have gone to Suva and settled there;
- (xciii) Stated he had D6 and D7 Roller Machines with Winch and denied that his entire claim is concocted and lies;
- (xciv) Stated that if 1st Defendant paid him \$795,000.00, ownership would have passed to 1st Defendant and 1st Defendant cheated him;
- (xcv) Agreed that he received \$305,000 from 1st Defendant;
- (xcvi) When asked if he made any Application to Court to enforce Orders from Madam Justice Wati he stated that his lawyers would know;
- (xcvii) Stated that within three (3) months if any property would have gone missing, it would be 1st Defendant's responsibility as he had to insure.

100. During cross-examination by Counsel for 2nd Defendant PW8:-

- (i) Stated that he had known 1st Defendant with whom he signed Agreement for sale of his Mill and items as per the Agreement and the mill and items were handed over to 1st Defendant after they signed Agreement in September 2006, from which date 1st Defendant had possession;
- (ii) Stated that when 1st Defendant did not give him money he spoke to his lawyer and after three (3) months of signing the Agreement he went to get the Mill back;
- (iii) Stated that after he failed to get possession and was assaulted, his lawyer took action to get possession;

- (iv) Stated that he gave notice to 1st Defendant but did not have a copy;
- (v) Stated that he knows the process for land transfer and you need iTaukei Land Trust Board's consent for transfer of itaukei lease;
- (vi) When asked if he prepared Application for Consent after Madam Justice Wati's Order he stated that his lawyer knows who also told him that 1st Defendant has no money and settlement cannot take place;
- (vii) When it was put to him that he has not disclosed any consent form in this case he stated that his lawyer knows;
- (viii) When it was put to him that paying of stamp duty on Transfer is next step he stated that transfer did not happen, then how could you pay stamp duty;
- (ix) Stated that he did not sign the Transfer and lawyer said if 1st Defendant pays money then Transfer will be signed and stamped;
- (x) Stated that he told lawyer that if 1st Defendant is not paying the money and to give mill and all his items back to him;
- (xi) Based on his instruction lawyer took out FIFA and Writ for Possession and he got possession on Mill on 31 May 2013, as per letter from VSL to ITLTB;
- (xii) In reference to Exhibit P19 (Inventory List prepared by PW8) he stated list of items missing or damaged was prepared in his office and he signed it;
- (xiii) When it was put to him that list was not made on 1 June 2013, he stated that it could be and that girls in his office typed it and could be an error;
- (xiv) Stated that list was prepared on date Setoki gave him the Mill and list could have been typed on 3 June 2013;

- (xv) Stated that he does not know where the handwritten list is and it could be in Setoki's file or his file;
- (xvi) Agreed that as at 31 May 2013 or 3 June 2013, he knew all the items in the list were missing and stated that he reported to Police that 1st Defendant took all his things from the mill and he wanted them back;
- (xvii) Stated Police seized some items which were in Police custody and not with him;
- (xviii) Stated that he did not know when Police seized but knows that it was after 31 May 2013;
- (xix) Agreed that his list (Exhibit P19) mirrors Statement of Claim and Police said they will give things seized after the case;
- (xx) Stated that he does not know as to whether Police seized his items before or after this case;
- (xxi) Stated that Police gave him a list and except of D6 he cannot remember what was in the list and has never asked Police for the items seized he was told that they do not if items were his or 1st Defendant's and that they will release the items after the case;
- (xxii) When asked why he filed claim against 1st Defendant when these items are not with 1st Defendant he stated 1st Defendant is saying those things are his and not Plaintiffs;
- (xxiii) In reference to Exhibit P22 (Police Minute) agreed that Minute is by Deputy ASP, who requested for additional manpower and it stated that Corporal Isoa will be travelling on 29 June 2013, to return on 2 July 2013, to oversee release of machinery and other equipment which were kept as Exhibits and as directed by Court of Appeal;
- (xxiv) Agreed that Police had already seized the items and when it was put to him that by 26 June 2013, seizure by Police occurred he stated

that he does not know date, but Police seized items and kept in their yard;

- (xxv) Agreed that Minute said apart from items in Minute there was another bench saw at 1st Defendant's Mill for which they need manpower for assistance;
- (xxvi) Stated that items in list were made with Setoki and agreed that it was around 31 May, 1 June or around that time;
- (xxvii) Agreed that he gave list to Police and stated that they seized few things and not all the items;
- (xxviii) When it was put to him that Police acted on his advise he stated that they did their own work and he only complained;
- (xxix) Stated that Police knew items were his because when they went to 1st Defendant's Mill, Setoki, 1st Defendant and HFC Manager Najab was there and Najab said to him that whatever items belonged to him he could take them when he pointed out to Police which items were his;
- (xxx) Stated that he does not know if Setoki executed FIFA and Police seized items on same day but there were lot of Police Officers;
- (xxxi) When asked if on 26 June 2013, any bench saw was there he stated that only Police knows as he gave missing items list to Police;
- (xxxii) In reference to Police Minutes dated 24 June 2013 (Exhibit P23) agreed with what is stated at paragraph 5 of Minutes;
- (xxxiii) Agreed that on 15 July 2013, 1st Plaintiff wrote letter to Police with heading "Circular saw to be seized" (Exhibit P24);
- (xxxiv) When it was put to him that Police said bench saw when he said "Circular Saw" and that there is nothing in this letter about the list he stated that he gave list to Police and all things had to be taken and given to him;

- (xxxv) Stated that he gave list to Police and it was their job to do the work and was not his responsibility;
- (xxxvi) Agreed with contents of letter dated 15 July 2013 (Exhibit P24);
- (xxxvii) When asked if it is not true that when FIFA was executed Police seized items he stated that he does not know;
- (xxxviii) In response to Police Minute (Exhibit P23) when it was put to that Police said only saw bench left to be seized he stated that it was not only saw bench but items in the list he gave to Police;
- (xxxix) Did not agree when it was put to him at that time June, July 2013, no list had been created;
- (xl) Agreed that he said he prepared list and stated that he does not know why Police Minute do not state anything about the list;
- (xli) When asked as why he did not mention the list in his letter dated 15 July 2013 (Exhibit P24), he stated that he gave list but did not write in the letter;
- (xlii) Stated that letter dated 19 July 2013, from him to Deputy Registrar (Exhibit P25) is about items that were given to him and he only talked about saw bench as missing item and list was with Setoki, Police and himself;
- (xliii) In reference to 3rd line, 2nd paragraph of Exhibit P25) he said that part of bench saw was removed;
- (xliv) Agreed that items as in Inventory list (Exhibit P8) in letter to Deputy Registrar (Exhibit P12) were seized and handed to him on 14 October 2013 (Exhibit P9);
- (xlv) Stated that whatever items he received have been removed and balance is to be given;

- (xlvi) Stated that Police said they cannot give his things seized unless Court says all things are his;
- (xlvii) Stated all things that are missing has been taken by 1st Defendant;
- (xlviii) When it was put to him that list does not say which items are missing he stated that Agreement says what was there and now it is missing so he gives them back to him or give his money;
- (xlix) Stated that he did not write to 2nd Defendant to say what items are in Namara Mill but stated that Najab asked him to take his things;
- (l) Agreed that he did not give 4 page list to 2nd Defendant;
- (li) Confirmed that on 2 August 2013, e-mails were exchanged between Setoki and Najab Khan and what is written in 1st sentence of e-mail;
- (lii) When asked if he provided proof to HFC that items were his, he stated that HFC allowed him to remove his items like bench saw then why did they stop;
- (liii) Stated that he told 2nd Defendant what items were his;
- (liv) Stated that he told Najab what things that were his and Najab told him to take it;
- (lv) When it was put to him that after 2 August 2013, he did not provide any proof of items he stated that when Najab changed, 2nd Defendant said do not take anything because of mortgage;
- (lvi) When it was put to him that e-mail said “unless you can prove otherwise” he stated that e-mail was to Court Officer and not to him;
- (lvii) When asked if he made Application to Court for release of items he stated that Court Officer was doing that;

- (lviii) When it was put to him that he relied on Police and Court Officer, who took items he stated that he did not get items seized by Police but received items seized by Court Officer;
- (lix) Agreed that in reference to Exhibit P19 under heading Treatment Plant next to "Mix Tank No. 1, (MT No. 1) it is written "Not Taken" with no value;
- (lx) Stated that he wrote "not taken" for SOL Tank No. 1 but claimed \$9,000.00 because at bottom it is written "damaged" and where there is no damage it is written "not damaged and not taken";
- (lxi) Stated that Police is saying D6D is in their custody when 1st Defendant is saying it is in his;
- (lxii) Agreed that he has not removed any items he received or is in Police custody;
- (lxiii) Stated that if MV FG506 is not in list then Plaintiffs do not own it;
- (lxiv) Stated that MV FT219 was his vehicle with 1st Defendant putting different number and that is why Police charged him;
- (lxv) When asked if him or VSL (1st Plaintiff) had any interest in it he stated that he does not know;
- (lxvi) Stated that he does not know if him or VSL ever owned MV Registration Nos. DSL005 and FF390;
- (lxvii) When asked if he is not sure about MV number how can he say what things are his he stated that if you talk about things he sold he can tell;
- (lxviii) Stated that he was told by 2nd Defendants Manager that 2nd Defendant has Mortgage over Namara Mill;

- (lxix) When it was put to him that he knows Mortgage covers land, building and items fixed to building he stated that those he Mortgaged and not items he stole;
- (lxx) When it was put to him that is the reason he had to prove, he stated that they let them remove saw bench and Manager from 2nd Defendant who gave him chance to take his things;
- (lxxi) In reference to Exhibit P19 (list) when it was put to him that list is not in any of his letters, Police Minutes and Court Officer correspondence he stated that list was made later when Setoki gave possession of Mill to him;
- (lxxii) Agreed that all correspondence of Police Minute were after he got possession on 31 May 2013, and any correspondence from him, High Court or Police does not refer to list;
- (lxxiii) Stated it not to be true when it was put to him that he prepared the list (Exhibit P19) when tried to institute this action;
- (lxxiv) When it was put to him that list matches claim he stated that him and Setoki made list and date it was done is typed;
- (lxxv) Agreed that page 3 of Exhibit 19 say “Timber-Drying Shed” which was typed in office and Statement of Claim says the same thing with same font;
- (lxxvi) When asked if his office made the mistake then his lawyer made same mistake he stated that he does not know;
- (lxxvii) When it was put to him that when he finished 1st step of involving Police and 2nd step on issuing FIFA and Writ of Possession then he took 3rd Step which is this action he stated it was about money and if 1st Defendant would have given the money then he would not have done this case;

- (lxxviii) When it was put to him that he did not remove items received by him from the claim he stated that items with Police he did not receive and with items received he cannot run the mill unless all things are in the Mill;
- (lxxix) Denied that he manufactured the list when all steps he took finished;
- (lxxx) In reference to 3rd paragraph of letter written by VSL to Police Headquarters (Exhibit P26) he stated that if he gets Mill parts then he can operate and if he does not get it then he cannot operate;
- (lxxxii) When it was put to him then he wrote (Exhibit P26) that “upgrading sawmill ready to roll, mill ready to operate...” he stated that he was preparing but was not ready;
- (lxxxiii) When asked as where is expense for making the Mill ready to roll he stated that Accountant has got it;
- (lxxxiiii) When it was put to him that all he is saying is false and he did not upgrade the Mill and that is why he did not bring he stated it is a lie.

101. During re-examination PW8:-

- (i) Agreed that when he signed Agreement with 1st Defendant it was agreed that property will pass to 1st Defendant on same day and handed over the keys;
- (ii) His understanding when he signed the Agreement on the same day Mill will be given to 1st Defendant in exchange for payment of \$150,000.00 held in 1st Defendant’s lawyers Trust Account to his lawyers Trust Account for payment to Fiji Development Bank;
- (iii) Stated that Agreement said everything in the Mill will be 1st Defendant’s who has to pay insurance, cannot take anything from Mill and within 3 months to pay whole amount;

- (iv) Stated that if he would have been paid within 3 months he would have transferred everything in the Agreement to 1st Defendant;
- (v) Stated that items in Schedule “B” of the Agreement does not have individual value and was sold in one lot and if paid within 3 months price would have been \$900,000.00 but if paid after, price would be \$1.1m;
- (vi) In reference to Exhibit P19 (List) he stated that he made list of missing and damaged items with Setoki on 31 May 2013, day he took possession;
- (vii) In reference to Exhibit P9 he stated when he received No. 2 size bench, 50 HP Motor, Trolleys and Gauge were not in working condition with blades being rusted;
- (viii) Stated that Exhibit P19 (List) was typed in computer and sent to his lawyer;
- (ix) Stated that since 31 May 2013, he could not operate the mill.

102. 1st Defendant Mohammed Shamsheed during examination in chief gave evidence that:-

- (i) Agreed that on 2 September 2006, he entered into Sale and Purchase Agreement with Plaintiffs to purchase Plaintiffs machines and sawmill with method of payment set out in the Agreement and he took possession of mill upon payment of \$105,000.00 to Plaintiff;
- (ii) Agreed that him and Plaintiffs had differences concerning the Agreement when Plaintiffs instituted legal proceeding being Civil Action No. 8 of 2007, in which her Ladyship delivered Judgment on 15 December 2011;
- (iii) After judgment Plaintiff did not comply with the Order and when he asked Bashir Khan he said that he will not give mill to him or his father and he wrote to Bashir Khan and called him with no response;

- (iv) Plaintiffs did not enforce the Order of the Court;
- (v) He thought Bashir Khan must be angry so he waited for 10 to 15 days then told him to forward Application for Consent and Transfer to his lawyer;
- (vi) In 2007, he bought sawmill in Labasa when he called Bashir Khan but he did not pick the phone;
- (vii) He wrote to Bashir Khan asking him to send Transfer and Application for Consent and said the money \$795,000.00 is ready to be paid with no response from Bashir Khan;
- (viii) At that point in time he had access to finance to purchase mill which he wanted to purchase at that point in time because he had paid \$305,000.00 to Plaintiff, constructed \$180,000.00 house, made Treatment Plant and machine ready which cost him \$905,000.00;
- (ix) When he purchased the Mill, 40 goats were grazing, fence was of tin and goat waste and rubbish was in the mill;
- (x) Bashir Khan made a fool of him by taking money from him and saying mill was in operation;
- (xi) When Judgment was delivered, the mill at Vunimoli was in working order and condition;
- (xii) In 2011, he bought another sawmill which did not have treatment plant which he needed because it adds value to sawn timber;
- (xiii) In May 2013, when Plaintiffs took possession of mill in Vunimoli the mill was running and he was in the mill and 40 workers were working at that time;
- (xiv) Treatment plant was working and he had put in brand new pump for \$60,000.00;

- (xv) He had all his saws in Vunimoli mill except a No. 2 bench saw which he took to Namara on which he spent \$15,000.00 for repair costs and was being tested at Namara Mill when Bashir Khan took it;
- (xvi) When Bashir Khan took over the mill all fixtures and fittings attached to land at Vunimoli sawmill was when he bought it were there with 300 cubic metres of log, about 10 packets of sawn timber, 4 drums of treatment plant chemical;
- (xvii) When Bashir Khan and Setoki came he was in the mill sawing timber;
- (xviii) Setoki told him that Bashir Khan has issued FIFA when he told Setoki that so many times he was ready to give Bashir Khan money;
- (xix) Setoki gave 15 minutes for him and his men to get out of mill which they did with fear of being locked up;
- (xx) He did not remove items from Vunimoli Mill because he had to pay money;
- (xxi) He asked Bashir Khan about inoperative vehicle BV 439 and which bush was it in he said it is here and there but he never saw vehicle BV 439 to-date;
- (xxii) He did not use or fix Diggers, loaders and dismantled vehicle in the Agreement and was kept at wreckage yard in VSL;
- (xxiii) Sheriff and them came looking for Bashir Khan's items with the name of Central Manufacture Company in FIFA, he informed them it was not his or his relative company and asked why did they bring it, which officer did not take heed of;
- (xxiv) He showed Court Officers No. 2 bench saw which was in operation when they stopped it, removed timber, cut it and loaded it with digger when him, his wife, Bashir Khan, 11 Police Officers and Court Officers were present;

- (xxv) Bashir Khan or Police Officer did not give notice to remove all items and he did not receive any demand in writing from Bashir Khan about the items;
- (xxvi) Police did not do any inquiry on him;
- (xxvii) After the Agreement was signed his understanding was that Bashir Khan is the owner of the items and after settlement he would become the owner;
- (xxviii) After Judgment of her Ladyship his understanding was that he was Owner and he just had to pay the money;
- (xxix) After he was removed he did not go back to the Mill because Setoki told him that if he goes back he would be locked up;
- (xxx) He never told Sudama to punch different engine and chassis numbers and Sudama stole from his Company and slept in Police cell for one day;
- (xxxi) He never asked Roneel to grind engine/chassis numbers and punch numbers;
- (xxxii) He knows Sudama and does not know where he works now;
- (xxxiii) Apart from bench saw and accessories which came from Vunimoli Sawmill Police Officers did not find any other items of Bashir Khan;
- (xxxiv) They were in his Mill for 15 minutes when they cut the bench saw, went around the mill and took his moulding machine, saw sharpener and when he told them not to take it as he had serial numbers they still took as Bashir Khan told them to load it;
- (xxxv) When he purchased Namara Mill it was running and operative and he bought it through tender from Westpac of which he has valuation;
- (xxxvi) Production at Namara Mill is 17, 18, 20 or 23 cubic meters per day;

- (xxxvii) He could not use accessories from Vunimoli Sawmill at Namara Sawmill because Namara Mill is much bigger than Vunimoli Sawmill;
- (xxxviii) When he bought Namara mill he gave Mortgage to 2nd Defendant;
- (xxxix) He did not bring any parts from Vunimoli Sawmill to put it at Namara and gave Mortgage over them to 2nd Defendant.

103. During cross-examination by Counsel for Plaintiff, 3rd Defendant:-

- (i) Agreed that had Bashir Khan sent Consent Form and Transfer he was ready to pay \$795,000.00 to Bashir Khan and he was really sure about that;
- (ii) Agreed that after Madam Justice Wati's Judgment he appealed the decision and Notice of Appeal was filed on 24 January 2012;
- (iii) Agreed that he also filed Application for Stay of Execution of Judgment and at paragraph 7(ii) of his Affidavit in Support he stated that he "may not be able to raise finance";
- (iv) In reference to paragraph 12 of Ruling on Stay Application which states "*It was further argued that the defendants' are unable to raise such a large sum of money as they do not have any security to offer for the loan as no assets that have been purchased have been conveyed or transferred to the defendants'.*" he stated he had money ready all the time, Bashir Khan never gave and HFC is his Bank and his brother who is overseas would have given him the money;
- (v) When it was put to him that Khan's lawyer was telling him that Shamshood did not have money he stated that he had money and he bought Namara Sawmill in 2011;
- (vi) Agreed that as stated at paragraph 16 of Stay Application Ruling his lawyers contention was that Court should have ordered payment in installment;

- (vii) Agreed that he did not have \$795,000.00 in cash to pay Khan;
- (viii) When it was put to him that he did not have money and said he may not be able to raise it, he stated that if Transfer was not given he could not go to Bank but his brother in Australia said he will give the money;
- (ix) Agreed that from 2007, apart from \$305,200.00 paid he did not pay any other monies to Khan;
- (x) Agreed that his lawyers position is that there is no specific order for payment of money, FIFA is illegal;
- (xi) Accepted paragraphs 45 - 46 of Stay Ruling state as follows:-

“45. For the above reasons, I order that the orders granted on 15 December 2011, be stayed on the condition that the defendants’ pay in Court a sum of \$350,000 within 14 days from the date of the ex-tempore ruling.

46. In the event that payment is not made within 14 days as stated, there shall be no stay and the plaintiffs’ shall then be entitled to execute the judgment of 15 December 2011.”

- (xii) Agreed that he did not pay \$350,000.00 into Court at anytime;
- (xiii) Agreed that thereafter Plaintiffs were entitled to execute Judgment of 15 December 2011;
- (xiv) Agreed that he made another Application for Stay before Justice Calanchini which Application was dismissed on 3 May 2013;
- (xv) Agreed that FIFA was filed after Justice Calanchini’s Ruling;
- (xvi) Agreed that FIFA said Central Manufacture Co. Ltd (CML);
- (xvii) Stated that when he said to Setoki that FIFA say CML, Setoki said to him not to talk too much or else he will be locked in cell;

- (xviii) Stated that he went to Rakesh Sharma and gave him copy of Receiving Order, Rakesh Sharma did not listen and told him to go and do whatever and come to Court;
- (xix) Stated that he saw Fresh FIFA with Sam Civil Services name now;
- (xx) When it was put to him that his lawyers did not put to Rakesh or Setoki that he did not receive fresh FIFA he stated that he did not receive it;
- (xxi) Agreed that he gave evidence that he bought Namara Mill on tender from Westpac under Mortgage Sale;
- (xxii) Stated he purchased Namara Mill in 2010 or 2011 and subsequently stated tender was called in 2010 with settlement in 2011;
- (xxiii) Agreed that he took finance from HFC to purchase Namara Mill as per letter of offer from HFC dated 10 January 2011;
- (xxiv) Agreed that he had existing loan with HFC in the sum of \$257,761.00 and new facility was for \$747,375.00;
- (xxv) Agreed that securities that was given and those he had to give to HFC were as follows:-

Existing Securities:

- (a) 1st Guarantee Mortgage was to be upstamped
- (b) Bill of Sale over Keto Registration No. FF390 to be upstamped
- (c) Unlimited Guarantee by Jahuran Bi

New Security:

- (d) 1st Registered Mortgage over CL No. 14969;
- (e) 1st Registered Bills of Sale (2) over Truck Registration No. DSL005 and FG506;

- (f) Unlimited Guarantee by him.
- (xxvi) Namara Mill property subject to CL No. 14969 was transferred to him on 24 March 2011, he signed Mortgage Registered No. 743536 on 20 January 2011 for \$747,375.00;
- (xxvii) Agreed that he gave Mortgagee to HFC which he signed on 20 January 2011, for \$747,375.00;
- (xxviii) Agreed that on 23 March 2011, he signed two Bills of Sale over Truck No. DSL 005 and Vehicle No. FG 506 both of which were registered on 24 March 2011;
- (xxix) Agreed that those securities were to secure finance for purchase of Namara Mill;
- (xxx) On 1 September 2011, he signed Bill of Sale over Forklift No. FT 219 to borrow money for repairs to Mill;
- (xxxi) Agreed that he bought Namara Mill in March 2011 for \$747,375.00 which was \$352,625.00 cheaper than Khan's Mill;
- (xxxii) Stated that when he applied for Stay of Madam Justice Wati's Judgment in January 2012, he did not disclose in his Affidavit that he bought Namara Mill in March 2011;
- (xxxiii) When it was put to him that he did not disclose to Madam Justice Wati that he could not raise \$795,000.00 to pay Plaintiffs because he had taken loan for purchase of Namara Mill, he stated loan was for \$1million with property valued at \$2.9 million and he was ready to pay if Bashir Khan paid him his losses and gave him Transfer;
- (xxxiv) When it was put to him that he had no intention to buy Bashir Khan's Sawmill he stated that he had documents to show he built house for \$180,000.00 and always his intention was to buy the mill until today;

- (xxxv) When it was put to him that true position is that he found and bought a cheaper mill he stated that if he gets another mill he will buy or buy ten mills;
- (xxxvi) When it was put to him that having bought a cheaper mill he did not have financial stability to buy Khan's mill he stated that he had money and he is willing to buy today if Khan pays his expenses from 2011;
- (xxxvii) Agreed that his loan was restructured on June 2013 when he sold a property for \$350,000.00 or \$480,000.00;
- (xxxviii) Stated that restructure is bank term and he made advance payment;
- (xxxix) Stated that he gave sale proceeds to Bank, his property was not on tender, his account was clear and he got money;
- (xl) Stated that he gave money to Bank and Bank CEO came and said that he can take money at anytime;
- (xli) Denied and called it a lie when it was put to him that only reason for restructure was that he could not keep up with his repayment of HFC loan and stated that he made advance payment;
- (xlii) Stated that he bought items listed in Schedule B of Agreement (Exhibit P18) with land;
- (xliii) Stated that he had 90 days (by 29 December 2016) to pay \$900,000.00 if not then price will go up to \$1.1million;
- (xliv) When it was put to him that he did not pay \$900,000.00 by 29 December 2006, he stated Plaintiff terminated the Agreement by letter dated 22 December 2006 from Sahu Khan & Sahu Khan which he received on 23 December 2006;
- (xlv) Denied that he abandoned mill at Vunimoli by 31 May 2013;

- (xlvi) When it was put to him that on 31 May 2013, there were not 40 people working in the mill, he did not have mill at Vunimoli to run, there was not 350 cubic meters of log, there was no sawn timber and no drum of treatment chemical he stated that he has record that 40 people were working; mill was running, 350 cubic meters of log was there, sawn packet of timber was there, 4 drums of treatment chemical was there and without chemical treatment plant will not operate;
- (xlvii) Denied that he removed louvre blades and stated that he had to leave within 15 minutes when he left place he took nothing;
- (xlviii) When it was put to him that when Khan took over possession of Mill on 31 May 2013, his evidence was that Mill was abandoned he stated that Khan took over Mill on 20 May 2013, and everything was there when he came with Setoki and that he was out on 20 May 2013, and he does not know what Khan did on 31 May 2013;
- (xlix) When it was put to him that on 31 May 2013, Khan observed that most of his machines in the list were taken he stated that he left everything and after 11 days he does not know who took it or Khan may have taken for claim;
- (l) When it was put to him that Khan prepared list (Exhibit P19) on 31 May 2013, and Khan's evidence was that when he took over the Mill items listed in Exhibit P19 were either missing or was damaged he stated that it is a false list, he can say what is there, Forestry Department can tell that Mill was in operation and he left everything there and came;
- (li) Stated that Police came asking about items when he asked to prove I brought them and they said if they could not find, they would charge him when he said to Police to charge and his lawyer will speak in Court;

- (lii) When it was put to him it was Setoki's evidence that he went with Setoki to Vunimoli Mill on 31 May 2013, he said on 20 May 2013, when Setoki came he was in the Mill and Setoki did not take him;
- (liii) When it was put to him that there was no equipment or machine in Mill to take inventory he stated that he took Setoki around who took photos and inventory when Bashir was on road and after 15 to 20 minutes he left and went to see Deputy Registrar about CML;
- (liv) Did not agree when it was put to him that Setoki said Mill was in a mess;
- (lv) Denied that there were cut wires in power box and stated if so then how could Mill run?;
- (lvi) When it was put to him that for those reason Setoki did not take inventory he stated that Setoki did take inventory;
- (lvii) When it was put to him that Khan's evidence was that when he went to Namara Mill with Police Officers, Court Officers and Najab he pointed out 6 of his items he stated that it is a lie and Khan showed only bench and Khan said it is his and they loaded;
- (lviii) Agreed that his evidence in the morning was that he removed No. 2 Sizing Bench Saw and took it for repairs;
- (lix) When it was put to him that it cannot be true because he installed it at Namara Mill he stated that while using that bench saw in Vunimoli Sawmill it was cutting timber in crooked way, he spent \$15,000.00 to repair it, fixed it with four bolts, was not mounted to cement and was removable;
- (lx) When it was put to him that evidence was that they had to cut bench with gas he stated that they had to cut Rollers with gas as Rollers were welded with gas;

- (lxi) When it was put to him that earlier he said 10 or 15 days after Madam Justice Wati's decision he wrote to Bashir Khan for Transfer and that no such correspondence is before the Court he stated that he has letter.

104. In answering question by Counsel for 2nd Defendant 1st Defendant:-

- (i) Stated when loan offer was received his financial position was better offer before after sale of property and all throughout and he paid loan when he sold property;
- (ii) Stated that when Plaintiff came with Police, things that were mortgaged to 2nd Defendant were taken away when Police Officers said to get Order and then issue FIFA;
- (iii) Stated that there is not anything of Bashir Khan in Namara Mill;
- (iv) Agreed that in e-mail dated 19 July 2013 (Exhibit P14) from Najab Khan to Setoki, 2nd Defendant required more details if they want to remove things;
- (v) Stated that e-mail was written Setoki e-mailed Najab that he wanted to take all parts of sawmill which was under Mortgage to HFC when he showed HFC itemised listed after which they came and checked that mill was Korean made and said it is mortgaged to HFC and if someone wants to take things they should get serial number and model number which Bashir Khan did not get;
- (vi) Stated there is nothing of Plaintiffs in Namara Mill and Bashir Khan took his items.

105. During re-examination by Counsel for 1st Defendant:-

- (i) Stated that he does not have in his possession any items he bought from VSL;

- (ii) Stated that other than 1 bench in Namara Mill he did not take anything belonging to Plaintiff and he said earlier that Vunimoli Sawmill is small mill whereas Namara Mill is big mill and as such Vunimoli Sawmill cannot be fitted in Namara Mill;
- (iii) Agreed that Writ of Possession was executed at Vunimoli Sawmill;
- (iv) Stated that he does not know procedure for taking inventory as he saw them for first time;
- (v) Stated that when Setoki went in the Mill he was writing something and there were items there which Setoki could take and write them down;
- (vi) Stated that when his loan was being re-structured he had access to finance to purchase Mill if Bashir Khan gave Transfer and Bank would have given him loan and any bank would have or his brother would have;
- (vii) Stated that he did not have to disclose to Justice Wati about purchase of Namena Mill and he buys things;
- (viii) When asked if Bashir Khan knew he bought Namara Mill he stated that Labasa is small place and everyone know who does what;
- (ix) Stated that when Justice Wati refused Stay she did not change her Judgment and refusal of Stay did not entitle Bashir Khan to issue FIFA and take property;
- (x) Stated that he did not pay between 2007 - 2013 because the case (Action No. 8/07) was going on;
- (xi) Stated that if Bashir Khan had not terminated Agreement he would have paid Bashir Khan under option A or option B;
- (xii) Stated that after Order of Justice Wati he had access to finance and he wrote letter to Bashir Khan and told him in Court House.

106. 1st Defendants next witness was Abdul Khalid of Koro, Labasa, Self Employed (**1DW2**) who in examination in chief gave evidence that:-

- (i) He is 53 years old, married with children. He knows Bashir Khan who is a member of Vanua Levu Muslim League Mosque opposite MH, and was introduced to him by Siddiq Koya and Bashir Khan is present in Court;
- (ii) For 15 years he worked with Bashir Khan in the Mosque and later worked for Bashir Khan since he did not have work;
- (iii) In 2013, he did carpentry and labour work for Bashir Khan;
- (iv) In 2013, and before that Mill was run by Bashir Khan and after him 1st Defendant bought it from Bashir Khan;
- (v) In 2013, he worked for Plaintiffs and did repair works and maintenance;
- (vi) Stated that he was not sure about the date Bashir Khan took mill back from 1st Defendant in 2013, but Bashir Khan went and took over the Mill;
- (vii) When Bashir Khan went to take over the mill he was there with Bashir Khan's workers;
- (viii) When he went to the mill there about 15 or 20 people working who were workers of 1st Defendant;
- (ix) Stated that when he went there work was being done, logs and sawn timber were there;
- (x) When asked if he saw saws, there he stated that machines were there but he did not notice properly;
- (xi) When asked if he saw Khan's mill in 2006, before 1st Defendant took over he stated he does not know;

- (xii) He went with Bashir Khan to takeover Namara Mill with Police Officers and 3 or 4 men to cut the machines;
- (xiii) Khan said that Mill was his and he wants to take over and that he will take Mill and destroy 1st Defendant;
- (xiv) He continued working for Bashir Khan.

107. During cross-examination 1DW2:-

- (i) Stated that until six (6) months ago he worked for Bashir Khan at Jaduram Street and many places;
- (ii) When it was put to him that until six (6) months ago he had very good relationship with Bashir Khan he stated he still has;
- (iii) When it was put to him that when Bashir Khan's Mill was completed he did not have work, he stated that he worked Vakamaisuasau Subdivision at Bashir Khan's residence;
- (iv) When it was put to him that he entered into Tenancy Agreement with Bashir Khan to run coffee shop, he stated that he was working for Bashir Khan when he told him to go to town and Agreement is there;
- (v) When it was put to him that recently Bashir Khan terminated the Agreement for failure to pay substantial amount of rent he stated that only one (1) month's rent was due and he asked for seven (7) days to pay as cheque was not cleared;
- (vi) Agreed that Bashir Khan served demand notice for arrears of rent and when he did not pay the rent Bashir Khan closed the shop;
- (vii) When it was put to him that he now has a sour relationship with Bashir Khan he stated it is good and he still respects Bashir Khan;
- (viii) Stated that after he closed the shop they did not meet each other;

- (ix) Agreed that he said that he went with Bashir Khan to Namara Mill in 2013, and Bashir Khan told him that they need to take over the Mill;
- (x) When it was put to him it was not correct and that Setoki requested Bashir Khan to go and identify Khan's items then he stated that he went with Sheriff to the Mill who surveyed the Mill and stopped the work when Bashir Khan gave instructions to remove the Mill;
- (xi) When it was put to him that Khan was reluctant to go to Namara Mill, until he was provided Police protection he stated that in the morning Khan called him and asked to come and do some work when he came to office, Sheriff was asked him to sit in the vehicle with him when he went to Namara Police Station. At Namara Police Station, Sheriff went into the Station and returned, then they went to Namara Mill as there was Court Order from Suva to seize Mill;
- (xii) Stated that he cannot remember when he saw 1st Defendant's workers working at Vunimoli Mill and that he saw packets of timber just before he got hold of mill but cannot remember date;
- (xiii) Stated he went to Khan's Mill at Vunimoli before 2006 and one or two times before 2013.

108. During re-examination 1DW2:-

- (i) When asked from being Carpenter how did he become Salesman he stated that:-
 - (a) he was working in Bashir Khan's building at Vakamaisuasua when Khan asked him to go to work in town building where he stated work at 8.00 and was told to close at 10.00am but work was not finished when Khan told to finish it by 1.00pm;
 - (b) When Khan came at 1.00pm and saw work not being finished Khan growled at him and asked him to sit in the car and told other workers to finish work;

- (c) Later Khan brought him to coffee shop and told him that two girls are not running shop properly and for him to supervise;
- (d) On Thursday, Khan did give him wages and told him to run coffee shop from Friday and asked him to pay \$50.00 per day for coffee shop which sum the Maulana will come and take;
- (ii) After 1 week Bashir Khan brought a company from Suva who signed Agreement and gave Bashir Khan \$900.00 when Khan asked him to buy the coffee shop or lease;
- (iii) Stated that he saw coffee shop running and all his friends were going to him and causing him embarrassment;
- (iv) At the same time Khan told him to transfer his Twin-cab van which was valued at \$25,000.00 but Khan valued it at \$15,000.00;
- (v) Stated that Khan gave him one month to sell the van for which he brought two customers but did not get chance to sell;
- (vi) Stated that Khan got angry on him when he moved from there and he respected him because he was an old man;
- (vii) Stated that he owed only one (1) month's rent being \$1,300.00 and he asked seven (7) days to pay and Khan was holding \$1,300.00 as bond;
- (viii) Stated what he told Court about Bashir Khan wanted to take over Namara Mill was truth.

109. 2nd Defendant called Usainia Losalini of Waikete, Nabua, Manager Legal Services (**2DW**) as its only witness who during examination in chief gave evidence that:-

- (i) She is Manager Legal Services for 2nd Defendant and Banks securities come under her portfolio;

- (ii) In reference to letter dated 4 June 2013, from 2nd Defendant to 1st Defendant (Exhibit 2D1) she stated that in terms of page 8 of letter change was done because Native Lease No. 22479 was sold, Mortgage over it was to be discharged with securities re-arranged and hence this letter;
- (iii) In reference to loan offer letter dated 10 January 2011, from 2nd Defendant to 1st Defendant, the purpose of loan was to purchase sawmill with property comprised in Crown Lease No. 14969 taken as security being Mortgage dated 20 January 2011, and Registered No. 74353 (Exhibits 2D3 and 2D4);
- (iv) Crown Lease No. 14969 with Sawmill as it was transferred to 1st Defendant pursuant to Westpac Mortgagee Sale;
- (v) 1st Defendant gave General Lien to 2nd Defendant which is security over chattels (Exhibit 2D5);
- (vi) Mortgage over Crown Lease 14969 secured land, building, fixtures and fittings on the land;
- (vii) Other securities given by 1st Defendant to 2nd Defendant were Guarantee by Jahuran Bi (Exhibit 2D6) dated 6 June 2013, Guarantee dated 2 March 2012, by Jahuran Bi (Exhibit 2D7), Registered Bill of Sale Nos 2011/835 and 2011/834 over vehicle Nos. F6506 and DSL 005 (Exhibit 2D8, 2D9 and 2D90) and Registered Bill of Sale No. 2011/2705 over Forklift No. F7219 (Exhibit 2D11);
- (viii) Agreed that Bills of Sale are result of searches carried out at LTA (Exhibits 2D12);
- (ix) Ownership history of vehicles subject to 2nd Defendant's Bills of Sale are as follows:-
 - (a) FG506 - Everest Investment Ltd to Tabua Powers to 1st Defendant;
 - (b) FF390 - Bhimas Construction to 1st Defendant to Jahuran Bi;

- (c) DSL005 - Speedy Clearance to Kasim Hussein to 1st Defendant;
- (d) FT219 - Japanese Truck to 1st Defendant;
- (x) There is no record to show that vehicle Nos. FG506, FF390, DSL005 and Forklift No. FT219 were ever owned by Plaintiffs;
- (xi) 2nd Defendant mortgaged land belonging to 1st Defendant and basically when they give loan then carry out search at Titles Office and Companies Office and loan which can only be given if customer can prove he is owner of land;
- (xii) Agreed that there was an attempt by Plaintiffs to obtain machines from Namara Mill;
- (xiii) 2nd Defendant never received any demand from Plaintiffs asking for return of items or chattels and attempts to recover items by Plaintiffs were only by Police and Court Sheriff;
- (xiv) 2nd Defendant never received list of missing chattels from any of the Plaintiffs at anytime;
- (xv) Agreed that Police were hunting for items and took some items from 1st Defendant;
- (xvi) In reference to e-mail dated 19 July 2013, to Setoki (Exhibit P14) she stated that Bank stated their position, it will not release any item until and unless whoever claims proves that those items belong to them;
- (xvii) 2nd Defendant did not receive any specification of or model number or proof of ownership of items already taken or claimed until to-date;
- (xviii) In reference to e-mail dated 2 August 2013, she stated that people were trying to claim items and 2nd Defendant's position was that they will have to prove ownership before 2nd Defendant can release otherwise those items are under Mortgage to 2nd Defendant;

- (xix) Agreed that if they released items without proof they could face claim from 1st Defendant and that is why 2nd Defendant discouraged people from taking items without proving ownership;
- (xx) After Police and Sheriff came and took some items, there was no demand from Plaintiffs for any further items;
- (xxi) Agreed that letter dated 15 July 2013, from Plaintiff to Commissioner of Police (Exhibit P24) talks about circular saw and letter dated 19 July 2013, from Plaintiff to Acting Deputy Registrar talks about saw bench and gauges;
- (xxii) Police or anyone from Court never asked 2nd Defendant for release of further items;
- (xxiii) 2nd Defendant did not convert Plaintiffs assets for its own use;
- (xxiv) 2nd Defendant did inspection of customers properties but she does not look after that;
- (xxv) 2nd Defendant as Bank would not know if customer buys new things and puts it in the Mill.

110. During cross-examination 2DW:-

- (i) Confirmed that General Lien was security over items at Namara Mill and they were owned by 1st Defendant but was not aware if Najab of HFC has a list of the items;
- (ii) Read e-mail dated 5 July 2013 (3rd page), from Najab Khan to Setoki which was in following terms:-

“The valuation carried out on 18/06/2011 by Professional Valuations Limited has not got the items listed below in the chattels list.”

- (iii) When it was put to her that Najab after verifying list allowed certain items to be released to Setoki she stated that she understood Najab released certain items but not certain whether he verified it or not;
- (iv) Stated that by e-mail dated 9 July 2013, Setoki is seeking confirmation that if five (5) items in the e-mail are under HFC Mortgage and e-mail was in following terms:-

“Thank you for the anticipation and cooperation shown by your office to the Court in regards to the execution of court process today (09/07/13) against the above mentioned company. We further request you to confirm to us if the following items are also under mortgage with your company:

- 1. 34 circular sizing saw [second hand]*
- 2. 3 dock face hammers*
- 3. 2 saw setter*
- 4. 2 twist face hammer*
- 5. 4 trail with small gaig”*

- (v) Confirmed that Najab replied to e-mail dated 9 July 2013 at 3.47pm in following terms:-

“Setoki: we will confirms once we have gone through our listing.”

- (vi) Agreed that there was confirmation from Najab that certain items in Mill was not in list held by HFC;
- (vii) When it was put to her that Bashir Khan pointed out to his items she stated that she heard that in evidence;
- (viii) When it was put to her that evidence was that Bashir Khan said Najab told him that whatever is his to take it out she stated that, that is what Bashir Khan asked initially;
- (ix) Stated that she was not certain if Najab had asset list and list will come from valuation he is referring to;

- (x) When it was put to her that when Najab Khan said to Bashir Khan that he can take his items he is referring to chattel list she stated it would be correct;
- (xi) Stated that subsequently HFC stopped because HFC's stand was if you can prove item belongs to you, you can take it;
- (xii) Stated that there was no need for Najab Khan or HFC to ask Bashir Khan to provide serial number or photo of machine as Bashir Khan was not their client;
- (xiii) When it was put to her that HFC or Najab Khan never wrote to Bashir Khan to provide details she stated they did not as they were liaising with Court Officer;
- (xiv) When it was put to her that items identified by Bashir Khan to Najab Khan remains in Namara Mill she stated that she is not certain about that;
- (xv) Confirms that she sees items listed in letter from Fiji Police Force to Bashir Khan (Exhibit P21);
- (xvi) When it was put to her that Police while removing chattels would have checked HFC's Asset listing she stated she is not aware of that.

111. In answering question by Counsel for 1st Defendant 2DW:-

- (i) Stated that total funding as per page 1 of Exhibit 2D2 was \$1,081,277.00;
- (ii) In reference to Exhibit 2D1 she stated that restructured amount was \$680,685.00 which reduced the loan by approximately \$400,000.00 with two securities being Mortgage over Native Lease 22429 and Bill of Sale over Kato FF390 being discharged;
- (iii) Agreed that taking into consideration discharge of Mortgage and Bill of Sale with loan reducing by \$400,000.00 HFC would not hesitate

making further advances to 1st Defendant and that if 1st Defendant came back to HFC and offered Bill of Sale and Mortgage over property that had been discharged Bank would have given him the loan of \$800,000.00;

- (iv) Confirmed that Najab was referring to list from Valuation Report and CEO of HFC said not to release any items to anyone unless they can prove that items belongs to them;
- (v) Stated that Court Sheriff did not come back to 2nd Defendant to claim items belonging to Plaintiffs.

112. During re-examination by Counsel for 2nd Defendant 2DW:-

- (i) Stated that in e-mail of 5 July 2013 (Exhibit P14) Setoki refers to specific items and not the list;
- (ii) Stated that during whole transaction or dealing Bashir Khan or VSL did not write any letter to HFC;
- (iii) Stated that since they did not wrote to HFC, HFC is not obliged to write to them;
- (iv) Confirmed that first seizure of items was done by Police and second by Court Sheriff;
- (v) Agreed that Court Officers write to HFC and HFC wrote back to Court Officer through Najab.

113. Counsel for 2nd Defendant submitted that Plaintiff should have obtained Leave of the Court to initiate proceedings pursuant to Bankruptcy Act 1944.

114. Section 9 of Bankruptcy Act 1944 provides as follows:-

“9.-(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom

the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.

(2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

115. Plaintiffs in this action claim for following relief:-

- “1. Special Damages of \$1,622,000.00.*
- 2. General Damages to be assessed.*
- 3. Interests pursuant to the Law Reform (Miscellaneous Provisions)(Death and Interest) Act, Cap. 71.*
- 4. Costs.*
- 5. Any other relief or remedy that this Honourable Court may deem fit and necessary.”*

116. Pursuant to Section 9, the only person who require Leave of Court before institution of proceedings against a person against whom a Receiving Order has been made are Creditors with debt provable in bankruptcy.

117. In this instant, Plaintiffs are enforcing payment of debt provable in bankruptcy but seeking assessment of damages for items allegedly taken or damaged by 1st Defendant from Vunimoli Sawmill.

118. Plaintiffs would only become a Creditor with debt provable in bankruptcy if they claimed a sum of money that was firstly and truly owed to them by 1st Defendant against who a Receiving Order was made prior to this action being instituted.

119. This Court therefore holds that in this instance, no Leave was required by Plaintiffs to institute proceeding against 1st Defendant against whom a Receiving Order was made prior to this action being instituted.
120. It is undisputed that FIFA and Writ of Possession were issued to enforce the Orders of Madam Justice Wati in Civil Action No. 8 of 2007 between Plaintiffs and 1st Defendant and his spouse.
121. FIFA is a process whereby Judgment Creditor enforces the Judgment to recover judgment debt from judgment debtor.
122. Writ of Possession is issued to enforce Order for Vacant Possession.
123. No evidence has been adduced in Court to show that Plaintiffs obtained Leave of Court to issue Writ of Possession.
124. Having said that it is appropriate to reproduce Madam Justice Wati's Orders in Civil Action No. 8/07 (hereinafter referred to CA8/07) which are as follows:-

- a. The plaintiffs have breached the sale and purchase agreement by terminating the same on the 23rd Day of December 2006. The said termination was unlawful and of no legal effect. As such, the only remedy that the plaintiffs are entitled to is the purchase price which calculates to \$795,000.*
- b. The defendants must pay this sum of \$795,000 to the plaintiffs, in lump sum, in exchange of the transfer of all the properties agreed to be sold vide the sale and purchase agreement.*
- c. The settlement must take place within three months from the date of the order, that is, on or before the 15th day of March 2012.*
- d. The parties to work out a suitable date for settlement within the given time frame.*
- e. All other claims of the parties are unsustainable and are thus dismissed.*

- f. The High Court Registry must forthwith pay to Mr Bashir Khan the remaining sum of \$50,000 deposited in the High Court Registry.*
- g. Each party to bear their own costs.*
- h. Orders Accordingly.”*

- 125. The Order for payment of \$795,000.00 being balance purchase price for Sawmill and equipment payable by 1st Defendant and his spouse to Plaintiffs pursuant Sale and Purchase Agreement is to be paid in exchange for tractor of Sawmill and equipment to 1st Defendant and his spouse.
- 126. There is also no order for vacant possession of Sawmill against the 1st Defendant in CA No. 8/07.
- 127. This Court takes the action of P2 and/or their Solicitors to be unconscionable and in total disregard the law and rule of Court in issuing FIFA and Writ of Possession.
- 128. This Court also fails to understand on what basis the High Court Registry in Suva issue FIFA and Writ of Possession without there being an unconditional Order for payment of a sum by Defendant to Plaintiff and without there being an Order for Vacant Possession.
- 129. The Sheriff Officer, Setoki (PW1) and Rakesh Sharma (PW7) totally relied on FIFA and Writ of Possession issued by Suva Registry as they were without the benefit of Judgment in CA 8/07.
- 130. It is evidently clear from evidence of PW8 (2nd Plaintiff) and 1st Defendant that:-
 - (i) 2nd Plaintiff had no intention of enforcing the Order in CA 8/07;
 - (ii) This Court accepts 1st Defendants evidence that 2nd Plaintiff told him that he will not sell the Sawmill at Vunimoli to 1st Defendant or his father;

- (iii) 2nd Plaintiff sat on the Order in CA 8/07 for almost two (2) years;
 - (iv) It is then 2nd Plaintiff who engaged Police Department to seize certain items from 1st Defendant when Police did as per Fiji Police Force Minute dated 24 and 26 June 2013 (Exhibits P22 and P23);
 - (v) After Police seized the items and refused to release it to Plaintiffs, Plaintiffs then through their lawyers filed FIFA and Writ of Possession;
 - (vi) 2nd Plaintiff with the assistance of Sheriff Officer, Setoki and Police Officers tried to seize items from 1st Defendants Namara Sawmill alleging to be his.
131. There is no doubt that 2nd Plaintiff through Sheriff Officer and Court Officers were trying to get items he alleged to be his which is not what is the purpose of FIFA.
132. This Court accepts that bench saw and accessories seized by Sheriff Officer and released to Plaintiffs were brought by 1st Defendant from Vunimoli Sawmill.
133. PW1 (Setoki) and PW7 (Rakesh Sharma) on the face of the Judgment in CA 8/07 and Receiving Order against 1st Defendant accepted and acknowledged that FIFA and Writ of Possession should not have been issued or executed.
134. This Court therefore holds that FIFA and Writ of Possession issued and executed in CA 8/07 was unlawful and an abuse of court process by Plaintiffs and their former Solicitors in CA 8/07.
135. Counsel for Plaintiffs in Plaintiff's evidence tried to rely on Madam Wati's Ruling on Application for Stay in CA 8/07 delivered on 31 July 2012, when it was ordered that:-

"45. For the above reasons, I order that the orders granted on 15 December 2011 be stayed on the condition that the defendants' pay in Court a sum of \$350,000 within 14 days from the date of the ex-tempore ruling.

46. *In the event that payment is not made within 14 days as stated, there shall be no stay and the plaintiffs' shall then be entitled to execute the judgment of 15 December 2011."*

136. To put forward that the Orders in respect to Stay Application allows Plaintiffs in CA 8/07 to issue FIFA and Writ of Possessions in totally misconceived for following reasons:-

- (i) Orders in respect to Stay Application clearly states that Stay of Orders granted on 15 December 2011, is stayed on condition that Defendants pay \$350,000.00 into Court within fourteen (14) days;
- (ii) If condition was not met then there would be no stay;
- (iii) Only way Plaintiff in CA 8/07 could enforce Order of 15 December 2011 in CA 8/07;
- (iv) Only way Order of 15 December 2011 in CA 8/07 can be enforced is by way of committal proceedings against the party who failed to comply with the Orders;
- (v) No FIFA could be issued because of the fact the \$795,000.00 was to be only paid by Defendant to Plaintiffs in CA 8/07 in exchange of Transfer and undisputed evidence was that there was Transfer was not ready for exchange at settlement.

137. It is quite apparent that Plaintiffs used FIFA and Writ of Possession to take possession of the Sawmill and to terminate the Agreement (Exhibit P22).

138. The dispute in respect to Agreement (Exhibit P22) was before the Court in CA 8/07.

139. It is unconscionable and totally wrong for Plaintiff to have commenced this proceeding to claim for the items in Schedule 2 of the Sale and Purchase Agreement (Exhibit P18) on the face of Order in CA 8/07 whereby Madam Justice Wati ordered for those items to be transferred to Defendants in that action in exchange for payment of \$795,000.00.

140. Before concluding this Court makes following finding of facts on basis of evidence of witnesses and demeanour of witnesses:-

- (i) Chassis numbers and engine numbers of certain vehicles were grinded and new numbers punched in at Namena Mill by employees of 1st Defendant as was the evidence of Sudhama Nand (PW5);
- (ii) After the new numbers were punched Sudhama Nand assembled the parts that were removed to grind and punch numbers;
- (iii) Court rejects Sudhama's evidence that he did not grind and punch numbers because it was morally and legally wrong on the ground that he was part of the process and what he did in the process was also morally and legally wrong;
- (iv) No evidence has been provided to show that items subject to grinding of chassis/engine numbers belonged to Plaintiffs;
- (v) Sudhama lodged complaint with Police against 1st Defendant reported him and other staff to Police for stealing;
- (vi) PW2 and PW3's evidence is totally irrelevant and rejected on the grounds that quotations are for brand new machines and the items sold to 1st Defendant were second hand with some machines not even in running condition;
- (vii) Abdul Khalid's (2DW2) evidence is considered to be irrelevant and was given to take revenge on Plaintiffs because of termination of his Tenancy Agreement and disagreement with 2nd Plaintiff;
- (viii) No evidence has been produced to establish that apart from Bench Saw and accessories that were seized by Court Officer there were other items in Namara Mill belonging to Plaintiffs;
- (ix) Even if any items did belong to Plaintiffs, they could not take it back from 1st Defendant on face of Order of 5 December 2011, in CA 8/07;

- (x) This Court does not accept PW8's evidence that he prepared list of items (Exhibit P19) on or about 31 May 2013, but prepared it just before Plaintiffs filed this action.

Conversion - 2nd Defendant

- 141. No evidence has been established to prove that 2nd Defendant in any way converted any of Plaintiffs items for its own use and benefit.
- 142. Mere fact that certain items in Namara Mill were not in valuation list held by 2nd Defendant, does not establish that those items belonged to Plaintiffs and not 1st Defendant.
- 143. General Lien is a floating security on chattels and intangible property of Lienor which in this case is 1st Defendant and becomes fixed when Lienee serves Demand for payment of debt.
- 144. 2nd Defendant was absolutely right when it asked Plaintiffs or any other person claiming to have ownership of items in possession of 1st Defendant to provide proof of ownership before 2nd Defendant could release the items to third parties.
- 145. This Court also accepts 1st Defendant and 2DW's evidence that 1st Defendant was in financial position to purchase Vunimoli Sawmill pursuant to Sale and Purchase Agreement (Exhibit P18).

Conclusion

- 146. This Court finds that Plaintiffs claim against the Plaintiff is unconscionable total unmeritorious and an abuse of court process at the highest order.
- 147. Since, there is no counterclaim by 1st Defendant, Court will not deal with items seized by Plaintiff from Namara Mill through Police and Court Officers.

Costs

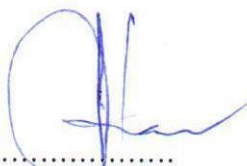
148. Court takes into consideration that trial lasted for eight (8) days; 2nd Plaintiff gave evidence and called seven (7) witnesses, 1st Defendant gave evidence and called 1 witness, 2nd Defendant called its Manager Legal Services as only witness and parties filed Submissions.

Order

149. This Court makes following Orders:-

- (i) Plaintiffs claim is dismissed and struck out;
- (ii) Plaintiffs jointly and severally pay 1st Defendant costs in the sum of \$7,500.00 within fourteen (14) days from date of this Judgment;
- (iii) Plaintiffs jointly and severally pay 2nd Defendant costs in the sum of \$7,500.00 within fourteen (14) days from date of this Judgment.




.....
K. Kumar
JUDGE

At Suva

22 March 2019

HANIFF TUITOGA for the Plaintiffs

KOHLI & SINGH for the 1st Defendant

GIBSON & CO. for the 2nd Defendant