

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 149 of 2015

BETWEEN : PATRICK JOHN JAY

PLAINITFF

AND : RAJENDRA PRASAD aka JENA NAREN AUTAR  
t/a YADRA VITI INVESTMENT

DEFENDANT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr S. Singh for the Plaintiff  
: Mr A.K Singh for the Defendant

Dates of Hearing : 27 February 2019  
15, 25 and 26 March 2019

Date of Judgment : 25 April 2019

## JUDGMENT

1. The Plaintiff in his Statement of Claim says as follows:

- (1) Circa 16 July 2012, he entered into an agreement (agreement) with the Defendant to an excavator registration No. FQ518 for \$58,000 (sum).
- (2) The payment of the sum was to be made by 12 installments of varying amount between April and 2 November 2012.
- (3) At all material times the Defendant retained possession of the excavator.
- (4) Circa 6 May 2015, the Plaintiff tried to lodge the transfer of the excavator at the Land Transport Authority but was advised it could not be lodged due to a Bill of Sale by Credit Corporation of Fiji (CCF) over the excavator.
- (5) The Plaintiff was unsuccessful in getting the Defendant to transfer the excavator or return the sum.
- (6) The Plaintiff says the Defendant fraudulently entered into the agreement with him to obtain the sum.

### Particulars:

- (a) The Defendant knew there was a bill of sale over the excavator.
- (b) He knew the Plaintiff was a foreigner.
- (c) He represented to the Plaintiff that it was free of all encumbrances.
- (d) He knew he could not transfer legal ownership of the excavator without removing the bill of sale.
- (e) He had no intention to transfer the excavator but entered into the agreement to obtain payment of the sum.
- (f) The Plaintiff is entitled to a return of the sum and to damages.

2. The Defendant in his Second Amended Statement of Defence and Counterclaim says as follows:

- (1) The Defendant is aware the Plaintiff is an Australian citizen
- (2) The Defendant says the excavator was under the bill of sale with CCF and could not be sold.
- (3) The alleged agreement dated 16 July 2012 is a fraud.
- (4) The Defendant requires the Plaintiff to produce the originals of the 2 agreement in Action No. 245 of 2013.

### Particulars of Fraud:

- (a) The writing in the agreement is not that of the Defendant.
- (b) The signatures on both documents are not that of the Defendant
- (c) No deposits and no installments were paid by the Plaintiff
- (d) The signatures of the Defendant have been forged by the Plaintiff
- (e) The Plaintiff did not have the agreement stamped because he does not have the original.

- (5) The Plaintiff purchased a property where the Defendant paid a deposit of \$5000. The funds taken from the Plaintiff's account was used in purchasing that property.
- (6) The alleged transfer form was forged by the Plaintiff after he stole a signed blank transfer form from the Defendant's office without his knowledge.
- (7) No monies were advanced to the Defendant for the purchase of the excavator, and no agreement was entered into for its sale. The said fraud (sic) agreement cannot be tendered in Court unless it is stamped under section 100(1) of the Stamp Duties Act 1920 (Act).

**Amended Counterclaim:**

- (8) On the promise of the Plaintiff to pay the Defendant \$300 a year as a lease payment the Defendant spent \$20,000 to build a house for the Plaintiff. The Plaintiff owes \$600 as lease payments.
- (9) The Plaintiff owes the Defendant \$5,000 that the Defendant paid as a deposit on his behalf to Parshotam & Co., solicitors.
- (10) The Plaintiff on 7 November 2013, obtained an injunction preventing the Plaintiff from using the excavator. The injunction was dissolved on 20 November 2014.
- (11) The Defendant was earning \$60 an hour operating the excavator 9 hours per day 6 days per week and as a result lost \$162,000.
- (12) This amount is owed and payable by the Plaintiff to the Defendant.
- (13) The Defendant paid CCF, \$8079 as legal costs to Naidu Law on behalf of CCF in defending the Plaintiff's action No 245 of 2013 and in dissolving the injunction.
- (14) On 13 September 2014 the Plaintiff wrongly procured a police constable to arrest the Defendant and take him in custody on a complaint made by the Plaintiff that the Defendant has dishonestly obtained \$49,300 from him, for the sale of the excavator.
- (15) On 6 August 2014 (sic) the Defendant was again arrested and taken in custody and charged for the offence of obtaining financial advantage by deception contrary to section 318 of the Crimes Decree 2009.
- (16) From 6 August 2014 till 14 June 2018, the Defendant had to attend the Nausori Magistrates' Court to defend the charges. On 14 June 2018 the Defendant was acquitted by the Resident Magistrate.
- (17) In the premises the Plaintiff caused the Defendant to be wrongfully imprisoned and deprived (sic, deprived of) his liberty for 11 hours.
- (18) The Plaintiff (sic, defendant) suffered loss and damage.

**Particulars of Special Damage**

(a) 10 times attending the Magistrates' Court	- \$100
(b) 10 days loss of income - \$75 x 9 hours per day	- \$6,750
(c) Legal costs	- <u>\$20,000</u>

Total    \$26,850

- (19) Wherefore the Defendant Claims:
  - (a) Judgment for - \$195679

- (b) Special Damages - \$26,850
- (c) General Damages
- (d) Exemplary, Punitive and aggravated damages

3. The Plaintiff in his Reply to the Second Amended Statement of Defence and Defence to Counterclaim joins issue and prays for the Counterclaim to be dismissed.
4. The Defendant in his Reply to the Defence to Counterclaim claims the Plaintiff's Claim be dismissed.
5. The Minutes of the Pre-Trial Conference dated 26 February 2019 include:

**Agreed Facts**

- (1) The Plaintiff is an Australian Citizen now residing in Australia.
- (2) The Defendant trades as Yadra Viti Investment
- (3) The Defendant is the registered owner of excavator No. FQ518 and retained possession of it.

**Agreed Issues**

- (1) Whether any agreement was entered into between the Plaintiff and the Defendant for the sale of the excavator.
  - (2) Whether the signature or initial on the alleged agreement is that of the Defendant
  - (3) Whether the Plaintiff paid any deposit or installment payments to the Defendant
  - (4) Whether the Defendant signed any transfer for the excavator
  - (5) Whether the Defendant sustained losses as a result of the Plaintiff's injunction
  - (6) Whether the Plaintiff's action resulted in the Defendant been subject to malicious prosecution
  - (7) Whether the Defendant is entitled for compensation for wrongful imprisonment.
6. In this judgment, the Plaintiff's Counsel is referred to as Mr Shelvin, the Defendant's Counsel as Mr Singh and the word "digger" and "excavator" are used interchangeably.
  7. The hearing commenced with the Plaintiff (PW1) suing evidence. He said he first met the Defendant at the end of December 2011 and beginning of 2012. He purchased a digger for \$58,000 and in July 2012 they agreed \$11,700 would be the deposit and further payments as per document 4 in the Agreed Bundle

- (AB). All these payments were paid to the Defendant. The Defendant signed for every payment except the final.
8. At this juncture Mr Singh objected that the document could not be accepted until it is stamped - s.100 of the Act.
  9. Mr Shelvin requested the court for a postponement to enable him to subpoena the police to produce the original documents. Mr Singh said he could not object. The court adjourned the hearing to 15 March 2019.
  10. On that date, the Plaintiff called Superintendent of Police, Abhay Nand (PW2) the Deputy Director of the Criminal Investigation Department (CID). He said he did not have the originals of the documents concerned. He was informed by the Investigating Officer (I.O) that these documents were tendered at the trial at the Nausori Magistrate's Court.
  11. Under cross-examination PW2 said of his own knowledge he does not know what happened to these documents.
  12. In re-examination, PW2 said D.C Alvin Kumar told him all the original documents were tendered in court.
  13. PW1 resumed his evidence on the next date. He said the document is in the Defendant's hand writing from the top and his handwriting is at the bottom. He loaned the Defendant's wife \$4,500 and she repaid \$5,000 3 weeks later by cheque. He filed an action in 2013 for the digger but lost the case. He said the police arrested the Defendant and the DPP prosecuted him. The Defendant has not returned the \$58,000 to him and he wants the court to order a refund.
  14. Under cross-examination, PW1 said the agreement had been done by himself without a lawyer. Page 80 contradicts page 102 and the Defendant's signature are on both pages. On Exhibit P3 the Defendant's signature appears. It was not stolen from the Defendant's office. The Defendant never gave him a letter saying he would sell a digger for \$20,000.
  15. The next witness was Setoki Qalubau (PW3) the Senior Court Officer in the Nausori Family Court. He has the court file for the Nausori Magistrates' Court. He has no idea whether the originals or copies were tendered and where the originals are.

16. Under cross examination PW3 said he does not know whether originals or copies were tendered in court.
17. The next witness was P.C Alvin Kisor Kumar (PW4), the I.O. He took the exhibits from the Central Police Station to the Nausori Court and handed them to Sergeant Reshmi. They were sealed in a brown envelope and he had no idea what they were.
18. Under cross-examination, PW4 said he was the witnessing officer of the interview of the Defendant.
19. Mr Shelvin said that Sgt. Reshmi had been subpoenaed the previous week but was that day in hospital. After conferring with the Plaintiff he informed the Court he was closing the Plaintiff's case.
20. The Defendant then opened his case with his first witness being Ms Pushpa Lata Ram (DW1). She said she just met the Plaintiff in 2012. Her relationship was like a de facto one. The Plaintiff asked her to have a look at a LTA transfer form, which was blank but had a signature on the left which he asked her to witness. She saw him filling the document. She did not witness the signature because she could not witness a pre-signed signature.
21. Under cross-examination DW1 she was a Justice of the Peace (J.P). The form had a signature on the right and a signature on the left, the rest was blank. That was the first time she saw the signature.
22. In re-examination DW1 said her evidence was the same as that she gave in the Magistrates' criminal Court.
23. The next witness was the Defendant (DW2). He said he met the Plaintiff in December 2011. The Plaintiff (PW1) asked to come to his place in Nausori. PW1 stayed for a period. As he DW2 is a heart patient Sanjay advised him to sign 8 or 9 of the forms so if anything happened to him, his wife could transfer the vehicles. MF1 5 - it is not his signature. He never agreed to sell the excavator to the Plaintiff. The Plaintiff never paid any money to him. DW2 said Exhibit P1 was his daughter's exercise book which he used as his record book to note down daily operations etc. He never exchanged it with the Plaintiff.
24. He reported at the Nausori police station that some of his property was stolen. They included the LTA transfer form, and 2 report books, one was a red

exercise book and the other was a bigger one. At the interview, the police showed him photocopies. No originals were tendered in the Magistrates' Court. The Plaintiff never paid him any money. He built a house for the Plaintiff with the arrangement that he will pay the lease money of \$300 p.a to ITLTB. But he did not pay any money. The Plaintiff did not refund him the \$5,000 paid to M/s Parshotam.

25. DW2 said the Plaintiff came with a bailiff to the job site and told him the Court had given an order to stop the machine from working. They gave him a copy of the order which he gave to his lawyers. DW2 stopped the excavator and took it into the garage. It was earning \$60 per hour for 9 hours per day, 6 days per week. It was parked from 7 November 2013 to 20 November 2014 when the injunction was dissolved. He paid CCF \$8079 as their legal fees for Naidu Lawyers who represented CCF who debited this amount from his account with them.
26. DW2 said he was called by the police, he went and gave them an interview, was taken into custody, bailed by the Court and acquitted on 14 June 2018. He is claiming for the 11 hours he was in a cell, for attending court 10 times, for paying 2 lawyers for defending him in Court. He asks for \$195,679 and special damages of \$26,850.
27. Under cross-examination, DW2 said he followed the order which he gave to Carl Jamnadass. The order cannot be produced. He lost \$540 per day. The Plaintiff did not purchase the excavator so why should he transfer it to him. The Plaintiff did not prosecute him. The police charged him with obtaining by deception.
28. On re-examination, DW2 said the Plaintiff wrongly filed an action against him, that is why he should be reimbursed \$8079.
29. DW2 said he did not sign a single line from top to bottom. The Plaintiff never gave him a single cent.
30. The next witness was Nilesh Kumar (DW3) who worked for the Defendant as a excavator operator. On 7 November 2013 he was operating the excavator when he saw the Plaintiff and another man. The Plaintiff signaled him to stop operating the excavator and told him he had a Court order. The Defendant told him to stop working and arranged for a truck to take the excavator to his yard.

31. Under cross-examination, DW3 denied he made up a story.
32. The final witness was Kamlesh Chand (DW4) who worked for the Defendant as a mechanic. The Plaintiff approached him and asked to be shown the engine and chassis numbers, which DW4 said he did.
33. With that, the Defendant closed his case and Counsel began their submissions.
34. Mr Shelvin submitted the Plaintiff sought the return of the \$58,000. The Plaintiff could not register the transfer because of the Bill of Sale. The agreement was marked for identification but the original cannot be traced. He asked the Court to accept the photo copy under section 10(1) (b) of the Civil Evidence Act. The Defendant has not shown the agreement was forged. The Plaintiff's bank statement supports his story.
35. Regarding the Defendant's Counterclaim, Mr Shelvin said the order only says not to sell and transfer. It did not say not to operate.
36. With regard to the malicious prosecution the Commissioner of Police has not been made a party. The Court should not make an award for loss of income.
37. Mr Singh then submitted. He said there is no evidence that the parties breached an agreement. He asked why the Plaintiff did not pay the entire \$58,000 in one go; why by installments. The duty of the Plaintiff is to prove the document was not forged. Under section 100 of the Stamp Duties Act the agreement cannot be accepted as it is not stamped. Finally Counsel said he would leave the special damages to the Court to decide.
38. Mr Shelvin in his reply said the \$50,000 in the charge was put by the D.P.P and not the Plaintiff. The Plaintiff paid by installments because that was what the Defendant wanted.
39. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision. I shall deal first with the Plaintiff's claim and then the Defendant's Counterclaim.



### A. Plaintiff's Claim

40. The pivotal issue is this. Can the Plaintiff rely on an alleged agreement which is not stamped and the original is not produced in Court.
41. So I shall turn to the Stamp Duties Act 1920. Section 41 says *"Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of Fiji shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed"*. In my view the intention of the legislature was that stamping is a prerequisite for any instrument being admissible or received in evidence. S.2 - Interpretation - says "instrument includes every written document." The agreement concerned certainly is such a document. Therefore the agreement cannot be received as evidence in this case.
42. I am fortified in my conclusion by s.100(1) of the Act. This says *"Any document which ought to bear a stamp under the provisions of this Part shall not be of any validity unless and until it is properly stamped nor shall any Judge, Magistrate or officer of any court allow such document to be used, although no exception be raised thereto, until such document has been first duly stamped"*.
43. Mr Shelvin's relies on section 10-(1)(b) of the Civil Evidence Act which reads as follows:
- "If a statement contained in a document is admissible as evidence in civil proceedings, it may be proved-*  
*(a) by the production of that document; or*  
*(b) whether or not that document is still in existence, by the production of a copy of that document or the material part of it,*  
*authenticated in a manner the court approves"*.
44. The operative words are "admissible as evidence". The plain truth is the original agreement would not be admissible as evidence here because of the non-compliance with the requirement of the Stamp Duties Act. Therefore the photocopy also cannot be received as evidence.

45. Consequently in the absence of a stamped agreement and admissible photocopy the Plaintiff's claim has fallen to the ground. The agreement was necessary to refute the Defendant's denial of his execution of it.

46. In the result the Plaintiff's Claim is hereby dismissed with costs.

#### **B. Defendant's Counterclaim**

47. I shall deal first with the Defendant's claim arising from the injunction obtained by the Plaintiff regarding the excavator. This issue is easily resolved when the injunction is perused. On 7 November 2013 Brito Mutunayagam J ordered the Defendant (his) employees or representatives be "restrained from selling or transferring Hitachi excavator digger reg. No. FQ51, until the final determination of this action".

48. It is thus crystal clear that the Defendant was not prevented from using or utilizing the excavator. There was therefore no basis at all, in law or in fact for him to have stopped using it to generate income for him and no basis at all for him to have parked it from 7 November 2013 to 20 November 2014 as he alleged in his evidence. Since he had shown the order to his lawyer he would surely have been advised that he could continue to utilize it, only that he could not sell or transfer the excavator. It shows that the Plaintiff was not in any way responsible for the alleged consequent loss of income and this claim must therefore fail.

49. The next claims I shall consider are those arising from what can be described as false imprisonment and malicious prosecution. The Defendant has, in my opinion, demolished his own claims here by his testimony under cross-examination for he said the prosecution was done by the Police, not by the Plaintiff who only complained; the Plaintiff did not prosecute him; the Police charged him with obtaining by deception. So it is clear from the Defendant's own mouth that he considers the Police to be responsible for his predicament and not the Plaintiff. He should therefore have sued the Commissioner of Police but he failed to do so. His claims must therefore fail.

50. The remainder of the Defendant's claim come under the rubric of special damages. The Oxford Dictionary of Law, 9<sup>th</sup> edn. states "Special damages are given for losses that are not presumed but specifically proved". The Plaintiff is not entitled to claim special damages arising from the alleged malicious prosecution claim which I have dismissed. He is not entitled to the alleged

claims for lease payments (due to iTLTB), deposit and legal costs paid as he has not clearly and precisely proved them nor called any witnesses.

51. In the result, the Defendant's Counterclaims are hereby dismissed with costs.

52. In fine, I make the following orders:

(1) The Plaintiff's Claim is dismissed with costs summarily assessed at \$3,000 to be paid to the Defendant.

(2) The Defendant's Counterclaim is dismissed with costs summarily assessed at \$3,000 to be paid to the Plaintiff.

Delivered at Suva this 25<sup>th</sup> day of April, 2019.



David Alfred  
JUDGE  
High Court of Fiji