

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

CIVIL ACTION NO. HBC 303 OF 2019

BETWEEN : **BHAG WATI** of Yalalevu, Ba, Domestic Duties.

PLAINTIFF

AND : **SHASI SHALENDRA PRASAD** of Vuniyasi, Nadi, Driver.

DEFENDANT

Date of Application : 14 April 2020

Date of Decision : 30 April 2020

DECISION

Introduction

[01] **Covid-19 Protocol**: This decision was handed down remotely by circulation to the plaintiff's solicitor by email. The date for hand-down is deemed to be Thursday 30 April 2020.

[02] The plaintiff took out a writ of summons endorsed with statement of claim seeking the following relief:

- i. *An order that the sum of \$41,000.00 paid under the Bill of Sale by the plaintiff to the defendant be returned;*
- ii. *Loss of income from 6 January 2019, at a rate of \$100.00 per day until the final determination of this matter;*
- iii. *Specific performance of the Agreement dated 12 December 2014 between the plaintiff and the defendant;*
- iv. *Damages for breach of Bill of Sale in lieu or in addition to specific performance and*
- v. *Costs on an indemnity basis;*

[03] The writ was personally served on the defendant on 2 December 2019 as evidenced by the affidavit of service of Ashok Chand, a registered bailiff. The

affidavit of service has been filed of record on 4 February 2020. The defendant filed neither acknowledgement of service nor statement of defence within the time prescribed by the High Court Rules 1988, as amended (HCR). A defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for acknowledging service of the writ or after the statement of claim is served on him or her, whichever is later (See: HCR, O 18, R 2). Since it is a service within the jurisdiction, the defendant ought to have acknowledged service within 14 days after service of the writ (See: HCR, O 12, R 4 (a)).

- [04] The defendant did not file his defence, albeit the statement of claim was served on him on 2 December last year. As such, the plaintiff makes application to enter against the defendant a judgment in respect of his claim.
- [05] The application, which is supported by an affidavit of Bhag Wati (the plaintiff), is made under HCR, O 19, R 6, which provides:

Default of defence: mixed claims (O 19, R 6)

6. Where the plaintiff makes against a defendant two or more of the claims mentioned in Rules 2 to 5, and no other claim, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter against that defendant such judgment in respect of any such claim as he or she would be entitled to enter under those Rules if that were the only claim made, and proceed with the action against the other defendants, if any. [Emphasis provided]

- [06] In the case of mixed claim, Rule 6 simply allows the plaintiff to enter, after the expiration of the period fixed by or under the HCR for service of the defence, against the defendant that fails to serve a defence within the prescribed period such judgment in respect of any such claim as he or she would be entitled to enter under those Rules. There is nothing in that Rule (as in the case of other claim, O 19, R 7, the plaintiff need to apply to the Court for judgment) that the plaintiff must apply to the court for default judgment or that the court must have a hearing when entering a default judgment under Rule 6.

[07] In *Wan Tai Holdings Co Pte Ltd v Denarau Waters Pte Ltd* [2019] FJHC 913; HBC198.2019 (23 September 2019), Stuart J dealing with an application to enter default judgment filed under O 19, 7 (default of defence: other claim) held (at paragraphs 17 and 18):

“17. I am therefore satisfied that in the present case, where the defendant has been served with the writ of summons endorsed with a statement of claim, but has not served a defence in the proceedings, the plaintiff is entitled under O.19 r.7 to seek judgment on its claims without further notice to the defendant.

B. Are the orders sought (as listed in paragraph 3 above) orders that the court can and should make, notwithstanding that these are not identical to the remedies sought in the statement of claim.

18. However I also note in the Court of Appeal decision referred to above the following comment in relation to the filing of an affidavit by the respondent, in support of its application for judgment:

Although the learned judge was not entitled to rely on affidavit evidence for the purpose of giving judgment for the plaintiff, he was entitled to look at it when the appellant referred to what might possibly be a defence.

This comment reinforces what the rule states: that where an application under O19.r7 is made for judgment, the Court on the hearing of the application shall

give such judgment as the plaintiff appears entitled to on his statement of claim.” [Emphasis provided]

[08] In arriving at the above decision, Stuart J referred to a decision of the Court of Appeal in *Kumari v Dass* [1999] FJCA 22.

[09] On that basis, I propose to determine, without a hearing, whether the plaintiff is entitled to enter judgment in respect of his claim against the defendant under Rule 6.

The facts

[10] The statement of claim pleads as follows:

- 10.1 The plaintiff at all material times is purchaser of the Motor Vehicle Registration Number LT 2497 Engine No. INZ-C725186, Chasis No. NZE141-9040798 (the vehicle) as well as the taxi permit Number T2497/26439.
- 10.2 The defendant is the registered permit holder for the vehicle, having the base at the Koroivalu Road, Nadi Town.
- 10.3 By a Bill of Sale executed and dated 12 December 2014, registered with the Registrar of Deeds on 30 December 2014 (the Bill of Sale), the plaintiff agreed to lend the sum of \$41,000.00 as principal sum to the defendant.
- 10.4 Pursuant to the terms of the Bill of Sale, the defendant agreed with the plaintiff, inter alia:
 - (a) That the defendant will transfer and assign unto the plaintiff the vehicle and the benefit of the Taxi Business (Permit Number T2497/26439) as described in the schedule of the Bill of Sale.
 - (b) The plaintiff will take possession of the vehicle and the plaintiff will be entitled to the benefits from the Taxi Business (Permit Number T2497/26439).
- 10.5 At all material times, the defendant failed to transfer and assign the vehicle to the plaintiff as per the Bill of Sale upon numerous requests by the plaintiff.
- 10.6 After the execution of the Bill of Sale, the plaintiff had the possession of the vehicle and the taxi permit without the vehicle and the permit being transferred to the plaintiff.
- 10.7 The plaintiff was taking the benefits from the taxi business as agreed in the Bill of Sale agreement. However, due to the defendants neglect to transfer the vehicle and the taxi permit, no income, tax or vat return was lodged with the Fiji Revenue and Customs Authority.
- 10.8 The defendant was still holding ownership of the said vehicle and taxi permit, thus he was liable to make such returns on the income derived

from the taxi business after consulting the plaintiff. The defendant neglected to lodge any returns for the years 2014, 2015, 2016, 2017, 2018 and 2019 till date.

- 10.9 The defendant stole the vehicle from the possession of the plaintiff sometime in 2019.
- 10.10 That the Bill of Sale has not been terminated and the same is in full force and effect.
- 10.11 The plaintiff has at all times been ready and willing to carry out and comply with the terms of the Bill of Sale. However, the defendant has failed and/or refused to do the same in breach of the Bill of Sale, the particulars of which are:
- a) The Bill of Sale was executed on 12 December 2014, but the defendant has failed and/or refused to transfer the vehicle to and unto the plaintiff;
 - b) The agreement was executed on 12 December 2014, but the defendant has failed and/or refused to give access to the plaintiff to the vehicle.
 - c) In breach of the agreement to transfer the vehicle, the defendant unlawfully and without notice took the vehicle out of the plaintiff's possession.
- 10.12 That as a result of the refusal to transfer by the defendant and the above said breaches of the Agreement; the plaintiff was unable to obtain income from the business.
- 10.13 That as a consequence of the acts and/or omissions of the defendant, the plaintiff has suffered inconvenience, loss and damages. The plaintiff continues to suffer loss and damages.
- 10.14 That the defendant stole the vehicle on 5 January 2019 and kept it in his possession and due to this breach, the plaintiff continues to suffer loss of income at a rate of \$100.00 per day till to date.

Discussion

- [11] For the purpose of the present application, I will consider the entitlement of the plaintiff to enter default judgment in respect of his claim against the defendant.
- [12] At this stage, the statement of claim remains unchallenged in the absence of defence. The defendant has failed to serve a defence on the plaintiff within the prescribed time.
- [13] The plaintiff claims the return of \$41,000.00 he paid to the defendant under the Bill of Sale. Essentially, according to the statement of claim, the plaintiff lent the sum of \$41,000.00 to the defendant, and the defendant assigned his motor vehicle number LT 2497 together with the Taxi Permit Number T2497/26439 under a Bill of Sale (BoS) as security. The defendant delivered possession of the taxi to the plaintiff upon execution of the BoS so that the plaintiff could take benefits from the taxi business.
- [14] On 5 January 2019, the defendant had removed the taxi from the plaintiff without returning the money he obtained from the plaintiff depriving him of getting benefit from the taxi business. It appears that the defendant to be the contract breaker. He has removed the taxi that was given as security for the loan he obtained.
- [15] Upon reading the statement of claim, I am satisfied that the plaintiff is entitled to the return of the money he lent to the defendant.
- [16] The taxi was given to the plaintiff because he can get benefit from it for the loan he gave. By removing the taxi, the defendant had deprived the plaintiff of using and getting income from it, a right under the BoS. Therefore, the plaintiff seeks loss of income from 6 January 2019 until the final determination of this matter (this should be read as 'until the return of the money'). The plaintiff was entitled to use and get benefit from the taxi. He is therefore entitled to enter judgment for loss of income at the rate of \$100.00 per day from 6 January 2019 until full payment of the money.
- [17] The BoS was not an agreement to transfer the taxi to the plaintiff. It was an assignment of the taxi as security for the loan. Since the plaintiff is claiming the

return of the money, he is not entitled to enter judgment for specific performance.

[18] The plaintiff may claim general damages for breach of the BoS. Therefore, the plaintiff is entitled to general damages for breach of contract and cost which is to be assessed before the Master.

[19] In the result, the plaintiff is entitled to enter judgment against the defendant as follows:

1. The defendant shall pay the sum of \$41,000.00 to the plaintiff.
2. The defendant shall pay \$100.00 per day to the plaintiff from 6 January 2019 until the judgment sum is paid in full.
3. The plaintiff shall be entitled to general damages and cost as assessed by the Master.

M.H. Mohamed Ajmeer

30/4/20

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M.H. Mohamed Ajmeer

JUDGE



At Lautoka

30 April 2020

Solicitors:

M. Y. Law, Barristers & Solicitors for the plaintiff