

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 229 OF 2021

BETWEEN : **ASWIN SANJESH UMA SHARMA** **PLAINTIFF**

AND : **BANK OF BARODA** **DEFENDANT**

BEFORE : A.M. Mohamed Mackie- J.

COUNSEL : Mr. Sharma. J. – For the Plaintiff.
 : Mr. Singh. R. A. – For the Defendant.

HEARING : Held on 16th April 2024.

WRITTEN SUBMISSIONS : Filed by the Plaintiff on 1st May 2024.
 : Filed by the Defendant on 16th October 2024.

RULING : Pronounced on 28th November 2024.

RULING

1. This Ruling pertains to the hearing held before me on 16th April 2024 in relation to the **Originating Summons** filed by the Plaintiff on 22nd October 2021 against the Defendant Bank seeking the following **Determinations** in terms of paragraphs (a) to (f), **Declarations** in terms of paragraphs (1) to (6), and **Orders** in terms of paragraphs (1) to (5) of the prayers to the Originating Summons respectively.

Determinations:

- a) *Whether Plaintiff gave the Defendant a Lien over the Plaintiff's Term Deposit standing to his name for \$420,000.00 (Four Hundred Twenty Thousand Dollars) with the Defendant, to the exclusively for a Bank Guarantee for a limited time;*
- b) *Whether the Plaintiff's Personal Guarantee and the Lien over the Plaintiff, Aswin Sanjesh Sharma's Term Deposit with the Defendant, Bank of Baroda has expired;*

- c) *Whether the Plaintiff has consented to or agreed to an extension of his Personal Guarantee and the Lien over the Plaintiff, Aswin Sanjesh Sharma's Term Deposit with the Defendant, Bank of Baroda*
- d) *Whether upon of the Plaintiff's Lien and Guarantee expiring and upon maturity of the Plaintiff's Term Deposit with the Defendant, the Defendant has refused to and or neglected to release the Plaintiff's monies amounting to \$420,000.00 (Four Hundred Twenty Thousand Dollars) to him despite numerous requests and reminders made to the Defendant.*
- e) *Whether the Defendant should pay the Plaintiff his monies amounting to \$420,000.00 (Four Hundred Twenty Thousand Dollars).*
- f) *Whether the Plaintiff is entitled to be paid accumulated Interest by the Defendant on the Plaintiff's monies amounting to \$420,000.00 (Four Hundred Twenty Thousand Dollars).*

Declarations:

1. *That the Plaintiff gave the Defendant a Lien over the Plaintiff's Term Deposit standing to his name for \$420,000.00 (Four Hundred Twenty Thousand Dollars) with the Defendant, to the Defendant exclusively for a Bank Guarantee for a limited time*
2. *That the Personal Guarantee and the Lien over the Plaintiff , Aswin Sanjesh Sharma's Term Deposit with the Defendant, Bank of Baroda, was valid till 16th October, 2020 and has expired now;*
3. *That the Plaintiff has not consented to nor agree to an extension of his Personal Guarantee and the Lien over the Plaintiff, Aswin Sanjesh Sharma's Term Deposit with the Defendant, Bank of Baroda*
4. *That upon of the expiry of the Plaintiff's Lien and Guarantee and upon maturity of the Plaintiff's Term Deposit with the Defendant, the Defendant has wrongfully refused to and or neglected to release the Plaintiff's monies amounting to \$420,000.00 (Four Hundred Twenty Thousand Dollars) to him;*
5. *That the Plaintiff is entitled to be paid his monies of \$420,000.00 (Four Hundred Twenty Thousand Dollars) by the Defendant forthwith.*
6. *That the Plaintiff is entitled to be paid accumulated Interest by the Defendant on the Plaintiff's monies amounting to \$420,000.00 (Four Hundred Twenty Thousand Dollars).*

Orders:

1. *That the Defendant pay the Plaintiff his monies amounting to \$420,000.00 (Four Hundred Twenty Thousand Dollars) forthwith.*
 2. *That the Defendant pay the Plaintiff accumulated Interest on the Plaintiff's monies that were held by the Defendant at the agreed rate up to the date the Plaintiff's Term Deposit matured.*
 3. *That the Defendant pay the Plaintiff Commercial Interest at the rate of 13.5% per annum (or such other rate that the Court determines) on the Plaintiff's monies that were held by the Defendant at from the date the Plaintiff's Term Deposit matured to the date of actual payment to the Plaintiff.*
 4. *That the Defendant pays the costs of this application on a full Solicitor Client Indemnity basis.*
 5. *Any further or other relief that this Honorable Court deems fit.*
2. The Originating Summons states that it is made under the provisions of Order 7, Order 28 and Order 32 (as applicable) of the High Court Rules 1988, under General provisions of the High Court Rules and inherent jurisdiction of this Court.
 3. It is supported by the Affidavit of the Plaintiff, **Aswin Sanjesh Sharma**, sworn on 21st October 2021 and filed on 22nd October 2021 with annexures marked as "AS-1" to "AS-15". The Defendant's Affidavit in Response sworn by one **Asit Kumar**, Chief Manager on 31st May 2023 was filed on 01st June 2023 with annexures marked as "A" and "B", and the Affidavit in Reply thereto sworn by the Plaintiff on 26th July 2023 was filed on 27th July 2023.
 4. The hearing being taken up before me on 16th April 2024, Counsel for both parties, having made their oral submissions, have filed their respective written submissions as aforesaid.

Submissions

5. Mr. Sharma, Counsel for the Plaintiff, in his oral and written submissions, took up a stern position that what the Plaintiff gave the Defendant Bank, over his Term Deposit of \$420,000.00 with it, was only a limited guarantee for a period of 12 months, for the Bank to issue a Performance Bond in favor of "**Fiji National University ("FNU")**" on behalf of "**Kartika Constructions Plumbing Services Pte Limited**" ("**Kartika Constructions**") and the Defendant Bank should have released his Term Deposit at the expiry of 12 months period.
6. Conversely, Mr. Singh, Counsel for the Defendant Bank submitted, inter alia, **that**;

- a. The guarantee given by the Plaintiff is a continuing one and the Offer Letter (“AS-1”) has everything in black and white.
 - b. The Rules that govern the Demand Guarantee are followed by worldwide.
 - c. If, the Guarantee is discharged as moved by the Plaintiff, the Bank will not be in a position to recover the Money paid by it unto the FNU on performance Bond issued on behalf of “Kartika Constructions”.
 - d. The Offer Letter is addressed to “Kartika Constructions” who is the Customer of the Bank and the Plaintiff was simply a Guarantor for “Kartika Constructions” with an additional Guarantor, namely, B.L. Naidu & Sons.
 - e. The performance Guarantee is intact in favor of the FNU, the beneficiary, and all the securities provided by Kartika Constructions, which includes the guarantee given by the Plaintiff, are continuing securities.
 - f. The proper way to litigate this matter is Writ of Summons and not the Originating Summons.
7. In reply, Mr. Sharma argued that paragraph 1 of the offer letter marked as “AS-1” clearly states that the Plaintiff’s Guarantee was limited for only 12 months and it should have expired on 16th October 2020. There cannot be a guarantee without a specific date of expiry.
 8. Counsel also raised issue on belated filing of Affidavit in response by the Defendant (delay of around 20 months) which was sworn by Mr. Asit Kumar, pursuant to an Authority given by one Ms. Kusum Lata Chand, being the a Power of Attorney holder of the Defendant Bank, and the Affidavit is not sworn and signed by the very Power of Attorney Holder.
 9. Mr. Sharma also argued that the Affidavit in Response should have been sworn by Mr. A.S.S. Prakash, the Defendant’s Chief Credit Manager, who is alleged to have told the Plaintiff that his personal Guarantee and security will be only for 12 months. He pointed out that when Mr. A.S.S. Prakash was still available in Fiji for around 09 months, during the time material prior to his departure for India, he could and should have sworn the Affidavit in opposition.

DISCUSSION:

10. On perusal of the averments in the Affidavit in support of the Plaintiff, it appears that the preliminary objection, raised by the Counsel for the Defendant in his submissions, is not devoid of merits.
11. As per the averments in paragraph 10 of the Affidavit in support, the plaintiff appears to be substantially relying on what the former Chief Credit Manager, namely A.S.S. Prakash, of the Defendant Bank had told him during the, alleged, discussion for granting of the guarantee by the Plaintiff.
12. Counsel for the Defendant urges that the Court should give full evidentiary value to the Offer Letter marked as "AS-1", which is addressed to "**Kartika Constructions**" who is the customer of the Defendant Bank, while the Plaintiff only stood as a guarantor to "**Kartika Constructions**" along with another guarantor, namely, B.I. Naidu & Sons.
13. The Bank claims that it has no direct relationship with the Plaintiff under the Offer Letter, and on any issue it is Kartika, who should rightfully be the party to liaise with the Bank in respect of the Performance Bond as it was Kartika, who provided the Plaintiff as a guarantor for the facility it obtained.
14. It is observed that the contents of the sub paragraph 3 of paragraph 5.0 in page 3 of the Offer Letter (AS-1) , which is reproduced bellow, completely rules out the admissibility of the contents of any discussion the Plaintiff claims to have had with Mr. A.S.S . Prakash, in this regard , unless the Plaintiff adduces some cogent evidence to supersede the contents of the Letter of Offer

"Any statement, representation, promise or information of any kind given by Bank or its representative whether in answer to your queries or otherwise do not form part of this Letter of Offer unless they are contained in the Letter of Offer"
15. There is no evidence to show that it was the Defendant Bank who requested the Plaintiff to stand as a guarantor and sign the Letter of Offer on behalf of Kartika, as averred in paragraphs 11 and 12 of the Affidavit in support.
16. The Plaintiff in paragraph 13 of his Affidavit in support states that "My understanding was that my Personal Guarantee and the lien over my term deposit was valid till 16th October 2020". The Court cannot act upon what was "understood" by the Plaintiff during the processes or at the time of signing the Offer Letter. There has to be cogent, convincing and independent evidence before the Court, which have to be formally led in court and tested by way of cross examination and re-examination before arriving at a decision.

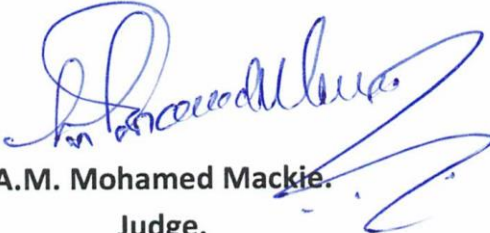
17. Further, on a quick glance of the “GUARANTEE BOND” marked as “AS-2” , which dates back to 25th April 2018 and signed by the Plaintiff as the “Guarantor” being read over and explained by his Solicitor, I don’t find any clause, which stipulates an expiry date for the Guarantee or specific time period to that effect.
18. Under these circumstances and , particularly , when the Plaintiff appears to be, substantially, relying on the discussion he claims to have had with the Credit Manager of the Defendant Bank, whose evidence is not before the Court , it is not prudent for this Court to decide the matter by way of Originating Summons. Thus, in fairness to the Plaintiff, without proceeding to dismiss the Application, I decide to leave the Plaintiff at the liberty of proceeding with this matter by conversion of it as a Writ action, if minded to do so. I decide not to order costs.

FINAL ORDERS:

1. The Originating Summons filed by the Plaintiff on **22nd October 2022** is to be converted and heard as a writ action under Order 28, Rule 9 of the High Court Rules 1988.
2. The Plaintiff is at liberty to file summons for direction for the continuation of the matter as a writ of Summons.
3. No costs ordered and the parties shall bear their own costs.

On this 28th Day of November 2024 at the High Court of Lautoka.





A.M. Mohamed Mackie.
Judge.
High Court (Civil Division)
Lautoka.

SOLICITORS:

For the Plaintiff- :Messrs. Janend Sharma Lawyers – Barristers & Solicitors.
For the Defendant- :Messrs. Parshotam Lawyers - Barristers & Solicitors.