

**IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION**

**Civil Appeal # HBA 11 of 2024
(On Appeal – Nasinu Civil Action # 129 of 2017)**

BETWEEN: Dharmendra Singh T/A M Smart Building Services

Appellant/Original Defendant

AND: Avichal Prasad

Respondent/ Original Plaintiff

Representation

Appellant: Ms. Saumaki (Shelvin Singh Lawyers).

Respondent: Mr. E. Maopa (Babu Singh & Associates).

Date of Hearing: 14th November 2024.

Judgment

A. Introduction

- [1] This is an appeal against the decision of a Resident Magistrate delivered on 1st May 2024. The parties had entered into an agreement for the construction of a dwelling house. The Appellant in the Magistrate Court was the Defendant. The Respondent, the Plaintiff.
- [2] The Respondent had claimed that the Appellant failed to complete the construction of building and breached the agreement. He claimed damages and costs. The Learned Magistrate found that the Appellant had breached the agreement and awarded \$40,000.00 as special damages and \$500.00 as costs to the Respondent. Pre and post judgment interest was calculated at 5%. The Appellant had proven his counterclaim and was awarded \$7000.00 for losses sustained. The orders in favour of the Respondent are the subject of this appeal.

B. Grounds of Appeal

[3] The grounds of appeal are that:

- “1. *The Learned Magistrate erred in law and in fact by holding that the Appellant breached the construction agreement in failing to complete Stage 3 works within 2.5 weeks, when the Appellant had already completed the works required.*
2. *The Learned Magistrate erred in law and in fact by, failing to properly evaluate the evidence of the Appellant/Defendant and the photographs tendered in by the Plaintiff/Respondent which clearly show that Stage 3 works had been substantially completed the Appellant, and holding therefore the Appellant breached the construction agreement in failing to complete Stage 3 works.*

3. *The Learned Magistrate erred in law and in fact by holding that payment had been given to the Appellant on 1 March 2017 to then complete two stages 2 and 3 from the Schedule of payment when Paragraph 4.2 of the Building agreement clearly states that "4.2 The payments shall be done upon completion of each stage and in accordance to Schedule A attached herein".*
4. *The Learned Magistrate erred in law and in fact by holding that the Appellant failed to complete Stage 3 works when the Appellant gave evidence that he had actually began working on other stages of the building agreement.*
5. *The Learned Magistrate erred in law and in fact by holding that the Appellant breached the agreement when the Respondent had failed to notify the Appellant on his issues with the Appellant's performance of work in line with paragraph 8.1 of the agreement, however forcefully made the Appellant leave the premises.*
6. *Such further and/or other grounds as shall become apparent from the court record."*

C. Determination

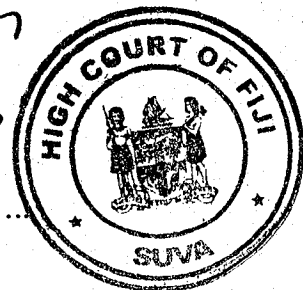
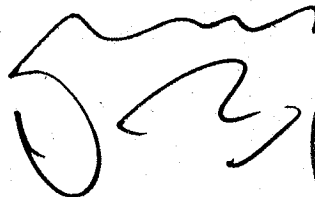
- [4] I have noted every material that is before me. The first ground of appeal relates to completion of Stage 3 of the building work. The parties entered into a building agreement on 27th June 2016. All the works was to be completed by 30th November 2016. This was a period of about 5 months. Clause 2.3.1 of the building agreement allowed for amendment to the terms by mutual agreement in the event of "weather conditions".
- [5] The Learned Magistrate noted from the evidence that the Defendant (Appellant) accepted that Stage 3 was not completed. The requirement was that the Appellant be paid upon completion of the Stage. He was paid in full for Stage 3. The payment of \$50,000.00 was made on 1st March 2017. This is well past the completion date of construction by 30th November 2016.
- [6] The proposed schedule of payments is contained on the Appellant's letterhead. It sets out the stages and the payment amount. It is dated 5th January 2017. The evidence before the Learned Magistrate was that the 3rd Stage could not be completed on time by the Appellant. He was given more time. Even the Appellant admitted that he had not completed Stage 3. This first ground of appeal fails.
- [7] For the second ground of appeal I find that the Learned Magistrate careful analyzed the evidence of the witnesses and gave relevant weight to the evidence. On the evidence before him the Learned Magistrate found that Stage 3 was not completed. This was also by the Appellants admission. In Paragraphs 47.0 to 51.0 the Learned Magistrate dealt with the work done in Stage 3. He found that the there was some work done but not sufficient to render Stage 3 complete. I find that the Learned Magistrate did not err. He properly evaluated the matters raised in the 2nd ground of appeal. This ground fails.
- [8] For the 3rd ground of Appeal, the Appellant in his evidence admitted that he did work for Stage 4 and 7. This is understood given that building work for certain stages overlap. The Appellant in his affidavit evidence in chief in Paragraph 10 admits that a

payment of \$50,000.00 was received for the Stage 3. The Appellants affidavit evidence is that he completed Stage 3 (except 50% electrical works). The Appellant not stating in his affidavit that 50% electrical work which was part of Stage 3 was not completed is a point only known to him. I note this from paragraphs 10 and 11 of his affidavit evidence in chief and the proposed schedule of payments. In cross examination the Appellant admitted that Stage 3 was not complete (Page 158 of copy records).

- [9] I do not find that the Learned Magistrate erred when he found that from the evidence of the Defendant Stage 3 was not completed. Ground 3 of appeal fails.
- [10] The Learned Magistrate was correct in his finding that the Appellant failed to complete Stage 3 of works. This finding is based on the evidence that was before him. The 4th ground of appeal fails.
- [11] The Learned Magistrate dealt with the notice to quit. This was a notice by the Appellant to the Respondent. He rendered the notice invalid. The Learned Magistrate found that a notice of breach of agreement was served on the Appellant. This was what was a requirement of the building agreement. I agree with the Learned Magistrate on these points. The Learned Magistrate was correct in his determination of these issues. The Learned Magistrate correctly found that the Appellant breached the agreement. He then went on to see what remedy was available to the Respondent for the breach by the Appellant.
- [12] The Learned Magistrate in his judgment was fair to the Appellant. He did not find any evidence of \$80,000.00 being paid to another contractor by the Respondent. He had evidence of \$50,000.00 paid to Appellant. He found partial work done for Stage 3. Although the Respondent claimed full sum of \$50,000.00 for non-completion. The Learned Magistrate allowed for services rendered. In paragraph 49 of the judgment, he set out what was done and what remained. Based on that he worked out \$40,000.00. The 5th ground of appeal fails.
- [13] None of the grounds of appeal are made out. The judgment of the Learned Magistrate is affirmed. I summarily assess costs be paid by the Appellant to the Respondent in the sum of \$2500.00 within 21 days.

D. Court Orders

- (i) **Appeal dismissed.**
(ii) **Appellant to pay Respondent \$2500.00 as costs within 21 days. Costs have been summarily assessed.**



Chaitanya S.C. A. Lakshman

Puisne Judge

30th January 2025