

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 170 of 2015

BETWEEN : BANK OF BARODA a Government of India undertaking incorporated and carrying on business at 86/88 Marks Street, Suva, and elsewhere.

PLAINTIFF

AND : RATNEEL VISHAL NAIDU of 24 Tikaram Place, Namadi Heights, Suva.

1ST DEFENDANT

AND : PRIYA POONAM RAM of 24 Tikaram Place, Namadi Heights, Suva.

2ND DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Rudra Nand for the Plaintiff
No Appearance of the Defendants

Date of Ruling : 15th May, 2018 @ 9 am

DECISION

(Judgment by Default on the failure to file and serve any pleadings the 1st and 2nd Defendants pursuant to Order 19 Rule 9 of the High Court Rules, 1988)

INTRODUCTION

1. This is the **Plaintiff's** application seeking for the following orders-
 - (i) **Judgment by Default** for the liquidated sum of **\$392,950.37** under the Personal Guarantee of the 1st and 2nd Defendants jointly and severally;
 - (ii) **Interest @ the rate of 80.74% as @ 12th February, 2015; and**
 - (iii) **Costs on an indemnity basis.**
2. The 1st and 2nd Defendants were served by substituted service by advertising the Writ of Summons and the Statement of Claim in the "Fiji Sun" Newspaper on 25th June, 2015.
3. Both Defendants failed to file and serve the **Acknowledgment of Service** and the **Statement of Defence** as per the requirement of the **High Court Rules**.
4. The application for Judgment by Default was made pursuant to **Order 19 Rule 6 of the High Court Rules, 1988**.

The LAW

5. **Order 19 Rule 6 of the High Court Rules, 1988 deals with Default of Defence and mixed claims and states as follows-**

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 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.

ANALYSIS and DETERMINATION

6. The issue to determine is "**Whether the Plaintiff is entitled to Judgment by Default on their substantive Claim?**"
7. This Court directed the Plaintiff that this Court needed to hear evidence on the claim bearing in mind the nature of the substantive claim for which Judgment by Default was sought.
8. The **Plaintiff** produced **Nalini Kumar**, as witness, who testified in her capacity as the Supervisor Credit of Bank of Baroda gave evidence and tendered her Affidavit Evidence into evidence for court to determine the substantive claim and grant Judgment by Default accordingly.
9. The Plaintiff's witness gave the following evidence-
 - *That pursuant to a Loan letter dated 15 January 2013, the Plaintiff had agreed to lend and advance the sum of \$727,222.00 to Suva Hire and General Supplies Ltd being the Debtor for the purpose of refinancing its*

debt with Merchant Finance Company Limited and for purchase of Howo Dump Truck from China. The 1st and 2nd Defendants were Directors of the said company. A copy of the Loan Letter dated 15 January, 2013 annexed and marked as "NK1".

- That in consideration for the loan facility the Debtor, Suva Hire and General Supplies Ltd gave the Plaintiff the following securities:
 - a. First Registered Mortgage Debenture over entire assets of the Debtor is annexed and marked as "NK2".
 - b. First Registered bill of sale over motor vehicles and heavy duty vehicle registration nos. FP752, FA655, FN311, FX713, FY683, FE117, FC994, FH300, FM057, FY916 and HC015, is annexed and marked as "NK3".
 - c. Demand Promissory Note signed by the 1st and 2nd Defendants, is annexed and marked as "NK4".
- That as a condition precedent to the said Loan, the 1st and 2nd Defendants as Directors of the said company were required to provide Guarantee to secure the advances made to the Debtor. The 1st and 2nd Defendants executed and provided to the Plaintiff a Deed of Guarantee dated 29 January 2013 in the sum of \$727,222.00 being the Guaranteed Sum, plus interest at the rate of 7.5% per annum. A copy of Guarantee is annexed and marked as "NK5".
- That the 1st and 2nd Defendants had agreed to pay variable interest at the rate of 7.5% default interest at the rate of %80.74 per diem and all other charges on the said credit facility.
- That interest on the credit facility was agreed, however, the Plaintiff had reserved the right to amend the interest rate, without notice at any time during the currency of the credit facility.
- That the Debtor defaulted in its loan repayments and the Plaintiff wrote to them on 19 June, 2013 to regularize the account but they failed to do so. Copy of the said letter is annexed and marked as "NK6".
- That on 12 September, 2013 the Plaintiff further advised the Debtor that the loan account is in arrears and requested them to clear the said arrears. A copy of the said letter is annexed and marked as "NK7".
- That the Debtor did not pay the arrears and the Plaintiff caused an advertisement on 15 August 2014 in the Fiji Sun calling for written offers for the sale of the motor vehicles. A copy of the advertisement is annexed and marked as "NK8".
- That the Debtor failed to cooperate and regularize the default in its loan repayments of the said Loan. The default led to the Plaintiff calling up the loan and selling the motor vehicles and that sale proceeds was credited to the Debtor's Account and reducing the current debt to \$392,950.37. Annexed and marked as "NK9" is a copy of Loan Statement dated 3rd August 2015.
- That the Plaintiff instructed its Solicitors to recover the debt amount being owed to it. A copy of Letter of instructions dated 12 February 2015 is annexed and marked as "NK10".
- That according to the Plaintiff's Solicitors the Debtor has been wound up and the debt being owed to the Plaintiff cannot be recovered against it. A copy of company search dated 17 February 2015 and the winding Up Order dated 8 August 2014 made against the Debtor are annexed and marked as "NK11" and "NK12" respectively.
- That the Plaintiff through its Solicitors sent the 1st and 2nd Defendants a Notice of Demand dated 13 March 2015 pursuant to the Deed of Guarantee dated 29 January 2013 demanding payment of the

guaranteed sum which was owing in the amount of \$392,950.37 (Three Hundred Ninety Two Thousand Nine Hundred Fifty Dollars and Thirty Seven Cents) plus interest at the rate of \$80.74 per day from 12 February 2015 and costs was to be paid within 14 days from the date of Demand. Copies of the said Demand notices are annexed and marked as "NK13" and "NK14" respectively.

- *That the 1st and 2nd Defendants have failed and/or neglected and/or refused to pay the sum as demanded.*

IN CONCLUSION

10. I am satisfied with the service of the Writ of Summons and the Statement of Claim together with the evidence of the witness herein.
11. The 1st and 2nd Defendants have failed to file and serve the Acknowledgment of Service and the Statement of Defence and therefore in absence of the acknowledgment and the Defence I have no alternative but to accede to the Plaintiff's application before court for the entry of the Judgment by Default.
12. Accordingly I grant the orders for judgment by Default in favour of the Plaintiff for the liquidated sum of \$392,950.37, Interest @ the rate of \$80.74 per day from 12th February 2015 until full payment and Costs summarily assessed at \$650 to be paid within 21 days timeframe.
13. I now proceed to make the following final orders:

FINAL ORDERS

- A. Enter Judgment by Default against the 1st and 2nd Defendants in favour of the Plaintiff for the liquidated sum of \$392,950.37 jointly and severally;
- B. Interest @ the rate of \$80.74 per day from 12th February 2015 until full payment; and
- C. Costs summarily assessed at \$1,000 against the 1st and 2nd Defendants;
- D. Orders accordingly.

Dated at Suva this 15th Day of May, 2018



cc. R. Patel Lawyers, Suva

Master
Vishwa Datt Sharma