

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 85 of 2018

BETWEEN : **SIGATOKA CLUB** a duly registered club under the Registration of Clubs Act with their office situated at Lot 3 and 4 Queens Road, Sigatoka, Fiji.

1st PLAINTIFF

AND : **KRISHNA RATTAN BHAN** of Sigatoka, President of Sigatoka Club, Businessman.

2nd PLAINTIFF

AND : **VIJAY SINGH, MADAN SEN and NIUMAI TOGAKAI**, Trustees of Sigatoka Club, first being a businessman, the latter two being retired.

3rd PLAINTIFFS

AND : **DEV ANAND SHARMA** of Sigatoka, Businessman.

1st DEFENDANT

AND : **MARK FROST** of Korotogo, Sigatoka, Occupation Unknown.

2nd DEFENDANT

AND : **BIRAN KUMAR** of Sigatoka, Businessman.

3rd DEFENDANT

AND : **SANJAY MAKANJEE** of Sigatoka, Businessman.

4th DEFENDANT

Counsel : Plaintiffs: Mr Liverpool A

: Defendants: Mr Sharma N

Date of Hearing : 24.06.19 at 9.30 am

Date of Judgment : 24.06.19 at 3pm

JUDGMENT

INTRODUCTION

1. First Plaintiff (the Club) is a registered recreational club and Plaintiffs were its former trustees and Defendants are the present registered as trustees. The appointment of the new trustees was disputed and earlier an injunction was sought by the Plaintiffs but this was refused on 28.6.2018. It was evidenced, at the hearing of the injunction sought by the Plaintiffs that no AGM was held since 2014 and no financial statements in terms of the constitution were submitted to the members in terms of Section 54 of the constitution of the Club by office bearers of the Club at that time. The 'committee' of the Club who had only 12 month tenure had also continued for four years without AGM. The trustees of the Club at that time had not taken action in terms of the Constitution of the Club to submit any financial statements for the Club and even payment of statutory dues were defaulted. There were evidence of valuable property belonging to the Club being rented during that time, but there were no audited accounts submitted to members. Though a loan was obtained from commercial bank there was no evidence of timely payment of the same. Second Plaintiff was struck off from the action due to bankruptcy. In the affidavit in opposition third Plaintiff alleging that mismanagement was due to actions of second Plaintiff. There are some valuable properties belonging to the Club and they were rented for commercial entity. In terms of the rental agreement, rental income needed to be paid to a specific bank account maintained by the Club. In spite of that, rental income was collected by a solicitors' trust account of the lawyers who are representing the Plaintiffs. Defendants are seeking orders regarding said rental income that was collected by solicitors held in the trust account and for proper accounts from 28.01.2018.

ANALYSIS

2. Defendants are seeking injunctive orders against second and third Defendants and second Defendant is now struck off from the action and accordingly it should read as only against third named Defendants.
3. First order of the Notice of Motion filed on 24.5.2019 sought to restrain third Defendant and its agents or solicitors from releasing the funds pertaining rental income of the Club from property described in CT24715 until determination of the action or order of the court.
4. A loan was obtained from a commercial bank before appointment of the present trustees, but due to default of the same a demand notice was issued to the Defendants as it trustees.

5. It is admitted that rental income was paid by the tenants to the solicitors trust account but states that the last payment was 9.01.2019. By virtue of that averment, there is admission that rental income was collected and paid till 9.1.2019 but conveniently avoided stating how much was paid to them.
6. There is no evidence of payment of monthly rents, since January, 2019 and the tenants are not a party to this action.
7. There is no account of how much of rent was paid to solicitors accounts and what is remaining in the said account and how that money was disbursed, this is the subject matter of second order sought in the Motion filed by the Defendants.
8. There is a letter from solicitors of the tenants to the Defendants' lawyers informing that tenants were instructed to abide by clause 2.1 of the Tenancy Agreement and to pay monthly rental to a specified bank account stated in the said Tenancy Agreement. It seemed that this instruction was not complied by the tenants.
9. In the affidavit in opposition admitted receipt of the rental income by solicitors for third Plaintiff.
10. In the affidavit in opposition there are no facts supporting refusal of the orders sought by the Defendants. Plaintiffs' refusal to accept the Defendants as the trustees of the Club is reiterated in the affidavit in opposition. This is not sufficient to meet the demand of the commercial bank which will not consider dispute between the parties for recovery of their dues. Why did the Plaintiffs allowed the loan account to default was not explained.
11. There is no need to mention principles stated in *American Cyanamid v Ethicon Ltd* [1975] 1 All ER 504.
12. There are serious question to be tried including and not limited in the manner of mismanagement of the Club and default of its financial obligations to statutory authorities and to the bank, and there is an eminent danger of property belonging to the Club being subjected to mortgagee sale. Plaintiffs who had allowed the tenant to violate clause 2.1 of the Tenancy Agreement had not taken any action even after being informed of the demand notice being served.
13. There was no proper handing over of activities of the Club to the Defendants as its trustees. No audited accounts of the Club were produced indicating lack of transparency during the time of their tenure as trustees before Defendants were registered as new trustees of the Club

14. Defendants who are presently registered trustees needs to verify the correctness of the demand notice of the bank and for that they need past audited financial accounts.
15. At the same time rental income received by the solicitors needs to be properly accounted. This was a long overdue. Despite refusal of the injunctive relief sought by the Plaintiffs they did not stop dealing with rental income of the Club.
16. Defendants as the registered trustees of the Club, are legally obliged to preserve the properties own by the Club and act in the best interest of the Club.
17. In terms of the tenancy agreement entered in 2014 trustees of the Club at that time had entered to a Tenancy Agreement and in terms of clause 2.1 a specified bank account is mentioned and there was no evidence of that being varied. In the circumstances, all the money remitted in violation of that clause to solicitors' trust account should be preserved and no withdrawal of that is allowed until final determination of this action. The balance of convenience lies with the preservation of the funds as there are outstanding legal obligation to settle loan obtained by the Club.
18. Defendants are seeking order directing third Plaintiff to provide accounts of the Club including details of the payments. Section 50 of the constitution of the Club required that the accounts of the Club be audited by an independent auditor. The auditors are required to be appointed at AGM. Hence there is mandatory requirement to submit audited accounts. (See Section 51 of the constitution of the Club).
19. The appointment of secretary and treasurer is by the trustees in terms of Section 45 of the constitution of the Club. All the payments to be made by secretary and treasurer signed by two trustees in terms of Section 48 of the constitution of the Club. Third Plaintiff cannot absolve themselves from the responsibility as trustees, making second Plaintiff who is struck off, a scapegoat.
20. In terms of the constitution of the club all payments and receipts of the club should be done in a transparent manner and trustees as signatories of the payment are obliged to verify the payments and inspect the accounts of the Club.
21. Since there was no evidence of audited accounts of the Club being submitted since 2014 that needs to be done forthwith.
22. There is no reason stated in the affidavit in opposition for objecting to provide accounts of the Club.

23. Plaintiffs as the registered trustees are legally obliged to prepare audited accounts for the Club and are accountable for the properties of the Club. Since rental income was paid in violation of the clause 2.1 of Tenancy Agreement and collected by solicitors for the Plaintiff all receipts of rental income from 28.01. 2018 should be provided within 14 days from this order to the Defendants by third Defendants.
24. Since the solicitors for the third Plaintiff had denied receipt of the monthly rentals from the property rented by them in 2014, the Defendants as its registered trustees may take necessary action against the tenant for the recovery of the same in terms of the Tenancy Agreement.
25. Whatever the money remaining in the solicitors trust account accumulated from the rental income from property CT 24715 in terms of Tenancy Agreement entered on 9.9.2014 should forthwith remitted to stated bank account in the clause 2.1 of the Tenancy Agreement.
26. Defendants as its registered trustees are seeking an order restraining third Plaintiff from dealing with money held in other accounts of the Club. This is a requirement for them to function as trustees. Since 2014 there were no audited accounts of the Club and even after registration of the Defendants as its trustees dealing with money belonging to the Club needs to be stopped. Balance of convenience lies with such restraint. Third named Defendants and its agents and solicitors are also restrained until further order of the court from withdrawing money from any other account of the Club held in any bank.

CONCLUSION

27. Defendants as the registered trustees of the Club are obliged to conform to the provisions contained in the constitution of the Club. The trustees of the Club through appointment of Secretary and treasurer, are responsible for preparation of audited accounts of the Club. Plaintiff disputing the appointment Defendants cannot absolve them from their responsibility as trustees. The registered trustees should function in terms of the constitution of the Club and they cannot be deprived from managing the Club. Plaintiffs should be restrained from violating the Tenancy Agreement that they entered in 2014 with the tenant by diverting rental income from what is expressly stated in clause 2.1 of Tenancy Agreement. Balance of convenience favour the Defendants in granting following injunctive orders. The cost of this action is assessed summarily at \$1,500 to be paid by third named Defendants jointly and or severally.

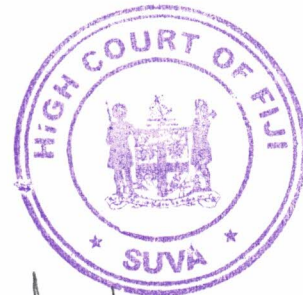
FINAL ORDERS

- a. An injunction restraining third named Plaintiffs, whether by themselves or through their solicitors, Reddy and Nandan Lawyers, their servants and/or agents or otherwise howsoever from withdrawing, transferring or in any manner releasing the funds

pertaining to the rental income from the operations and properties of the Sigatoka Club specifically with the property contained in Certificate of Title No. 24175 until determination of the within action or until further Order of this court.

- b. An Order that the third named Plaintiffs within fourteen days from today, deliver to the Defendants or their solicitors audited accounts including details of all payments and receipts of income and all financial records of the Sigatoka Club specifically with respect to the property contained in Certificate of Title No. 24715 from 28.01. 2018.
- c. An Order that third named Plaintiffs whether by themselves or through their solicitors, Reddy and Nandan Lawyers, their servants and/or agents or otherwise within fourteen days from today deliver money retained in their account from the rental income from the property contained in Certificate of Title No. 24715.
- d. An Order restraining the third Plaintiffs whether by themselves or through their solicitors, Reddy and Nandan Lawyers, their servants and/or agents or otherwise from withdrawing any moneys from any of Sigatoka Club bank accounts including monies held on behalf of the said Club, in the Reddy and Nandan Lawyers Trust Account until further Orders of the Court.
- e. Cost of this action is summarily assessed at \$1,500 to be paid by third named Plaintiffs jointly and or severally within 21 days from today.

Dated at Suva this 24th day of June, 2019.



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Justice Deepthi Amaratunga
High Court, Suva