

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 173 of 2015**

**BETWEEN** : **ANITA SUBAMMA** of Vunisalato Road, Bountiful Estate, Namaka,  
Nadi.

**Plaintiff**

**AND** : **ARK COMPANY LIMITED** a limited company having its registered  
office at Lot 1, Queens Road, Martintar, Nadi, Fiji.

**First Defendant**

**AND** : **KAMAL SEN** and **ANISH KUMAR** both of Nadi, Company Directors.

**Second Defendants**

Before : Master U.L. Mohamed Azhar

Counsels : Mr. R. Singh for the Plaintiff  
Mr. Rattan (on instruction) for the Second Defendants

Date of Ruling : 24.06.2022

**RULING**

01. The plaintiff sued the defendants to recover the money she advanced to the first defendant company on the alleged fraudulent misrepresentation made by the second defendants. The second defendants are the directors of the first defendant company. It is alleged by the plaintiff that, the second defendants fraudulently made oral and written representation that, the first defendant company was financially sound; it embarked on major project of constructing a Mini South Pacific Cultural Entertainment Centre; the said Centre would generate an income of Ten Million per year; and the investment with the first defendant company would yield high return. The plaintiff, having believed and being induced by those misrepresentations paid a sum of \$ 150,000.00 in total on a Memorandum of Understating. The plaintiff realized that, the representations were untrue and false and demanded the defendants to pay the money back. However they failed and neglected to do so. The plaintiff sought order for refund of \$ 150,000.00; damages for

fraudulent conduct; exemplary, punitive and aggravated damages; interest on the monetary award and cost on client/solicitor indemnity basis.

02. The second defendants acknowledged the writ and filed their statement of defence. However, the first defendant company neither acknowledged the writ, nor it did file the statement of defence. The plaintiff then sealed the default judgment for the liquidated amount claimed in her statement of claim against the first defendant company. Thereafter, the defendants through their solicitors filed a summons supported by an affidavit sworn by the first named second defendant to set aside the default judgment entered against the first defendant company. However, the attempt proved abortive as previous Master of the court turned down that application. No appeal was preferred by the first defendant against that order.
03. The plaintiff then brought the current summons pursuant to Order 14 rules 1, 2 and 4 of the High Court Rules seeking summary judgment against the second defendants. The second defendants opposed the summons and filed an affidavit sworn by the first named second defendant. At hearing of the summons, the counsel for the plaintiff made oral submission and tendered his legal submission. The counsel who appeared for the second defendants on instruction just tendered his written submission. He did not make oral submission.
04. The summary judgment is a procedural cannon used in civil litigation, to promptly and expeditiously dispose any case without trial proper. An applicant is entitled for a summary judgment as a matter of law if there is no defence and no dispute as to the material facts of the case. The purpose of summary judgment is to obtain quick judgment where there is plainly no defence to the claim to avoid unnecessary trial incurring the cost and expenses and exhausting the resources of the court which is not infinite.
05. The Order 14 of the High Court Rules provides for entering summary judgment against the defendant and the plaintiff as well on counterclaims. The rules 1 to 4 are relevant to the summons before me and those rules provide for the actions for which the rule on summary judgment applies; the manner in which the application must be made; how the judgment for the plaintiff to be entered and how the defendant be allowed to defend his case. Those rules are as follows:

***Application by plaintiff for summary judgment (O.14, r.1)***

1. (1) *Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to such a claim or part*

*except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.*

- (2) *Subject to paragraph (3), this rule applies to every action begun by writ other than –*
  - (a) *an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment.*
  - (b) *an action which includes a claim by the plaintiff based on an allegation of fraud.*
- (3) *This Order shall not apply to an action to which Order 86 applies.*

***Manner in which application under Rule 1 Must be made (O.14, r2)***

2. (1) *An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the cause may be, or no defence except as to the amount of any damages claimed.*
- (2) *Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.*
- (3) *The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day.*

***Judgment for Plaintiff (O.14, r.3)***

3. (1) *Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part as may be just having regard to the nature of the remedy or relief claimed.*
- (2) *The Court may by order, and subject to such conditions if any, as may be just, stay execution of any judgment given against a*

*defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.*

***Leave to defend (O.14, r.4)***

4.-(1) *A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.*

(2) *Rule 2 (2) applies for the purposes of this rule as it applies for the purposes of that rule.*

(3) *The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.*

(4) *On the hearing of such an application the Court may order a defendant showing cause or, where that defendant is a body corporate, any director, manager, secretary or other similar officer thereof, or any person purporting to act in any such capacity-*

*(a) to produce any document:*

*(b) if it appears to the Court that there are special circumstances which make it desirable that he should do so, to attend and be examined on oath.*

06. The principles that govern the application of these rules are discussed in many cases both foreign and local, and no reference is needed to all the cases. The court's duty, when an application for summary judgment is filed, is to ascertain whether there is a triable issue and no arguable defence to the claim. If there is an arguable issue to be tried and there are matters of facts to be resolved, which can only be resolved in a trial, the court should not allow the application for summary judgment, but should grant leave to defend the matter in a full and proper trial, no matter how strong the plaintiff's case would be. The law and procedure for summary judgment can be summarized as follows, based on the decisions under Order 14:

- a. The plaintiff may, after the notice of intention to defend the action has been filed, apply for summary judgment against the defendant on the ground that the defendant has no defence to the claim or part of the claim included in the Writ except the amount of damages: *rule 1 (3)*. This application must be by

way of summons supported by an affidavit with the assertion of facts and the belief of the deponent that there is no defence to the claim. This summons to be served on the other party to be heard inter parte: *rule 2*.

- b. The procedure under Order 14 rule 1 is applicable to every action begun by a Writ. However, it cannot be invoked for an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment and for an action which includes a claim by the plaintiff based on an allegation of fraud : *rule 1 (2)*. Likewise, this Order is neither applicable to summary judgment in specific performance under Order 86 nor does affect the provisions of Order 77 which applies for the proceedings against the state: *rules 1 (3) and 12*.
- c. The power to grant summary judgment should be exercised with care and should not be exercised unless it is clear there are no real issues to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99; *Theseus Exploration NL V Foyster* (1972) 126 CLR 507. It would be difficult to obtain summary judgment when there is an array of defences. However an application for summary judgment should not be refused for raising seemingly difficult issues to blot out otherwise simple cases: *Hibiscus Shoppingtown Pty Ltd v Woolworths* [1993] FLR 106; *Territory Loans Management v Turner* (1992) 110 FLR 341.
- d. The legal burden of proof is borne by the plaintiff throughout the application, however, when he has established a prima facie right to an order, a "persuasive" or "evidential" burden shifts to the defendant to satisfy the court that judgment should not be given against him: *Australian & New Zealand Banking Group v David* (1991)105 FLR 403. Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong: *Australian Guarantee Corporation (NZ) Ltd v McBeth* [1992] NZLR 54.
- e. The defendant may show cause against a plaintiff's claim on the merits. It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and states clearly and precisely what the defence is and what facts are relied on to support it: *1991 The Supreme Practice Vol 1 pages 146,147,152 and 322*. Mere raising of a defence that is complicated or difficult will not of itself result in a refusal to grant summary judgment: *Civil & CIVIC Pty Ltd v Pioneer Concrete (NT) Pty Ltd* (1991) 103 FLR 196.

- f. If a point of law is raised which the Court feels able to consider without reference to contested facts simply on the submissions of the parties, then it will see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs: Sethia Liners Ltd v State Trading Corporation of India (1986) 1 Lloyds Rep. 31.
- g. There has to be a balancing between the right of the defendant to have his day in Court and to have his proper defences explored and examined in details and the appropriate robust and realistic approach called for by the particular facts of the case: Bibly Dimock Corporation Ltd v Patel (1987) 1 PR NZ 84; Cegami Investments Ltd v AMP Financial Corporation (NZ) Ltd (11990) 2 NZLR 308; Australian Guarantee Corporation (NZ) Ltd v McBeth [1992] NZLR 54.
07. The plaintiff claims in her affidavit that, being induced by the false and fraudulent representations made by the second defendants she paid \$ 120,000.00 to the second defendants. The plaintiff annexed the copies of the receipts as Exhibit "E". The plaintiff further stated that, she also made payment of \$ 30,000.00 to the second defendants for the purchase of 13% ordinary shares and annexed Exhibit "F" for the proof of it. The summons for summary judgment is based on the premise that, the second defendants used the first defendant company as a vessel for deception and they still remain as shareholders and directors of the first defendant company.
08. Conversely, the second defendants categorically denied the allegations of the plaintiff and stated that, there was no short term loan provided by the plaintiff to the second defendant, but she purchased the shares from the first defendant company. The second defendants further elaborated that, plaintiff, her son Avinesh Chaudary and the second defendants were the shareholders of the first defendant company. The son of the plaintiff was a friend and he was interested in the first defendant company's project to build South Pacific Cultural Center in Nadi. The plaintiff joined the project after her son expressed interest to join the project. The plaintiff was given every opportunity to seek independent legal and financial advice and only after that, she on her own volition decided to purchase the 3% shares in the first defendant company. The second defendants totally denied the allegation of inducement and false and fraudulent representation.
09. Even though the plaintiff claims that, she paid the said amount to the second defendants, her Exhibit (marked as "E") clearly demonstrates that, the payment was made to the first defendant company. The Exhibit E contains two receipts issued by the first defendant company to the plaintiff upon her payment of \$ 120,000.00 which was paid in two installments. The plaintiff annexes the Exhibit F and claims payment of additional sum of

\$ 30,000.00 to the second defendants. However, the Exhibit F is not a receipt for payment \$ 30,000.00 as claimed by the plaintiff. It is a copy of the Board Resolution of first defendant company, by which the first defendant company resolved that, it will issue an extra 13% ordinary shares to the plaintiff for a consideration amount of \$ 45,000.00. It is not clear whether the said consideration amount of \$ 45,000.00 is included in the total sum of \$ 120,000.00 or not. Accordingly, the claim for payment of additional sum of \$ 30,000.00 cannot be substantiated by that Exhibit F.

10. In any event, payment was made to the first defendant company and not to the second defendants. The 'Separate Legal Personality' is considered as one of the most profound and consistent principle of corporate jurisprudence. This is the central characteristic of a company which distinguishes it from members and employees and other ventures like partnership. The separate legal personality gives a company with the legal identity distinct and separate from its members, directors, managers and employees. The debt and assets belong to the company and not to the shareholders (Macaura v. Northern Assurance Company Limited (1925) A.C. 619).
11. In fact, the principle of separate legal personality was recognized and affirmed by the House of Lords in the famous decision in Salomon v. Salomon & Company Ltd, which is considered as one of the most important cases in company law.

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provide by the Act.

12. Lord Justice Summer in Gas Lighting Improvement Company Ltd v. Commissioners of Inland Revenue (1923) AC 723 described the doctrine of separate legal personality as follows at page 741 that:

*"Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial; the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company, is duly formed and is not a sham (of which there is no suggestion here), the idea that it is mere machinery for affecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts".*

13. However, there are judicially imposed exceptions to the principle of separate legal personality, whereby the courts disregard the distinction of the company and hold the shareholders and directors responsible for the activities of the company as if they were of the activities of the shareholders and directors. One of the most prominent exceptions to the principle of separate legal entity is the fraud. The corporate veil will be lifted and or pierced when the corporation is used as a vehicle for fraud (**Re Darby, ex parte Brougham** [1911] 1 KB 95; **Jennings v Crown Prosecution Service** [2008] 4 All ER 113). In this instant case, the court needs the evidence to be satisfied of the established grounds of lifting corporate veil in order to hold the second defendants liable for the moneys advanced by the plaintiff to the first defendant company. In this circumstance, it is not appropriate to allow summary judgment against the second defendants in this case.
14. The plaintiff too alleges fraud on part of the second defendants and pleads that, the first defendant company was a 'self-company' and alter-ego of the second defendants. It is the position of the plaintiff that, the second defendants used the company for their fraudulent conduct, and she brought the current summons on that ground to obtain summary judgment. As mentioned in the preceding paragraph, fraud is one of grounds which enable lifting corporate veil. However, the rule [Order 14 rule 1 (2) (b)] is explicit that, an action which includes a claim by the plaintiff based on an allegation of fraud is excluded from the purview of Order 14.
15. **The Supreme Court Practice 1988** provides in Footnote in Volume I at page 133 as follows:

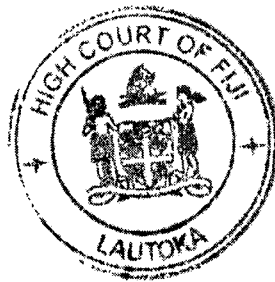
A claim is "based on an allegation of fraud," so as to be outside the scope of O.14, only if the action is framed in deceit, see *Barclays Bank Ltd. v. Cole* [1967] 2 Q.B. 738, C.A, applied in *Stafford Winfield Cook & Partners Ltd. v. Winfield* [1981] 1 W.L.R. 458; [1980] 3 All E.R. 750. Moreover, the action in deceit must be in respect of deception of the plaintiff (*Sony Corporation v. Anand* [1982] F.S.R. 200). But if there is such a claim against one of several defendants, then O. 14 is not available against any of the other defendants, even if fraud is not alleged against that defendant (*Standard Chartered Bank Ltd. v. Wymark Plant Hire Ltd.* (unrep.) Lloyd J., September 14, 1981).
16. In this case, the plaintiff claims fraud on part of both the second defendants. Accordingly, this action is excluded from the scope of the Order 14 of the High Court Rules. The obvious reason to exclude claim for allegation of fraud is that, the court can allow the summary judgment only in plain cases where there is no arguable defence or triable issue. Allegation of fraud is a serious triable issue. Apart from this exclusion by the rule itself, there are arguable defences forwarded by the second defendants in their statement of




defence. As the result, the court cannot allow the plaintiff's application for summary judgment against the second defendants in this case and I make the following final orders:

1. The application for summary judgment is dismissed, and
2. There is no order for cost.

At Lautoka  
24.06.2022



  
U.L. Mohamed Azhar  
Master of the High Court