

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 21 of 2011S.

IN THE MATTER of Land Transfer Act Section
109

AND

IN THE MATTER of an application to remove
Caveat No. 737424 lodged by Salesni Prasad
against Certificate of Title No. 10153, the property
of Rameshwaran Nair and Raajeshwaran Nair.

BETWEEN : **AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED** a
duly constituted banking corporation having its registered office in
Melbourne, Australia and carrying on business in Suva and having
branches throughout Fiji.

APPLICANT

AND : **SALESHNI PRASAD** of 105 Laucala Bay Road, Suva.

RESPONDENT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. B. Narayan** for the Applicant
Mr. Vinay Sharma for Defendant

Date of Hearing : **3rd June, 2011**

Date of Decision : **29th April, 2013**

DECISION

A. INTRODUCTION

1. This is an application filed by the mortgagee of the property for the removal of the caveat No 737424 filed by the Respondent who is the wife of the mortgagor of the said property. The affidavit in opposition alleges that she had loaned \$10,000 to the husband, who was the mortgagor of the property and to his

brother who is a joint owner of the property, in order to settle the outstanding arrears of loan account with the applicant and also for improvement of the property. The property was on a mortgagee sale due to default of mortgage and it was sold to a successful tenderer. The mortgagor of the property was not successful in obtaining injunctive relief restraining the sale of the property. The application for injunction was struck off twice for non appearance and the reinstatement of the said motion seeking injunction was also dismissed and in the said decision it was held that the said mortgagor did not even establish an arguable case against the mortgagee. The Applicant-mortgagee entered in to a sale and purchase agreement with the prospective buyer, who had also lodged a caveat. At the time of hearing of this application there were four caveats lodged on the property including the caveat in this application. The wife of the mortgagor and the mortgagor had filed caveats and the prospective buyer of the property had also filed a caveat based on the sale and purchase agreement. Since there were three separate applications for the removals of the caveats filed by the mortgagor, his wife and his father-in-law all three hearings were done simultaneously, with the consent of the counsel as the same counsel appeared in all three matters for removal of said caveats. After the hearing of the removal of three caveats, the matters were adjourned for written submissions and was informed that all issues pertaining to these caveats and the caveat lodged by the prospective buyer could be resolved amicably, and the matters were adjourned for settlement of all the issues. Then a separate application was filed for the removal of the caveat lodged by the prospective buyer of the property from the mortgagee sale who had entered a sale and purchase agreement with the Applicant. The said buyer had also filed an action for specific performance upon the said sale and purchase agreement. The caveat lodged on the basis of said sale and purchase agreement was extended. The decisions on the removal of caveats heard on 3rd June, 2011 were adjourned with the request of the parties till a determination of extension of caveat lodged on the basis of sale and purchase agreement. After the delivery of the said decision I was informed by the applicant-mortgagee that its desire to proceed with the removals of the caveats which were already heard. I allowed the parties to file written submissions.

B. ANALYSIS

2. The affidavit in opposition had admitted paragraphs 3, 4, 5, 6, 7, 8 and 9 of the affidavit in support of the removal of the caveat. In paragraph 8 of the affidavit in opposition the Respondent states as follows

‘8. That paragraph 9 is admitted to the extend that I have beneficial and equitable financial interest in the said property. I had lent both my husband and his brother more than \$10,000 from my savings to pay for the mortgage and the completion and refurbishment of the said property.’

3. The Respondent has to establish is caveatable interest on the property. The mortgagee had conducted a mortgagee sale and a successful tenderer was selected as prospective buyer of the property and a sale and purchase agreement was entered between the Applicant –mortgagee and the prospective buyer who had also lodged a separate caveat based on the said sale and purchase agreement. The application for the removal of said caveat was heard and it was extended. The said caveator had filed a separate action for the specific performance of the said sale and purchase agreement. So, the said buyer of the property awaits the transfer of the property. The mortgagor of the property was not successful in obtaining a stay of the mortgagee sale and the said motion seeking injunctive relief was struck off twice and the High Court judge had held that the said mortgagor even failed to establish an arguable case against the applicant mortgagee.
4. The ‘*caveatable interest*’ has to be described clearly, in the affidavit in opposition. The Respondent has not filed the said caveat which should have describe the caveatable interest, Neither party had produced the caveats to the court in order to ascertain the caveatable rights of the caveator. The Applicant had stated in its affidavit in support that it was not available at the moment they inquired it from the Registrar of the Title since it was handed over to the caveator for a correction. The burden of proof of caveatable interest is with the

caveator and she had failed to do so by annexing the caveat to her affidavit in opposition.

5. So, in reply to the lack of caveatable interest the Respondent is stating in her affidavit in opposition that the Respondent had given money to her husband who was the mortgagor of the property and to his brother for the repayment of the loan of the Applicant –mortgagee and also for refurbishments. The Respondent had stated the said amount of money she had given as \$10,000. This had not created a caveatable interest to defeat the completion of mortgagee sale. Section 109 of the Land Transfer Act states as follows

‘109.-(1) Upon the receipt of any caveat, the Registrar shall give notice thereof to the person against whose application to be registered as proprietor of, or, as the case may be, to the registered proprietor against whose title to deal with, the land, estate or interest, the caveat has been lodged.

(2) Any such applicant or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, and the court on proof of service of the summons on the caveator or upon the person on whose behalf the caveat has been lodged and upon such evidence as the court may require, may make such order in the premises, either *ex parte* or otherwise as to the court seems just, and, where any question of right or title requires to be determined, the proceedings shall be followed as nearly as may be in conformity with the rules of court in relation to civil causes.’

6. The Applicant being the mortgagee has instituted this action in terms of Section 109(2) of the Land Transfer Act. In *The Fiji National Provident Fund Board v Vivrass Holdings Limited* and *Registrar of Titles Office* Justice Jitoko’s decision of the High Court of Fiji at Suva Civil Action No. HBD 325D of 2002S in dealing

with an application by the Plaintiff by originating summons under section 109 (2) of the Land Transfer Act for the First Defendant to show cause as to why the caveat lodged by the First Defendant should not be removed the Court held that **“In order for the First Defendant to sustain its caveat, it must show that it has a caveatable interest in C.T.24128”**. (The said Fiji National Provident Fund Board case determined that the Fiji equivalent to New Zealand’s section 146 (now NZ section 137 (a)), is section 106 of the Land Transfer Act).

7. Justice Jitoko in the said case stated that the essential requirement in caveatable interest is that the right base on statute confers an estate or interest in land. It is this interest in land that gives a person the locus standi to caveat. It was quoted with authority **“Guardian, Trust and Executors Company of New Zealand, Limited v. Hall [1938] NZLR 1020 at 1025”** where it held in Gallan J’s judgment as follows

“A caveat is the creature of statute and may be lodged only by a person upon whom a right to lodge it has been conferred by the statute. **It is not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the Caveator. He must bring himself within section 146 of the Land Transfer Act.**”(emphasis is added)

8. In Cambridge Credit (Fiji) Ltd v. W.F.G. Ltd Vol. 21 FLR 182 the Fiji Court of Appeal stated that section 106 is concerned with the protection of unregistered instruments in land, and added, (p.185).

“Section 106 of the Fiji Act is designed to protect unregistered instruments in land. For instance an agreement for sale and purchase, an unregistered mortgage, an agreement to give a mortgage or an option to purchase land are just a few examples of unregistered instruments which are capable of being protected by the lodging of a caveat.”

9. The Court of Appeal in the said case p 184 at paragraph [H]stated,

“That the respondent must however, bring itself within the provisions of section 106 and in order to do this must satisfy the Court that the following are fulfilled.

(1) That it is a person claiming to be entitled to or to be beneficially interested in any land estate or interest under the Act; and

(2) That it is so claiming by virtue of an unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever.”

10. The money lent to the mortgagor and or to his brother to settle the loan account of the mortgagee will not itself create a caveatable interest as described by the Respondent in his affidavit in opposition. If so no mortgagee sale could be carried out since any person including any family member who alleges some money being loaned to a mortgagor to settle the arrears of the loan of the mortgagee could lodge a caveat preventing mortgagee sale. This is what had been partly achieved by the Respondent by lodging this caveat on the property which was subjected to a mortgage to the Applicant by the husband of the Respondent. The property was already sold in mortgagee sale and the mortgagor was not successful in stalling the said mortgagee sale where the court held that he did not establish an arguable case against the applicant – mortgagee in order to obtain an injunctive relief.

C. CONCLUSION

11. The Applicant is the mortgagee of the property in issue. The mortgagor of the said property was the husband of the Respondent. The alleged caveatable interest is the money given to the mortgagor and to his brother to settle the loan account of the Applicant which was in arrears and for improvements to the

property to the value \$10,000. This cannot be considered a caveatable interest in order to stall the completion of the mortgagee sale. I have not been presented with the caveat of the Respondent, which should indicate the caveatable interest, and in the absence of that only interest are the allegations contained in paragraph 8 of the affidavit in opposition, which only deals with the money given to settle the loan account of the mortgagor with the Applicant mortgagee and for alleged development of the property and the total of the alleged contribution by the Respondent is \$10,000. The Respondent was unable to present with any case law that supports her alleged caveatable interest. This does not create a caveatable interest for the extension of the caveat to prevent the exercise of the mortgagee's right to the property which is paramount consideration. The Applicant –mortgagee had already conducted a successful mortgagee sale and had also entered in to a sale and purchase agreement. The successful tenderer awaits the transfer of the property to him, in terms of the sale and purchase agreement. The balance of convenience rest heavily on the Applicant –mortgagee it had already entered into an agreement with the prospective buyer who had also lodged a caveat based on the sale and purchase agreement and had also filed an action seeking specific performance of the said sale and purchase agreement. The alleged interest of the Respondent is a loan of \$10,000 to mortgagor and his brother and there is no irreparable loss due to removal of caveat. The caveat is removed forthwith. Considering the circumstances of the case I will not award cost.

D. FINAL ORDERS

- a. The Caveat No 737424 lodged by the Respondent is removed.
- b. No costs.

Dated at **Suva** this **29th day** of **April, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva