IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CIVIL JURISDICTION]

Action No. HBC 60 of 2006

BETWEEN: **MAHENDRA SHARMA** father's name Ram Lakhan Sharma of Naikabula, Lautoka, Businessman.

1ST PLAINTIFF

AND: **RAJENDRA SHARMA** father's name Ram Lakhan formerly of Naikabula, Lautoka but now of 153 Triangle Road, Auckland, New Zealand, Businessman.

2ND PLAINTIFF
(Deceased)
[1st Plaintiff substituted in his place]

AND: **NATIVE LAND TRUST BOARD** a body corporate, duly constituted under the Native Land Trust Act Cap. 134.

DEFENDANT

Before:

Priyantha Nāwāna J.

Counsel:

Plaintiffs	:	Mr H Ram
Defendant	:	Ms L Macedru and Mr Lutumalagi
Dates of Hearing	:	21-22 November 2011; 08-09 October 2012 and 21 November 2012
Date of Ruling	:	31 January 2013

R U L I N G

1. The two plaintiffs, by their writ of summons dated 06 March 2006, instituted this action against the defendant seeking *inter alia* '*specific performance'* by the defendant of two agreements to lease-out two pieces of land in extents of 0.1142 and 0.1145 hectares (1142 and 1145 Square Metres [SQM] respectively). The plaintiffs '*further or alternatively*' claimed damages for breach of '*contract offer[s]*'. In addition, plaintiffs sought '*declarations'* that they were entitled to

leases of the two pieces of land of above extents identified as Lot-1 and Lot-2 situated in the District of Vuda.

2. The plaintiffs, in their pleadings in the amended statement of claim dated 13 February 2007, stated that the defendant by its 'Notice of Approval' No. 4/7/4073 dated 04 August 1983 (MS-4A) agreed to lease-out to the first plaintiff the parcel of land known as M/L-6 situated in the Tikina of Vuda comprising approximately an extent of 23 perches (581.67 SQM). It was further pleaded that the defendant by its 'Notice of Approval' No. 4/7/4072 dated 21 August 1984 (MS-4B) agreed to lease-out to the second plaintiff the parcel of land known as M/L-7 situated in the Tikina of Vuda comprising approximately an extent of 18 perches (455.22 SQM).

3. It was further pleaded that the two parcels of land proposed to be leased-out, had to be surveyed by the plaintiffs under clause 6 of the 'Notice[s] of Approval' marked MS-4A and MS-4B annexed to the affidavit. The Director of Town and Country Planning, according to the plaintiffs, had approved the plans in respect of the two parcels of land, Lots 1 and 2, referred to in the two notices after surveys. The plaintiffs further pleaded that, on or about 28 October 2005, the defendant offered them registered leases in respect of the Lots 1 and 2, which the plaintiffs claimed to have accepted.

4. It is in light of the above facts as pleaded by the two plaintiffs that they sought declarations in respect of their purported entitlements to Lots 1 and 2 in extents of of 0.1142 hectares (1142 SQM) and 0.1145 hectares (1145 SQM) as opposed to 23 perches (581.67 SQM) and 18 perches (455.22 SQM) in the two 'Notice[s] of Approval'; specific performance by the defendant of the alleged agreement to lease such extents of land; and/or alternatively damages for breach of the contract offer.

5. The defendant, by its amended statement of defence dated 19 November 2007, referred to clause 3 of the 'Notice of Approval' whereby it was required to exclude any existing freehold lease or title from the land that had been provisionally approved for lease. The defendant specifically pleaded that it was impossible for it to lease-out Lots 1 and 2 encompassing 0.1142 and 0.1145 hectares (1142 and 1145 SQM respectively) as such extents were crossing the adjoining lots. The defendant further pleaded that there were no contracts formed between the parties as the payments by the plaintiffs in anticipation of the leases were accepted conditionally. The defendant counterclaimed for specific performance of the plaintiffs' leases by the defendant excluding the areas encroached by the plaintiff.

6. The action proceeded to trial on the basis of the amended statement of claim dated 13 February 2007 and the amended statement of defence dated 19 November 2007 wherein the above matters were pleaded.

7. The first plaintiff-Mr Mahendra Sharma gave evidence on his own behalf and on behalf of the second defendant-Mr Rajendra Sharma on 21 November 2011 and relied substantially on the affidavit dated 19 September 2011 in support and placed documents MS-1 to MS-24 annexed to the affidavit. The authority for the first plaintiff to testify on behalf of the second plaintiff was on the basis of a Power of Attorney dated 16 March 2005 marked 'MS-1' and annexed to the affidavit.

8. When the first plaintiff was under cross-examination, court inquired as to the whereabouts of the second plaintiff for court to be satisfied of the need for the first plaintiff to testify on second-plaintiff's behalf. It was only then that the first plaintiff informed court that he had passed away on 30 July 2011. It was improper, irregular and unlawful for the first plaintiff to testify on the purported authority of a Power of Attorney as the force of such Power of Attorney had already ceased with the death of the second defendant on 30 July 2011. Court, thereupon, adjourned proceedings for the second plaintiff to be substituted on 22 November 2011.

9. Proceedings were set to commence on 08 October 2012 after substitution. As the court observed that there was no proper substitution, further proceedings had to be abruptly adjourned to effect substitution (Vide Order dated 08 October 2012 filed of Record). Further proceedings were, thereupon, resumed on 09 October 2012 after the first plaintiff was substituted in place of the second plaintiff. The first plaintiff, thereupon, placed evidence in regard to the second plaintiff afresh with relevant documents already annexed to the affidavit.

10. Under cross-examination, the first plaintiff admitted that he had signed the 'Application for Development Permission'-MS 7B of the second plaintiff on 17 January 2005. Upon being shown that he had received authority under the Power of Attorney marked MS 1 only after 16 March 2005, the first plaintiff admitted that he did not have authority to sign the document MS 7B.

11. The conduct of the first plaintiff, as revealed by the above two instances, made court circumspect of the entire evidence of the first plaintiff.

12. At this stage, court examined the documents MS-19 and MS-20, which were relied on by the plaintiffs as constituting contracts in order to secure extents of 1142 SQM and 1145 SQM of land by way of specific performance through the defendant. It was clear as clear could be that those two documents did not contain material information; and, signatures at all (for example in MS-19) and they were mere formats in which leases were intended to be entered upon. The two documents did not have the characters signifying any contract between the plaintiffs and the defendant. They also lacked any information pertaining to registration to constitute valid contracts.

13. The first plaintiff, when referred to documents MS-17 and MS-24, admitted that payments made in anticipation of the leases did not create contracts.

14. Court, in light of the evidence of the plaintiff, was compelled to determine whether the documents MS-19 and MS-20 could have formed valid contracts for the plaintiffs to seek specific performance against the defendant as a preliminary issue under O 33 r 3 of the High Court Rules. Both parties were afforded opportunities to present their cases. They made oral and written submissions to enable court to determine the preliminary issue (Vide Order dated 09 October 2012).

15. O 33 r 3 states:

> *Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.*

Rule 7 of the Order further provides:

> *If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.*

16. In this regard, the principles as expounded by Lord Roskill of the House of Lords in ***Ashmore v Corp. of Lloyd's*** [No. 1] [1992] 2 All ER 486 at 488, are instructive. They are:

> *The Court of Appeal appear[s] to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court, it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out*

> *his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. That was what Gatehouse J, in my view entirely correctly, sought to achieve by the order which he made, an order which as all your Lordships agree should be restored.*

17. Thus, O 33 of the High Court Rules, as supported by the foregoing reasoning, substantially vests court with the power to determine an issue of preliminary nature in a cause or a matter before court.

18. Upon consideration of the evidence and examination of the documents marked MS-19 and MS-20, I conclude that the two documents (MS-19 and MS-20) *ex facie* did not constitute contracts enforceable at law against the defendant. Reliefs for specific performance of the contract; and, for damages for breach of contract are, therefore, misconceived. Reliefs, by way of declarations that the two plaintiffs are entitled to two pieces of land in extent of 0.1142 Ha (1142 SQM) and 0.1145 Ha (1145 SQM), too, are without any basis for the reasons in the following paragraphs.

19. The pleas for declarations, in any event, are not mutually existent with the above reliefs. Instead, such pleas serve to acknowledge the fact that the plaintiffs themselves are not certain as to their true status vis-à-vis the contents of MS-19 and MS-20 when they claimed that they were contracts enforceable by specific performance on one hand; but, sought declarations on their entitlements under contracts on the other.

20. It is quite intriguing, too, to note that the plaintiffs, who were informed by the defendant that the leases were only for 23 perches (581.67 SQM) and 18 perches (455.22 SQM) by 'Notices of Approval' marked MS-4A and MS-4B respectively, are now claiming 1142 SQM (45.16 perches) and 1145 SQM (45.27 perches) on the basis of a survey plan marked MS-13. The claims are quite contrary to the survey instructions given by the defendant marked MS-9B where the estimated areas to be surveyed were only 582 SQM (almost 23 perches) and 455 SQM (almost 18 perches) in line with MS-4A and MS-4B. The plaintiffs have not explained as to how such a disparity in area could have occurred. This court, in the circumstances, reasonably infers that the first plaintiff or both plaintiffs have practised a trickery or subterfuge to claim more area than what they were offered by the defendant in the two 'Notices of Approval'.

21. This trickery, however, appears to have gone unnoticed when the defendant mildly chose to explain the difficulties it encountered at the behest of the plaintiffs' conduct by its letter

dated 10 May 2006 addressed to Mr. Ami Chand, a private surveyor, marked MS-22 by which it only requested to amend the Survey Plan SO 5364, MS-13.

22. The exact extent and the area of the native land to be leased out is a fundamental component in the process of a forming a contract with the defendant. The area given as 1142 SQM and 1145 SQM in MS-19 and MS-20 are contrary to the extents given in the 'Notices of Approval' MS-4A and MS-4B. It may well be that the defendant innocuously fell prey to some insidious conduct of the plaintiff/s when it offered to lease out 1142 SQM and 1145 SQM to the two plaintiffs quite contrary to what was offered in the two 'Notices of Approval'. The plaintiffs, however, are not entitled to take advantage out of the offer of the defendant as the plaintiff/s were, in my view, the architects of a manipulation to claim more area of the native lands.

23. I, accordingly, conclude that, in addition to MS-19 and MS-20 being deficient in vital information, the fundamental requirement to form valid contracts; namely, the exact extent and the area of the native lands are in dispute and questionable. I hold that MS-19 and MS-20 did not constitute valid contracts to enable the plaintiffs to secure specific performance and/or seek damages for breach of contract.

24. I further hold that this action amounts to an abuse of process of court and results in inconvenience and prejudice to the defendant. It also projected to cause a serious injustice to other lawful users of the native lands in adjoining lots.

25. Acting under the provisions of the r 7 of the O 33 of the High Court Rules, I dismiss the action. In view of the reasons set-out above, I order costs on indemnity basis payable by the two plaintiffs to the defendant.

26. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka
31 January 2013