

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

HBC 227 of 2010

BETWEEN : **RAJENDRA NARAYAN** of Dugapatu, Rakiraki, Retired.

Plaintiff

AND : **VINAY DARSHAN** of Dugapatu, Rakiraki, Cultivator.

First Defendant

Before : Master Anare Tuilevuka
Appearances : Mr. Dayal for the Plaintiff.
Mr. Reddy for the Defendant.
Date of Ruling : 24 June 2013.

R U L I N G

[1] Before me is the plaintiff's application filed pursuant to **Section 169 of the Land Transfer Act (Cap 131)** against the defendants to show cause why they should not give up immediate vacant possession to the plaintiff of that portion of the property in question which they occupy. The property in question is Crown Lease No. 11702 described as Lot 2 Plan RR1169, Parts of Vatumami & Colase Farm 240 situated in Dugapatu, in Rakiraki. The plaintiff is the last registered proprietor of the property in question. This is established by a copy of the relevant Crown Lease which is annexed to his affidavit, thus confirming his locus to institute these proceedings under **Section 169**.

[2] Having established that, the onus shifts to the Defendant under **Section 172** to show cause as to why vacant possession should not be given. To satisfactorily discharge this burden, the defendant must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under **Section 169**. This does not mean that he has to prove conclusively a right to remain in possession. Rather, it is enough that he shows some tangible evidence establishing a right or at least supporting an arguable case for such a right (see **Morris Hedstrom Ltd v Liaquat Ali** (Action No. 153/87) at p.2).

[3] By his affidavit filed in support of the summons, the plaintiff deposes that he and the defendant entered into an agreement on 08 January 2004 for the sale and purchase of the said leasehold. The agreed price was \$62,000. What they had agreed to was that the defendant was to pay a deposit of \$10,000 initially. The balance of \$52,000 was to be paid off little by little over a period of some five years. The deadline initially given to the defendant under the agreement by which to pay the full consideration was 31 December 2009. Immediately after signing the agreement, the defendant and his family moved onto the property on 07 January 2004. However, as it turned out, by 31 December 2009, the defendant had not paid the balance of the purchase price. The plaintiff then gave him a further extension of eight months. However, the defendant still was not able to settle the consideration sum. It was then that the plaintiff caused his solicitors to issue Notice for Vacant Possession on the defendant.

[4] The defendant, by his affidavit deposes that he has paid the \$10,000 deposit from the cane proceeds. He further deposes as follows:

8. (i)the average cane proceeds over the said farm is 150 tons per year.
 - (ii)the total sum paid to the Bank towards the plaintiff's debt was \$14,154.50 (fourteen thousand one hundred fifty four dollars and fifty cents).
 - (iii)it took me nearly four years to pay the plaintiff's debt to the Bank. That the total sum paid to the plaintiff is \$26, 228.65 (twenty six thousand two hundred twenty eight dollars and sixty five cents). A copy of the statement is annexed hereto marked as annexure "B".
 - (iv)the plaintiff knew very well that it would be difficult for me to pay the full purchase price of \$62,000.00 (Sixty Two Thousand Dollars) within five years with said average ton per year.
 - (v)the plaintiff has breached clause 2© of the said agreement by not paying me one quarter of the cane proceeds being my share towards the expenses for cultivation from the 22nd day of May, 2007.
 - (vi)I have tried my best to pay the said purchase price and even sought advance approved from Sugar Cane Growers Fund to pay off the said debt to the plaintiff but to the plaintiff's refusal to consent the same the said approval still remains pending. A copy of loan approval from the Sugar Cane Growers Fund is annexed hereto marked as annexure "C".
 - (vii)due to the plaintiff's continuous ignorance despite numerous request the debt still remains unpaid.
 - (viii)the plaintiff has gone ahead and cancelled the Power of Attorney and stopped the fertilizer. Without fertilizer the crops will be weak and there will decline in production.
 - (ix)on the 5th day of July, 2010 the plaintiff forcibly entered into our premises and damaged my personal properties and matter was reported at Rakiraki Police Station. A copy of Police Report is annexed hereto marked as annexure "D".
9.I deny paragraph 9 of the said affidavit and say the said Notice was for fourteen days only.
 10.as to paragraph 10 of the said affidavit I say that the money is still going into the plaintiff's account. He knew very well that all purchase prices was to be paid through cane proceeds and the time limit was not enough.
 11.as to paragraph 11 of the said affidavit I say that I need further time to pay the balance purchase price and had the plaintiff consented to the loan from Sugar Cane Growers Fund the balance purchase price would have been paid to him.

[5] The plaintiff replies by his affidavit sworn on 23 March 2011 as follows:

3.the defendant did not deposit **\$10,000.00 (TEN THOUSAND DOLLARS)** with Bank of Baroda. The plaintiff took a loan of **\$10,000.00 (TEN THOUSAND DOLLARS)**, from Bank of Baroda of which the defendant was paying through cane proceeds with accruing interest and charges.
4.the defendant did not work and cultivate the subject farm in a proper husbandry like manner.
 - (i)the average cane production over the said farm is over **150 tonnes** per year.
 - (ii)the defendant has paid only **\$14, 443.92 (FOURTEEN THOUSAND FOUR HUNDRED AND FORTY THREE DOLLARS NINETY TWO CENTS)** including banks interest and charges.
 - (iii)the defendant, paid a total sum of **\$27, 154.65 (TWENTY SEVEN THOUSAND ONE HUNDRED AND FIFTY FOUR DOLLARS & SIXTY FIVE CENTS)**. A breakdown of the said amount is attached herein.
5.the defendant agreed to purchase and the plaintiff agreed to sell the **Crown Lease No. 11702**, comprising of **approximately 6.0095 hectares** at a total sale price of **\$62,000.00 (SIXTY TWO THOUSAND DOLLARS)** and the defendant very well knew that the full purchase price shall be paid to the plaintiff **on or before 31st December, 2009**.
6.the plaintiff stopped refunding $\frac{1}{4}$ (**Quarter**) of cane proceeds to the defendant because the loan of **\$10, 000.00 (TEN THOUSAND DOLLARS)** to the Bank of Baroda was fully paid by the defendant on the 30th May 2007 and I attend to discharge all the securities held by the bank, and therefore the defendant was not entitled to any refund of cane proceeds.
7.the plaintiff did not consent to the Approval of Loan of **\$20,000.00 (TWENTY THOUSAND DOLLARS)** from **SUGAR CANE GROWERS FUND** because the defendant did not qualify due to short fall of his loan and the remaining, balance of **\$14,845.35 (FOURTEEN THOUSAND EIGHT HUNDRED AND FORTY FIVE DOLLARS AND THIRTY FIVE CENTS)** the defendant failed to make arrangements.
8.the defendant paid **\$10,000.00 (TEN THOUSAND DOLLARS)** loan to Bank of Baroda and from the **28th of June, 2007** up to 24th of November, 2010 the total amount of money paid by the defendant to the plaintiff was **\$27,154.65 (TWENTY SEVEN THOUSAND ONE HUNDRED AND FIFTY FOUR DOLLARS AND SIXTY FIVE CENTS)** leaving a balance of **\$34, 845.35 (THIRTY FOUR THOUSAND EIGHT HUNDRED AND FORTY FIVE DOLLARS AND THIRTY FIVE CENTS)** being balance purchase price.
9.the plaintiff revoked the Power of Attorney, and stopped the fertilizer as the defendant had breached the Sale & Purchase Agreement dated 8th January, 2004 as per Clause No. 7.
10.the Plaintiff had the right to enter upon the subject property. The plaintiff nor his families damaged any of the properties of the defendant.
11.the plaintiff gave the defendant an ample time to vacate/or pay the Purchase Price in full and final settlement, which the Defendant failed, refused and or neglected.
12.the plaintiff refers to Clause No. 8 of the Sales & Purchase Agreement where the defendant by its own judgment purchased the subject property.
13.the Plaintiff refers to **Clause No. 2 (b)** of the Sale & Purchase Agreement wherein the defendant agreed to pay the Balance Purchase Price of **\$52,000.00 (FIFTY TWO THOUSAND DOLLARS)** on or before 31st December, 2009. Therefore, in the event that the Purchase Price is **NOT** paid in **5 (five)** years than the Plaintiff will forfeit the proceeds received and terminate this Agreement.
14.on the 19th March, 2004 Lands Department duly endorsed their consent to the Sale & Purchase Agreement dated on the 8th day of January 2004, and the plaintiff admits no consent of eviction was obtained from the Lands Department.

15.... the plaintiff now exercises his right under Clause 15 of the said agreement and rescinds their agreement and claims from the defendant the sum of **\$10,000.00 (TEN THOUSAND DOLLARS)** as liquidated damages and additional pay **\$5,000.00 (FIVE THOUSAND DOLLARS)** being the Sale of working, Bullocks and damages to the Plaintiffs Dwelling House, situate on **Crown Lease No. 11702** at Dugapatu, Rakiraki.

- [6] The defendant appears to bemoan that the contract was, and has all along, been a one sided affair. The plaintiff promises to give the land on the one hand, only to take it away with the other. What enables the plaintiff to take the land away with the other hand, the defendant seems to say, are the terms of their agreement which set conditions impossible for the defendant to perform.
- [7] The defendant does not depose any fact or situation which might suggest the potential availability of the defence of *non-est factum*. Because the doctrine is usually pleaded to avoid a contractual obligation, perhaps he could not plead the doctrine in any event as he is trying to extend the contract rather than end it.
- [8] Neither does the defendant allege that the contract price was too high, or that his will was, one way or another, unduly overborne by the plaintiff at contract time, or that he had a special disadvantage which the plaintiff had exploited in an unconscionable manner to induce him to agree to contract on the terms involved. Rather, what the defendant wants is for this court to further extend the time for him to complete the agreement.
- [9] The plaintiff on the other hand wants to rescind the contract because of his (defendant's) breach, and this, after having already given the defendant an extension.
- [10]. It is clear from the documentation that the defendant is still way off the mark so to speak from fully paying off the agreed purchase price. The defendant wants an extension but it is not clear how much time he needs. He himself is not clear.

[11]. On that alone, assuming I had power to extend the time for completion in the circumstances, I would have refused to grant an extension. In any event, extending the time is a matter of further agreement between the parties. In the final, I grant Order in Terms of the application. I also grant costs to the plaintiff which I summarily assess at \$450-00 (four hundred and fifty dollars only).

.....

Anare Tuilevuka
Master

At Lautoka
24 June 2013.