

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: 14 of 2011

IN THE MATTER of an application for
partition proceedings under Section
119 of the Property Law Act [Cap 130]

BETWEEN : Shiva Wati (fn Ram Udit) of Verata, Nausori, Domestic
Duties

PLAINTIFF

AND : Dharendra Nath (fn Ram Nath) of Verata, Nausori, Van
Driver

DEFENDANT

COUNSEL : Mr Selvin Singh for plaintiff.
Mr Devata for Defendant.

Date of Judgment : 1 August, 2013.

JUDGMENT

1. By originating summons dated 17 January 2011, the Plaintiff, Shiva Wati is seeking an order or orders that the property comprised in certification of Title No. 22710 being Lot 43 Section III on Deposited Plan No. 126 be sold by tender to the highest tenderer and the proceeds of sale be shared equally between the parties in accordance with Section 119 of the *Property Law Act* [Cap 130].

2. The application is supported by the affidavit of Shiva Wati sworn on 17 January 2011. The Defendant in this application, Dhirendra Nath, filed an affidavit in opposition, sworn on 1 June 2012, to the affidavit of Shiva Wati.
3. On 18 June 2012, when the matter was mentioned in court, both counsel agreed that this matter should be settled as the dispute is between the plaintiff mother and the defendant step son and submitted that valuation should be obtained for the property and the cost of valuation should be shared between parties for a settlement to be effected.
4. The Defendant failed to comply with the proposed settlement and did not contribute to commence the valuation of the property.
5. This matter was thereafter fixed for hearing on 21 November 2012, and both counsel made oral submissions. Counsel for the Plaintiff filed written submissions subsequently with the leave of the court.

The Facts

6. The Plaintiff and the Defendant are the registered proprietors of the property comprised in certification of Title 22710 being Lot 43 Section III on Deposited Plan No. 126. They acquired the joint ownership of the property through the last will and testament of husband of the Plaintiff, Ram Nath, subject to the following terms of the will.

I hereby further direct:

- a. *That my wife Shiva Wati shall be given the 2 bedroom wooden iron structured house together with motor vehicle number BX 772.*
- b. *That my son shall have the bigger 4 bedroom concrete house together with motor vehicle CZ 747.*
- c. *That neither my wife Shiva Wati nor my son Dhirendra Nath is to sell his or her share of property to an outsider.”*

7. It is evident from the affidavits of both the Plaintiff and the Defendant that they have not been in good terms since the death of late Ram Nath. It is further evident that there had been history of violence between them and complaints too had been made to the Police Department.
8. The Defendant in the affidavit in opposition deposed that it is the Plaintiff who causes disputes and wishes to purchase the property and would make an effort to arrange funds to buy the share of the Plaintiff. However in the oral submissions, the counsel of the Defendant submitted that the Defendant has deposits which takes two years to realize to raise funds to purchase the share of the Plaintiff.

The Law

9. This Section 119 of the *Property Law Act* which was the Section under which the application was made by the Plaintiff, provides as follows;

ART XIII – PARTITION OF LAND AND DIVISION OF CHATTELS

In action for partition court may direct land to be sold

119. –(1) *Where in an action for partition the party or parties interest, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.*

(2) *The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstances, a sale of the land would be for the benefit of the parties interested.*

- (3) *The Court may also, it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.*
- (4) *On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.*
- (5) *Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations;*

Provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.

- (6) *On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to settling off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters.*

10. *As it was evident from affidavits in support and the affidavit in oppositions, of the Plaintiff and the Defendant respectively, that there had been disputes and violence between parties which affected the peaceful cohabitation. The Plaintiff submitted that the most partical solution to the existing problem is to sell the property and share the proceeds equally. The basis of the opposition to the Plaintiff's submissions was that he wishes to purchase the property and give effect to the will of late Ram Nath.*

The Determinations

11. In view of the submissions of both counsel and the provision of Section 119 of the Property Law Act, the issue before the court is to determine whether on the facts and circumstances of this case, the application of the Plaintiff ought to be granted or not.
12. In the case of **Atu v Atu** [1983] FLR 100 Fiji Supreme Court considered a similar application and stated as follows:

"..... Section 119(1) of the Property Law Act provides as follows:

"Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly."

Subject to one issue Mr Knight raised which I will consider later, unless the Court sees good reason to the contrary, it is mandatory to direct sale of the property since the plaintiff's interest in the property is not less than one moiety.

A 'moiety' means a half and the issue raised by Mr Knight is that section 119 is not available to be plaintiff because he is a joint tenant and not a tenant in common entitled to a moiety or upwards of the property.

It is not necessary to enter upon a description of joint tenancies and tenancies in common because partition of land by the Court is available to persons having concurrent interests whether jointly or in common in a property.

Halsbury Laws of England Volume 21 first edition as p. 810 when describing the legal term "partition" says:

"The legal term 'partition' is applied to the division of lands, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

In a note regarding co-owners, the author says:

"The co-owners may be joint tenants in common or co-partners."

The plaintiff is entitled to an order for sale of the property unless the Court considers there are good reasons to the contrary.

The defendant is presently living in the property and she states in her affidavit that if the house is sold she has nowhere to go unless she returns to her elderly parents' home which she does not want to do.

The defendant is presently unemployed and has not been working since May 1979. She was apparently employed by "Tiki Togs" in December, 1978. There is no explanation as to why she has not worked since May 1979 and I have to assume she is capable of working and earning a living for herself.

There is not mention of any children of the marriage; the plaintiff is paying her \$12 a week for her maintenance under a Maintenance Order in Maintenance Action No 151/74.

I do not consider that the defendant has advanced any good reason why an order for sale of the property should not be made and the plaintiff is entitled to the order he seeks..."

13. In the case of **Thomas v The Estate of Eliza Miller and Tess Goulding [1996] 42 FCR 268**, also considered similar facts and circumstances and stated as follows:

“... The application here is under s. 119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be “for the benefit of the parties interested” for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that “the sale would be for the benefit of the parties concerned.” In the definition of “land” is included “all estate and interests in land.” (section 2 of the Act).

In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the basis of the evidence. On the affidavit evidence the Plaintiff has proved and satisfied the Court the s. 119(2) is available to her.

*In coming to this conclusion I have been persuaded by the observations made by Brooke J.A, in his judgment in **Re Dibattista et al. and Menecola et al.** (Ontario Court of Appeal 74 D.L.R. (4th) p. 569). There he refers to **Cook v Johnston (1970)** 2 O.R 1(H.C.J) where Grant J considered the question of when and in what circumstances the court may order a sale. I quote below what Grant J said his judgment at pp. 1-2:*

*“In **Morris v. Mossirs** (1917) 12 O.W.N. 80 Middleton, J., in dealing with a similar matter stated at p. 81: “Sale as an alternative for partition is quite appropriate when a partition cannot be made.”*

*In **Gilbert v. Smith** (1879) 11Ch.D.78, Jessel, M.R., p.81 stated:*

“The meaning of the Legislature was that when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money among the parties.”

In **Lalor v. Lalor** (1883), 9P.R. (Ont.) 455, Proudfoot, J., who was deciding whether partition or sale should be ordered, stated:

“I do not think any party has a right to insist on a sale; and it will not necessarily be ordered, unless the Court thinks it more advantageous for the parties interested.”

In **Ontario Power Co. v Hattler** (1904) 7 O.L.R. 198, Meredith C.J. reviewed the legislation in the Province giving jurisdiction to the Court to order a sale instead of partition. In reference to the form of such remedies then adopted by the Consolidated Rules, he stated at p. 203:

“That form must be read in the light of the legislation by which jurisdiction has been conferred on the Court to order a sale instead of a partition, and the provision as to proceedings being taken for partition or sale is, I think, a compendious mode of saying that proceedings are to be taken to partition unless it appears ‘that partition cannot be made without prejudice to the owners of, or parties interested in, the estate,’ but that if that is made to appear proceedings are than to be taken for the sale of the lands.”

On the evidence I find that the defendants have not advanced any good reason why an order for sale of the flat should not be made.

The most practical solution to the problem which has plagued the parties for some time is to sell the property to the Plaintiff after valuation on terms and conditions hereafter appearing.

The Plaintiff I consider is entitled to the order she is seeking....”

14. In terms of Section 119(2) of the Act under which sale of property under direction of the court may be considered if such sale is considered by the court to be for the benefit for well being of the parties interested and in the instance case, its the mother and the stepson, which sets out the circumstances under which court make an order for sale notwithstanding the disagreement of one party. The Defendant has not shown any financial disability to purchase the

share of the Plaintiff but requested time for realization of his deposits. On the affidavit evidence placed before the court clearly proved to the satisfaction of the court that peaceful cohabitation is no longer possible between two parties and sale of the property is the most practical option available to court. However the court is mindful of the facts that the will of the late Ram Nath does not enable the parties to sell the property to the third party. The Defendant's opposition to sale of property to the 3rd party is on the premise that he wishes to purchase the property for the benefit of his children. In the circumstances, the courts of the view that even if the Plaintiff's application is granted the Defendant should be given the first opportunity to purchase the property on the valuation report and payment of the share of the Plaintiff should be effected within a reasonable time. However, if the Defendant is unable to make the payment within a reasonable time, the plaintiff is entitled to the orders of the sale of the property to a third party.

15. In view of the above reasons, and under section 119(2) of the Property Law Act, I direct and order the property comprised in CT No. 22710 being Lot 43 Section III on deposited plan No 126 be sold subject to further directions as follows:
 1. That within 28 days from the date of judgment, the Plaintiff appoints a valuer to carryout valuations of the property. The valuer to be acceptable to the Defendant's Solicitors.
 2. The cost of the valuations to be shared between parties.
 3. The opportunity should be given to the Defendant to purchase the half a share of the Plaintiff within 90 days from the date of valuation.
 4. In the event of Defendant not being able to purchase the share of the Plaintiff, the Plaintiff's solicitors shall advertise the property for sale by written tender in an at least two issues of a newspaper circulating in Fiji.
 5. Tender shall be opened in the presence of Defendant's Solicitors.

6. Sale shall be to highest tenderer who is to pay all costs and disbursements a transfer usually paid by the purchaser.
7. On a tender being accepted transfer shall forthwith be prepared by the Defendant's solicitors who shall obtain his client's executions thereto and shall forward some of the Plaintiff's solicitors who shall hold it until purchaser of the property is in a position to settle.
8. Forthwith upon settlement the defendants' solicitors shall pay into Court the settlement moneys and furnish an account of disbursements and costs incurred by the Plaintiff in the sale of the property.
9. Within one month after payment into Court of the said moneys, each party is to furnish to the other and file in Court his or her claim in respect of the sale moneys supported by documentary evidence of payments alleged to have been made or expenses incurred in the purchase of the property.
10. Liberty to parties to apply generally.

Susantha N Balapatabendi
JUDGE