

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 135 of 2013

BETWEEN : **VISHAL ANAND NAIR** of 13 Nasoki Street, Lautoka, Mechanic.

PLAINTIFF

AND : **SHIU NATH SHARMA** as the surviving Trustee of the Estate of Shri Nath Sharma of Sacramento, California, United States and **SHAILESH KUMAR SHARMA** Sacramento, California, United States of Surrey BC, Canada V3ROZ6, Company Director.

DEFENDANTS

Counsel : Mishra Prakash for the Plaintiff
S.B. Patel for the Defendant

R U L I N G

INTRODUCTION

- [1]. The plaintiff Vishal Anand Nair (“**Nair**”) seeks specific performance of a sale and purchase agreement over a certain piece of land located within the city of Lautoka. The land is described as Native Lease 9080. The land was acquired by one Shri Nath Sharma (“**Shri**”) on 16 October 1956. In 1966, Shri Nath Sharma transferred one undivided half share to his brother, Tribhowan Nath Sharma (“**Tribhowan**”).
- [2]. There is a memorial on the copy of the title annexed to Nair’s affidavit that records that on 02 November 1981, one undivided half interest in the land was registered by Transmission By Death to one **Savitri** and one Shiu Nath Sharma (“**Shiu**”) as executors and trustees, I gather of the estate of Shri.
- [3]. There is also a latter memorial which records that one undivided half share was transferred to Shailesh Kumar Sharma (“**Shailesh**”) on 19 July 2007.
- [4]. Hence, it appears that, as it is now, and as Nair deposes in paragraph 3 of his affidavit.

[the land]...belongs to Sailesh (sic) Kumar Sharma as to half undivided share and Savitri and Shiu Nath Sharma as to the other undivided half share and they are the trustees of the Estate of Shri Nath Sharma.

SOME OBSERVATIONS

- [5]. Nair was interested in acquiring the property in question. On 08 March 2011, Nair entered into an agreement with Shiu and Sailesh for the sale and purchase of the property in question. Savitri was not privy to the agreement.
- [6]. Nair's affidavit has annexed to it a copy of the Transfer document duly executed by Shiu and Shailesh. Again, Savitri is not privy to this document.
- [7]. In his affidavit in support sworn on 24 July 2013, Nair deposes that the agreed purchase price was \$200,000.00 but this was later varied to \$180,000.00. SB Patel and Company had prepared the transfer document accordingly. The defendants have executed the transfer.
- [8]. The iTaukei Lands Trust Board had consented twice to the transfer. These consents had lapsed after three months because of the delay on the part of the lawyers in completing the transfer. Nair deposes that obtaining of a fresh consent will not be a problem provided Native Land Trust Board rent has been paid.
- [9]. Nair also says that his transfer and mortgage had been lodged for conditional exemption of stamp duty by SB Patel & Co as far as he was aware. He says he had agreed to purchase the Lease so he could live there with his family and run his rental and electrical business from there.
- [10]. Nair deposes:
Apparently one of the Defendants has not signed statutory declaration which is required by the Commissioner for Stamp Duties who has requested the Beneficiaries to sign the documents. It seems he cannot be located in the United States.
- [11]. He further says:
17. I ask that the transfer to be put through and possession and as the delay was not my fault it was agreed with one of the vendors Mr. Sailesh Kumar Sharma that I was not to pay rental but look after the property.
 18. My loan application has expired and I am incurring expense and loss by not being able to develop the property properly as I had intended.
 19. My wife and I recently just had a baby on the 21st of November 2012 and my wife is distressed at the delay and I am not able to carry out the improvements that I want to.

20. I want to put screen doors to stop mosquitoes and I have been asked to screen the premises for the protection of my child's health. I also want to build a fence for security purposes as there have been robberies in the area.
21. There is also rental arrears and I received a Notice through the Native Land Trust Board which was sent to me by post and I want to be able to pay the arrears and get on with my life. A copy of letter from the Native Land Trust Board dated 13th March 2013 is annexed hereto and marked with the letter "J".
22. I verily believe that there are certain town rate arrears due and owing.
23. I am prepared to deposit the sum of \$180,000.00 either into the Trust Account of SB Patel & Co or in Court.
24. I humbly ask for an order in terms.

WHAT ABOUT SAVITRI?

[12]. Savitri's non-involvement in this whole affair is a matter of curiosity. Nair deposes at paragraph 4 of his affidavit that he:

..... was told by a staff member of SB Patel & Co that Savitri has died and Shiu Nath Sharma is the surviving Executor and Trustee as far as the Estate of Shri Nath Sharma.

[13]. SB Patel of course has not filed any affidavit to either confirm or refute that allegation. Nor has any official death certificate been put before me to confirm it.

[14]. I understand Nair's position very well. He appears to be the innocent purchaser caught in limbo through no fault of his. However, I cannot accept what he says about Savitri as true. Apart from the fact that Nair's deposition is hearsay, there is section 26 of the Births, Deaths and Marriages Act (Cap 49) to be considered. Section 26 provides:

Certified copies and certificates signed and sealed by Registrar or divisional registrar shall be accepted as evidence

26. A certified copy of any entry in a register or register book signed and sealed by the Registrar or a divisional registrar, as the case may be, shall be received in all courts as evidence of the birth, death or marriage to which the same relates and of the particulars therein recorded without further proof of such matters and every certificate of the Registrar that any register of births, deaths or marriages for any specified period is lost or destroyed shall be received in any court as conclusive evidence of that fact.

[15]. I interpret the above provision as saying that a certified copy of an entry in a register by the Registrar is the only conclusive evidence of an alleged birth, death, or marriage.

[16]. Since I have not accepted the allegation that Savitri is deceased, does that have any bearing on the application that is now before me?

APPLICATION BEFORE ME

[17]. What is before me is the plaintiffs application seeking specific performance of the agreement. As I have stated, that agreement was all done without Savitri being privy to it. The plaintiff's Originating Summons dated 25 July 2013 seeks the following particular Orders:

1. A declaration that the Plaintiff is entitled to specific performance and transfer of Native Lease No. 9080.
2. That the Defendants transfer assign and set over the property and improvements situated at 13 Nasoki Street, Lautoka being Native Lease No. 9080 to the Plaintiff within 10 days of the making of the Order of this Court.
3. An Order that the Deputy Registrar of the High Court at Lautoka do and/or execute a fresh iTaukei Land Trust Board consent application in place of the Defendants and/or execute all documents necessary on behalf and in place of the Defendants to effect the sale and transfer of Native Lease No. 9080 to the Plaintiff.
4. Upon registration of transfer the Plaintiff do deposit the sum of \$180,000.00 either into the Trust Account of SB Patel & Co or into Court.
5. The costs of this application be paid by the Defendants and the Plaintiff be at liberty to deduct the same out of the purchase price monies.
6. Such further and other relief as Honourable Court seems just.

[18]. The application is made pursuant to Order 7, 28, 85 and 86 of the High Court Rules 1988.

[19]. The hearing of the application happened on 17 November 2014 before me. None of the defendants appeared. Their solicitors, SB Patel & Company did not appear either, they, having earlier been granted leave on their application, to withdraw as solicitors for the plaintiff.

SPECIFIC PERFORMANCE

[20]. Specific performance can only be obtained if a vendor and a purchaser have entered into a binding contract.

[21]. In this case, one of two of the trustees of the estate of Shri, namely Shiu, is clearly interested in selling the undivided half share of the estate. The other trustee namely Savitri is not at all in the picture.

[22]. The question I ask is whether or not there is a binding contract.

- [23]. As a starting point, it is important to note that trustees have powers to sell trust property under section 23(1)(a) of the Trustees Act.

PART IV-GENERAL POWERS OF TRUSTEES

Powers to sell, exchange, partition, postpone, lease, etc.

23.-(1) Subject to the provisions of this section, every trustee, in respect of any property for the time being vested in him, may-

(a) sell the property.....

- [24]. Having said that, the next question to ask is whether or not a trustee can sell trust property without the knowledge or approval of the other trustee or trustees?
- [25]. The defendants' conduct, in particular Shiu's, in this whole proceedings does raise suspicions. Firstly, he has committed the half interest of the estate of Shri to a sale and purchase agreement of the same. Secondly, he does not care to explain why Savitri has not been privy to the agreement. And thirdly, he has not bothered to participate in these proceedings.
- [26]. This whole proceeding would have been quite simple if Shiu had participated and given instructions to his lawyers to explain Savitri's situation.

THE LAW

- [27]. A purchaser under a contract of sale for land has an equitable interest. That equitable interest entitles her to call for the conveyance of the land to her. However, that interest is strictly commensurate with her ability to obtain specific performance or other equitable protection.
- [28]. In this case, Nair's ability to obtain specific performance is somewhat worn down so to speak by two factors. Firstly, there is the fact that, at this time, there is no iTLTB consent in place. Secondly, there is the fact that Savitri's situation is yet unexplained. This must first be explained before any further remedial step can be taken.

iTLTB Consent & Specific Performance

- [29]. Where there is legislation in place that makes such an agreement subject to the consent of a statutory authority (Minister, municipal authority etc), the purchaser's right under such an agreement, to call for the conveyance

of the land to her, will not crystallize until the consent is in place. Hence, if there is no consent in place, the purchaser does not yet have that right. right to specific performance does not yet accrue (see **Brown v Heffer** [1967] HCA 40; (1967) 116 CLR 344 (19 October 1967) .

[30]. Hence, it is said that unless a purchaser is entitled to specific performance of her contract of sale, she does not have an equitable interest in land. And her equitable interest is commensurate only with her ability to obtain specific performance (see **Legione v Hateley** [1983] HCA 11; (1993) 152 CLR 406; **Stern v McArthur** [1998] HCA 51; (1988) 165 CLR 489; see also **Sale of Land** (2000) 2nd ed by DW McMorland at page 299).

[31]. The agreement in question requires the consent of the iTaukei Lands Trust Board.

[32]. In **Re CM Group Pty Ltd's Caveat** [1986] 1 Qd R 381, it was held that property did not pass in equity until the required municipal council approval was obtained. In **Brown v Heffer** (1967) 110 CLR 344, an interest in equity did not pass because the required consent of the Minister had not been obtained.

[33]. In this case, I will only grant an Order for Specific Performance if the iTLTB's consent is in place.

Lack of Explanation of Savitri's Situation

[34]. Nair deposes in his affidavit that "one of the defendants" has refused to swear a statutory declaration required by the Commissioner of Stamp Duties. I suspect this defendant he refers to is Shiu.

[35]. In this case, Nair's equitable interest, is also somewhat worn down by that refusal to swear that statutory declaration. I am curious as to why that defendant is refusing to swear that declaration. I suspect the Registrar of Titles will also have reasons to hold up the completion of the transfer. I suspect these all relate one way or another to the lack of explanation of Savitri's situation.

COMMENTS

- [36]. I need conclusive evidence of Savitri's situation. Also, ideally, the Commissioner of Stamp Duties and the Registrar of Titles should have been joined as nominal defendants so they can present to this court their side of the story for completeness. Furthermore, the iTLTB's consent will have to be in place before any order for specific performance can be made.
- [37]. The plaintiff is at liberty to make further application.



A handwritten signature in black ink, consisting of several stylized, overlapping strokes.

Anare Tuilevuka
JUDGE
Lautoka

19 November 2014