

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

PLAINTIFFS

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 : Mr. Vipul Mishra for the Plaintiffs
: No Appearance for the Defendants
: Mr. S. Pickering for the Registrar of Titles

R U L I N G

[1]. The background to this case is set out in my earlier Ruling reported in *pacii* in **Nair v Sharma** [2014] FJHC 841; Civil Action 135.2013 (19 November 2014). In that earlier Ruling, I had expressed some misgivings which led to my refusal to grant Order in Terms, then, of the plaintiff's application for specific performance of a sale and purchase agreement he had executed with the defendants. The subject matter of the said sale and purchase agreement was a certain real-estate property (and improvements thereon) situated at 13 Nasoki Street, Lautoka being *i*-TLTB Lease No. 9080. It is noteworthy that, earlier in October 2014, I had granted Order in Terms of an application by SB Patel & Company to cease acting for the defendants – who are the vendors.

[2]. There were two main reasons why I had earlier refused to grant Order in Terms. First, the property in question, being a trust property, I was curious as to why one of the three trustees appeared to be totally oblivious to and uninvolved in the dealings. Second, was the fact that the *i*-TLTB consent over the said dealing had long lapsed at the time the application was put before me – which – affected any *equitable-interest-as-a-purchaser* that the plaintiff was relying on. As I had observed:

[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 *i*TLTB 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.

*i*TLTB 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.

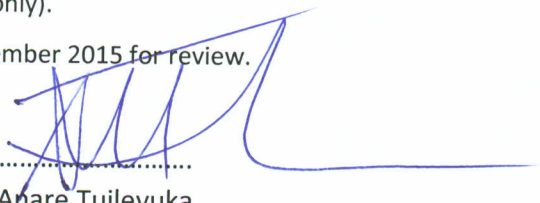
- [3]. I then left the matter at that but gave the plaintiff liberty to make a further application.
- [4]. On 20 March 2015, SB Patel & Company filed a Summons under Order 22 Rule 1(1) of the High Court Rules 1988 seeking:
- ...an Order that the firm of Messrs SB Patel & Co pay into Court the sum of \$10,000 [Ten Thousand Dollars] for the Honourable Court's determination upon the grounds set forth in the Affidavit of MANOJ KUMAR RAI filed herein.*
- [5]. In his supporting affidavit, Manoj Kumar Rai deposes that SB Patel & Company had been attending to the Sale and Purchase for the transfer of the property in question from the defendants to the plaintiff. Mr. Rai explains that:
- ".....pursuant to clause 1(a) of the Memorandum of Agreement dated the 8th March 2011, the Plaintiff on the 08th day of March 2011 vide SB Patel & Co's Trust Account Receipt No. 143663 deposited a non-refundable deposit in the sum of F\$10,00 into the trust account of the firm of Messrs SB Patel & Co.*
-*
- In the circumstances, it will be in the best interest of justice that the sum of F\$10,000 be deposited into Court.*
- [6]. The above application was put before the Master. It is not clear to me from the file records whether in fact the deposit was paid into court. Suffice it to say that the above application settles all questions I had in my mind as to the dealing between the plaintiff and the defendants. It confirms that the deposit was duly paid by the plaintiff.

- [7]. I need only mention here that since then, Mishra Prakash & Associates have placed before me a Death Certificate of Savitri Devi Sharma issued by the Vital statistics Agency of British Columbia, Canada (annexed and marked "A" to an Affidavit of Vishal Anand Nair sworn on 28 July 2015) which records a Savitri Devi Sharma, aged 78 years, and a resident of Vancouver, as having died on 04 February 2009.
- [8]. Having said that, I observe that the Sale and Purchase Agreement in this case was dated 08 March 2011 i.e. some two years after Savitri's death. I need only say that I have no more lingering questions regarding Savitri's lack of involvement in the sale and purchase agreement.
- [9]. As to the iTLTB's consent, the plaintiff has again today sworn and filed an affidavit which places before me a consent of the iTLTB dated 25 August 2015. This settles all issues I had raised in this regard.
- [10]. The only other issue I raised with Mr. Mishra this morning is about making sure that the mechanics of settlement are in accordance with the sale and purchase agreement as varied.

ORDERS

- [11]. In the final I grant the following Orders:
- (i) I declare that the plaintiff is entitled to specific performance and a transfer of Native Lease No. 9080.
 - (ii) that the Deputy Registrar of Lautoka High Court do sign the transfer document within ten (10) days of this Order.
 - (iii) upon registration of the transfer, the plaintiff is to deposit into the trust account of the Chief Registrar of Fiji the sum of \$180,000 (one hundred and eighty thousand dollars) less:
 - (a) any Capital Gains Tax assessed by the Fiji Islands Revenue & Customs Authority.
 - (b) costs which I summarily assess in the plaintiff's favour in the sum of \$2,000 (two thousand dollars only).

Case adjourned to 11 September 2015 for review.


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Anare Tuilevuka
Judge
Lautoka High Court
27 August 2015