

IN THE HIGH COURT OF FIJI

WESTERN DIVISION

AT LAUTOKA, FIJI

CIVIL ACTION NO. HBC 255 OF 2016

BETWEEN : **SIRTAJ ALI** also known as **SIREAJ ALI** of Nabuta, Tavua,
Fiji.

PLAINTIFF

AND : **SULESH CHAND** of Valelevu, Nasinu, Fiji.

1ST DEFENDANT

AND : **BHUPESH PRASAD** of 127 Croplay Drive, Baulkham Hills,
New South Wales, Australia.

2ND DEFENDANT

Appearances : Ms J. Singh (LAC) for Plaintiff
Mr W. Rosa for first Defendant
Non-appearance for second Defendant

Date of Hearing : 29 May 2017

Date of Judgment : 29 May 2017

J U D G M E N T

Introduction

[01] The Plaintiff files writ of summons together with the statement of claim and asks other things, damages against the First Defendant.

[02] The claim arises out of a Deed the Plaintiff entered with the First Defendant, whereby the First Defendant gifted a portion of land to the Plaintiff and allowed him (Plaintiff) to build a house.

- [03] The Plaintiff has foregone the claim against the Second Defendant as he is a bona fide purchaser. He also foregone other claims he sought in the writ of summons. He is seeking damages only from the First Defendant for breach of the contract and losses suffered.
- [04] The writ of summons was duly served on the First Defendant. However, the First Defendant did not file notice of acknowledgement, nor did he file statement of defence within the prescribed time. Therefore, the Plaintiff summons to enter judgment under Order 19, Rule 6 and 7 of the High Court Rules, 1988 ("HCR") against the First Defendant.
- [05] HCR, O.19, r.6 allows the Plaintiff to enter judgment against the Defendant who has failed to serve a defence on the Plaintiff within the prescribed time (within 14 days after the last day of the time limited for acknowledgement of service, which is 14 days after service of the writ pursuant to HCR, O.12, r.4).
- [06] The matter was fixed for formal proof today (29 May 2017). When the formal proof hearing was taken, Mr Rosa, counsel appearing for the First Defendant orally made an application in the absence of any formal application to vacate the formal proof hearing on the ground that he should obtain further instruction from his client. The court rejected that application and refused to vacate the formal proof hearing. Mr Rosa then withdrew from appearing for the First Defendant. The formal proof hearing proceeded.
- [07] At the formal proof hearing, the Plaintiff gave evidence and produced two documents in support of his claim.

Background Facts

- [08] The background facts, according to the Plaintiff, are as follows:
- [09] Sulesh Chand (the First Defendant) was the registered proprietor of the land on Certificate of Title 17325 ("the land").

[10] On 15 January 2010, the First Defendant entered into a Deed with Sirtaj Ali (the Plaintiff) wherein the First Defendant gifted a piece of land comprising of seven hundred and fifty nine square meters to the Plaintiff. According to the Deed, the Plaintiff was entitled to build a house. The Plaintiff built a house on the land gifted and occupying the same with his family.

[11] In breach of the Deed, the First Defendant sold and transferred the land to the Second Defendant without subdividing the share of the Plaintiff as stipulated in the Deed and obtaining a separate title for the Plaintiff. The Deed, under clause 2-5, provides:

“That upon the execution of this Deed the beneficiary shall be entitled to occupy the said area of land and to build dwelling house of his choice thereon.

That the within deed shall be sufficient title to enable the beneficiary to obtain building permits, install water and electricity connections from the authorities concerned and to do all the acts, deeds and things as if he is the registered proprietor of the said land.

That at a convenient time in future the parties may subdivide the said land and obtain separate title in favour of the beneficiary. However in the meantime, this deed shall operate having vested full title in the beneficiary in respect of the said area of land namely measuring seven hundred and fifty nine square meters. In case of sub-division all cost and thereof and incidental to obtaining a separate title shall be borne by the landowner.

It is hereby agreed and declared that the area marked on the site plan annexed hereto shall for all intent and purpose be deemed to be the boundary of the said area. However, it is agreed that the area of the seven hundred and fifty nine square meters is subject to survey may increase or decrease.”

[12] The Second Defendant, upon becoming the registered proprietor of the property, brought eviction proceedings to eject the Plaintiff from the property and obtained eviction order against the Plaintiff. Subsequently, the Plaintiff was removed from the property and his

dwelling was demolished. The Plaintiff seeks damages against the First Defendant.

The Issue

[13] The issue, at the formal proof hearing, was whether the Plaintiff is entitled to seek damages from the First Defendant, for the house he built on the gifted land, which was subsequently dismantled in the eviction process and for breach of the agreement.

The Evidence and Discussion

[14] At the formal proof hearing, the Plaintiff gave evidence. He also confirmed the affidavit sworn on 4 April 2017 and the supplemental affidavit sworn on 26 May 2017 both filed in support of his summons to enter judgment. As part of documentary evidence, he marked and produced (i) the Deed he entered with the First Defendant and the photographs of the dwelling he built as P/E-1 and P/E-2 respectively.

[15] In his supplementary affidavit he filed in support of his summons to enter judgment, the Plaintiff states:

"(a) I have entered into a Deed with the 1st Defendant on 15th day of January 2010.

(b) That I relied in clause 2 of the Deed and built my dwelling house therein on the piece of land that was given to me by the 1st Defendant.

(c) In clause 8 of the Deed, I understand that my rights were protected even though the 1st Defendant would sell the Land however, he would keep my shares and ensure that my interest is protected.

(d) I was ordered to evict with my family out of the land due to the sale of the land to the second Defendant.

(e) I am a social welfare beneficiary and I am not unemployed, and therefore, I had struggled to build my six bedroom wooden house which was dismantled.

(f) After the eviction, I did not have a place to go. I went and stayed with my daughter in Lautoka and I left the tin and wood which was dismantled from my home with my brother in Kavuli, Tavua.

(g) The first Defendant took advantage of my vulnerability. He did not honour his part of the deed wherein I have suffered substantial damage.

(h) I had built the house, with the assistance rendered from my brothers. I had that I had brought slowly with the money I had accumulated. Furthermore all the receipts that I had when purchasing the materials had been destroyed during Cyclone Winston and the roof was blown away, and I did not anticipate that one day I would be evicted so I did not think that I needed to keep the receipt, together with most of my belongings at home.

(i) My dismantled house was worth \$45,000.00. I did not do a valuation on the property as I cannot afford a valuer”.

- [16] By the Deed, which he entered with the Plaintiff (P/E-1), the First Defendant donated a piece of land to the Plaintiff. Both parties had signed the Deed in the presence of the Justice of the Peace, thereby creating a valid contract. The Deed was duly registered. In accordance with the Deed, the Plaintiff was entitled to occupy the gifted land measuring 759 square metres, subject to survey and to build dwelling house of his choice. The Deed empowers the Plaintiff to enjoy the gifted land as if he is the registered proprietor of the land (See Cl3 of the Deed). The Plaintiff accordingly built a six-bedroom dwelling with corrugated iron and wood spending a sum of \$45,000.00.
- [17] When granting a piece of land out of the land of which he was the registered proprietor, the First Defendant reserved his right to sell or assign the property and promised that he will protect the interest of the Plaintiff before entering into any such agreement. Cl.8 of the Deed provides:

*“8. That the land owner maintains full right and authority to sell or assign certificate of Title number 17325. **In the event the landowner sells or assigns the certificate of title 17325, this deed shall remain in full legal force and the landowner shall protect the interest of the beneficiary***

before entering into any agreement by sub-dividing the said piece of land and obtain a separate title in favour of the beneficiary.” (Emphasis provided)

- [18] The First Defendant executed the Deed in January 2010. He sold the property to the Second Defendant in September 2012. When doing so, the First Defendant also sold the portion of the land given to the Plaintiff under the Deed. He was under obligation by virtue of the Deed to protect the interest of the Plaintiff when selling the property covered by the certificate of title number 17325 (See Cl. 8 of the Deed). The First Defendant has failed to fulfil his obligation under Cl.8 of the Deed, thereby breached the agreement (the Deed).
- [19] Cl. 4 of the Deed requires the First Defendant as the landowner to subdivide the gifted portion and obtain separate title in favour of the beneficiary (the Plaintiff) at the expense of the landowner. The First Defendant did not do anything to complete his obligation under Cl.4 of the Deed.
- [20] In evidence, the Plaintiff specifically states that he spent \$45,000.00 on building the dwelling. However, he could not produce the receipts. He said the receipts were destroyed in cyclone Winston. Although he receives social welfare assistance, his brother, his daughter and his sister-in-law helped him build the house.
- [21] The Plaintiff’s evidence remains unchallenged. His evidence has been straightforward. He appeared to be a truthful witness. I find no reason to disregard his evidence. I, therefore, accept his evidence.
- [22] There is sufficient evidence to conclude that the First Defendant has breached the Deed he entered with the Plaintiff. So I find. I also find that the Plaintiff is entitled to damages for breach of the agreement.

Quantum of damages

- [23] I now turn to determine the quantum of damages the plaintiff is entitled to receive for breach of the agreement.

[24] The Plaintiff has proved breach of the agreement on the part of the First Defendant. Damages for breach of the contract are available, as of right, to the Plaintiff.

[25] In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, Lord Diplock said at p.849:

“Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract-breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for loss sustained by him in consequence of the breach...”

[26] The basic rule of recovery of compensation in the case of breach of contract is that the non-breaching party is to be put into the position it would have been in had the contract been performed as agreed (See *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha, The Golden Victory* [2007] UKHL 12, [2007] Bus LR 997, [2007] 2 WLR691).

[27] The Plaintiff suffered losses on breach of the contract. The Plaintiff built a six-bedroom house on the promised land expending a sum of approximately \$45,000.00. He had an expectation interest that he has got a piece of land to build a home for him and his family. The house he built was dismantled in ejectment process. He was ejected from the dwelling with his family. As a result, he became homeless. He now lives with his sister-in-law in Lautoka. These are consequence of breach of the contract. I, having taken all into my account, assess the damages at \$25,000.00, which would be reasonable in the circumstances of the case. I would, therefore, award a sum of \$25,000.00 to the Plaintiff for the disappointment suffered through not receiving the promised performance and for losses suffered on breach of the contract. I would not award cost of the proceeding as the Plaintiff appeared through Legal Aid.

The Result

1. There will be judgment in favour of the Plaintiff against the First Defendant in the sum of \$25,000.00.
2. No order as to costs.

M.H. Mohamed Ajmeer 29/5/17
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M.H. Mohamed Ajmeer

JUDGE

At Lautoka
29 May 2017

