

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 63 of 2009

BETWEEN : **PARMOD KUMAR** of Lot 22 Kouvula Place, Nakasi, Nasinu.
PLAINTIFF

AND : **D S NARAYAN LIMITED** of 322 Princess Road, Tamavua, Suva.
FIRST DEFENDANT

AND : **FIJI PUBLIC TRUSTEE CORPORATION LIMITED** as Administrator and Trustee of the Estate of **SAVITA DEVI** under whose name Certificate of Title No. 21334 is registered.
SECOND DEFENDANT

AND : **REGISTRAR OF TITLES** of Suvavou House, Suva.
THIRD DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI**
FOURTH DEFENDANT

Appearance : **Mr. Harper R. For Plaintiff**
No Appearance for 1st Defendant
Mr. Meru E. for the 2nd Defendant
Ms. Ali S. for 3rd and 4th Defendants

Date of Hearing : **17th October, 2017**
Date of Judgment : **21st September, 2018**

JUDGMENT

INTRODUCTION

1. This is an action filed by the Plaintiff seeking judgment against the 1st and 2nd Defendants for specific performance. The Plaintiff also seeks to order that transfer of the property

from 1st to the 2nd Defendant be declared null and void and transfer be reversed. The Plaintiff also seeks a declaration that 3rd and 4th Defendants have committed fraud.

FACTS

2. 4th Defendant is being sued pursuant to Section 12(2) of the State Proceedings Act.
3. 3rd Defendant is the head of the Title's Office in Fiji under the Solicitor General and who amongst other duties is responsible for the registration of all land transfers in Fiji.
4. 2nd Defendant is being sued in her capacity as the executor and administrator of the estate of late Savita Devi who died on 12.12.2002.
5. Lot 22, Nakasi, Nasinu is situated in Certificate of Title No 21334 being Lot 22 on Deposited Plan No 4988 comprising an area of 1 rod 9 perches and 2/10 of perch (the Land). The Plaintiff is residing on the Land, and had paid \$2,000 initially.
6. There is no evidence of sale and purchase agreement being signed between the parties or conditions of the said sale and purchase agreement. 1st Defendant was the registered proprietor of the Land but 1st Defendant had transferred the Land to late Savita Devi in 2003.
7. On 22.08.97 the Plaintiff registered a Caveat on the property being Caveat No 427673.
8. It was also admitted that in October, 2000 the Plaintiff received a letter from solicitors for the 1st Defendant demanding a sum of \$31,052.84 as the remaining sum for the Land.
9. In 2001 the Plaintiff was advised by the 3rd Defendant that there was an application before him to remove the Caveat and in a letter dated 22.11.2001 the Plaintiff's solicitors advised the 3rd Defendant that they would oppose any application to remove the Plaintiff's caveat. The Plaintiff did not seek extension of the caveat, and it was removed.

10. There was an attempt to transfer the property to Savita Devi on 27th October, 1988 but it was not registered and again an application for transfer was made on 3.1.2003 and was referred for correction and re-lodged on 11th April, 2003 with a new number 524253, the said transfer was registered subsequently.
11. The Plaintiff had obtained an interim injunction preventing the 1st Defendant, transferring of the property until further order of the court in HBC 171 of 2003. This order was first issued on 9th May, 2003 for a limited time but subsequently extended till further order of the court.
12. The Plaintiff did not take steps to enter the judgment in the memorial of the title to the Land.
13. There was no injunctive order made by the court against the 3rd Defendant in HBC 171 of 2003 though there was an appearance made.
14. The witness for the 3rd Defendant indicated that the procedure in the registration of instruments and more specifically what had happened in the registration of the transfer of the Land regarding an application made on 11th April, 2002.

ANALYSIS

15. According to the certificate of title the ownership of the Land had transferred to late Savita Devi on 11.4.2003 from the 1st Defendant. This is the date of application for the transfer of the Land made by the 1st Defendant. Since administrative steps would take some time the date of registration should be date of application.
16. There was no injunction order against the 1st Defendant on 11.4.2003 as the injunctive orders were issued only on 9th May, 2003 and even on that day there was no appearance for the 1st Defendant. There was no evidence as to the date of service of the said order.

17. In terms of Section 103 of the Land Transfer Act, 1971 had made special provisions regarding the orders made in regard to the registered title. According to that if an order is not registered in the memorial such order have no effectual operation.
18. Section 103 of the Land Transfer Act, 1971 states as follow;
- "103. Whenever the court has given any judgment, decree or order preferring as proprietor of any estate or interest in land subject to the provisions of this Act, any person other than the registered proprietor thereof, the Registrar on being served with an office copy of such judgment, decree or order, shall enter a memorial thereof in the register and shall state in such memorial the date of such judgment, decree or order, the date and hour of its production to him, and the name and description of the person in whom such judgment, decree or order purports to vest such estate or interest, and such person shall thereupon be deemed to be the registered proprietor of such estate or interest, and unless and until such entry is made, the said judgment, decree or order shall have no effectual operation."* (emphasis added)
19. It is an admitted fact that the injunctive orders obtained by the Plaintiff were not entered in the memorial of the title or any step taken in that regard. There was no evidence of the orders were even served to 3rd Defendant, for the purpose under said provision.
20. There was no order against the Registrar of Title in the said injunctive orders restraining them from any manner though the Registrar was also made a party to the said action.
21. It is an admitted fact that the transferee died on 12.12.2002 and at the time of the lodgment of the transfer the transferee was dead, though the transfer was executed by the transferor on 19.11.2002.
22. In terms of Section 43 of the Land Transfer Act 1971 specifically validate an instrument made in the name of dead person.
23. Section 43 of the Land Transfer Act states as follows;
- "43. If any instrument of title is issued in the name of a person who has previously died, the instrument shall not be void, but the interest of such deceased person in the estate or interest in the land the subject of such*

instrument shall devolve in like manner as if such instrument had been issued immediately prior to his death."(emphasis added)

24. The Registrar of Title cannot ascertain the parties are living at the time of the registration and such a process would also not be a pragmatic thing and would affect the indefeasibility of title, upon registration.(see Frazer v Walker [1967] 1 AC 569 and Bresdvar v Wall (1971) 126 CLR 376)
25. In terms of Section 43 of the Land Transfer Act if an instrument of title is issued to a dead person such title cannot be held void only on the fact the transferor had died. Through a legal fiction, such right to title will devolve to the estate of the deceased.

FRAUD

26. The Plaintiff alleges fraud on the part of the 3rd Defendant in the registration of the transfer to late Savita Devi.
27. It is trite law that in a claim for fraud the statement of claim should specifically plead the particulars of the fraud.
28. Accordingly the in the statement of claim Particulars of the fraud are pleaded from paragraph 26 against the 3rd Defendant.
29. Section 41 of the Land Transfer Act states as follow;
'Any instrument of title or entry , alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.' (emphasis added)
30. The claim for fraud was pleaded only against the Registrar of Title. In the evidence given on behalf of the 3rd Defendant the procedure regarding the registration of title was revealed. The Plaintiff cross-examined the witness for the 3rd Defendant but could not discredit the evidence. There was no fraud in the registration, and 3rd Defendant had applied normal procedure to register the transfer.

31. The transfer was dated 19th November, 2002. So presume transfer of the land was dated before the death of Savita Devi who died on 12.12.2002. The instrument of transfer was submitted subsequently for the registration, on 3rd January 2003 and later after correction on 11th April, 2003 and this would not invalidate the transfer of the Land in terms of Section 41 of Land Transfer Act, 1971.
32. In paragraph 32 of the statement of claim it is stated that the transfer to late Savita Devi was contempt of court orders by the 3rd Defendant.
33. This is not proved on the balance of probability. There was no order made against the 3rd Defendant on 9th May, 2003 in HBC 171 of 2003. The injunctive orders were made in the following manner on 9th May, 2003
- 'Interim injunction against the First Defendant¹ preventing transfer of the property until 23.05.2003 or further order.'*
- ~~The~~ An order was made on 21.7.2003
- 'Interim order issued by this court on 9th May, 2003 restraining the sale of the property situated in Certificate of Title No 21334 is to continue until further order.'*
34. The Plaintiff and or his solicitors had failed to enter injunctive order in the memorial of the certificate of title in terms of Section 103 of the Land Transfer Act and there was no order against the Registrar of Title restraining transferring the title. What was restricted was only a transfer of the Land after said orders and there was no restraint to register the transfer by 3rd Defendant. So the Registrar had processed with the pending application for transfer which is neither illegal nor contempt according to the provisions contained in Sections 43 and 103 of the Land Transfer Act, 1971.
35. Without nullification of the title of late Savita Devi the Plaintiff cannot seek specific performance for transfer of the title to him. There is no evidence that Plaintiff had entered a sale and purchase agreement with late Savita Devi, though the Plaintiff is seeking specific performance against 1st and 2nd Defendants.

¹The 1st Defendant in that case was D.S. Narayan Limited

36. The Plaintiff had paid part payment for the said property but there is admitted fact that solicitors for the 1st Defendant had written to Plaintiff in October, 2000 had demanded a payment of \$31,052.84. There is no proof of any written agreement for sale and purchase produced. The Plaintiff had requested for sale and purchase agreement but he was not provided with such an agreement.
37. The Plaintiff's solicitors had written a letter marked P1 dated 1st November, 2002 but in that letter indicated total payment of \$5,950, up to that time and that was not the full settlement for the Land.
38. The Plaintiff in his evidence said that he had paid \$8,500 to late Savita Devi by a cheque dated 18.7.2000 and this was more than the total sum he claimed to have paid by the letter written on 1.11.2002. It is unlikely such sum would have been omitted, it paid for the Land purchase.
39. There were no receipts issued according to the Plaintiff and there was no proof that the said cheque was encased. If such a substantial amount was paid regarding the Land it must be stated in P1. So the evidence of the Plaintiff cannot be accepted as correct position in the analysis of the evidence. So the Plaintiff's evidence as to the payments cannot be accepted as truthful.
40. So, there is no proof that Plaintiff had paid the amount agreed between the parties for the transfer of the property to him, too. The only indication as to the remaining amount for the sale was the demand by the 1st Defendant for a sum of \$31,052.
41. The Plaintiff was not successful in the claim against 3rd Defendant for fraud to nullify the transfer of title to late Savita Devi. The specific performance was claimed against 1st Defendant, as well as 2nd Defendant. The claim against 2nd Defendant for specific performance cannot sustain as the property had passed to the 2nd Defendant after her death and there was no evidence that she had a contract with Plaintiff for the transfer of the Land. It was the 1st Defendant who was the proprietor of the Land, which had

demanded \$31,052.84 as arrears of sum for the sale of Land. There was no evidence of payment of that amount or any other amount that can be considered as settlement of payment. After death of Savita Devi the Plaintiff was claiming that he had paid some money to her for the transfer of the Land. If the full payment for the land was made why was no request made to transfer the land before Savita Devi's death was not explained. According to P 8 a copy of cheque was enclosed and the cheque was dated 6 years prior to the P8 and there was no evidence of such a payment in earlier letters written to 1st Defendant.

CONCLUSION

42. The Plaintiff's claim for fraud against 3rd Defendant is not proved. 3rd Defendant had acted in its usual manner in the registration of the title to late Savita Devi. As pleaded in the statement of claim, the Plaintiff cannot seek cancellation of property transfer to late Savita Devi on alleged fraud of 3rd Defendant in terms of Section 41 of Land Transfer Act, 1971. Transfer of land to a deceased not void in terms of Section 43 of Land Transfer Act. The date of instrument of transfer was prior to the death of Savita Devi, on 12.12.2002 and it was presented for registration for the first time on 3rd January, 2003, but was returned for correction and resubmitted on 11th April, 2003. So any transfer to a deceased at the time of the transfer was recorded will not be void. The claim for specific performance cannot succeed without the title being reverted to the 1st Defendant.

FINAL ORDERS

- a. The Plaintiffs action is dismissed.
- b. No costs.

Dated at Suva this 21st day of September, 2018



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Justice *Deepthi Amaratunga*
High Court, Suva