

IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 29 OF 2018

BETWEEN: **MOHAMMED AIUB**

Plaintiff

AND: **SUMAN JYOTISHNA DEVI RAJ**

First Defendant

AND: **ARUNESH ASIS CHAND**

Second Defendant

CORAM: **The Hon. Mr. Justice David Alfred**

COUNSEL: **Mr. S. Sharma for the Plaintiff**

Mr. S. Nand, Mr. M. Nand with him, for the Defendants

Date of Hearing: **4 March 2019**

Date of Judgment: **4 March 2019**

JUDGMENT

1. This is not an ex-tempore judgment.
2. The Plaintiff in his Statement of Claim says, inter-alia, as follows:

- (1) The First Defendant entered into an agreement with the Plaintiff circa 19 December 2017 (SPA) whereby the First Defendant agreed to purchase the Plaintiff's property for the consideration of \$25,000. The Second Defendant is the husband of the First.
 - (2) Clause 3 of the SPA provided settlement would be completed within 90 days from its execution.
 - (3) The SPA is without the consent from the iTLTB and in breach of section 12 of the iTLTB Act.
 - (4) The SPA is "to be declared void abnatio" (sic, ab initio).
3. The Defendants in their Statement of Defence, inter-alia say:
- (1) The Plaintiff refused to execute the transfer documents before the consent could be obtained from the iTLTB.
 - (2) In their Counter-claim, the Defendants claim:
 - (a) Specific performance of the SPA.
 - (b) Declaration of constructive trust in favour of the First Defendant.
4. In the Plaintiff's Reply and Defence to the Counter-claim, the Plaintiff says as follows:
- (1) The SPA was drafted by M/S Maqbool & Company and was in breach of section 12 of the iTLTB Act.
 - (2) The SPA was in respect of a property which did not exist at the time of the SPA.
 - (3) The SPA is in breach of s.12 of the Act and cannot be enforced.
5. The hearing commenced with Mr Sharma informing the Court that both Counsel had agreed that the core issue is whether the SPA is enforceable in law in the absence of the iTLTB consent. And second, whether the Plaintiff is entitled to damages for the harvest of watermelons. Mr. M. Nand confirmed the above.
6. Mr. Sharma then submitted that the SPA is not enforceable in law in the absence of the iTLTB's consent. The Defendants admit in para 11 of the Defence that they

harvested \$20,000 worth and in equity the Plaintiff is entitled to damages. The Defendant's Counter-claim falls if the Court finds the SPA unenforceable in law.

7. Mr. S. Nand then submitted. He said the Plaintiff never applied for the iTLTB's consent. If the SPA is not enforceable, then there is no basis for the Plaintiff to make any claim. If, the SPA is not enforceable, the Defendants are not entitled to take the watermelons, then a separate action has to be filed by the Plaintiff. Without the consent of the iTLTB the SPA is not valid.
8. Mr. Sharma in his reply said the Plaintiff ought to be compensated for the watermelons harvested in this action and not in a separate action.
9. At the conclusion of the arguments, I took time for consideration and delivered this judgment in the afternoon.
10. I start by considering whether the SPA is void and invalid ab initio. The pivotal piece of legislation is the iTaukei Land Trust Act 1940, section 12 of which reads as follows:

“12 (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void...”

11. The Board referred to above is established by section 3 (1) of this Act and is called the iTaukei Land Trust Board.

12. I am fortified in the decision I am reaching by the decision of the Supreme Court in *New World Ltd AND Vanualevu Hardware (Fiji) Ltd AND Bashir Khan*: (Civil Petition no. CBV 0004.2016 (21 April 2017) where their Lordships refused to grant special leave to appeal against the judgment of the Court of Appeal that affirmed the decision of the High Court at Labasa that the purported agreement was null and void for want of written consent of the Director of Lands pursuant to section 13 of the State Lands Act.
13. In the Court of Appeal I had stated in para 21 of its judgment that the Director's consent is needed before the lease and has to be in writing. In the instant case the requirement for consent is stated in a similar fashion but without the requirement for it to be in writing. Therefore the result has to be the same.
14. In my opinion the Board's consent should have been first obtained. In the absence of such consent it was not lawful for the Plaintiff to alienate or deal with the land concerned. Thus the issues are answered in the negative.
15. I now turn to the law regarding illegal contracts which is very clear. (see *Tinsley v Milligan* [1994] 1 AC at pp 355 and 363 H.L). A claimant cannot succeed "if the claim is based on an illegal contract," and he also cannot succeed "if to do so would result in him benefitting from his own illegal contract". This applies here to both Plaintiff and Defendant, with equal force.
16. The Court of Appeal decision in *D.B. Waite (Overseas) Ltd v Sidney Leslie Wallath* [1972] (11, 30 October) shows that a party is entitled to the return of his deposit but not to damages in a situation where the agreement could not be made the basis of an action for damages. In the instant case, no deposit has to be returned as none was required to be paid by the First Defendant under the SPA.
17. In concluding, it is inexpedient to refer to the decision of the Court of Appeal in *NLTB v Subramani* [2010] FJCA 9 and the Privy Council decision in: *Chalmers v Pardoe* [1963] 3 A.E.R. 552 both of which are distinguished, as their facts are different from those in the instant case.

18. In the result:

- (i) The Plaintiff's claims for damages are dismissed.
- (ii) The First Defendant's Counter-claim is dismissed.
- (iii) Each party is to pay his/her own costs of these proceedings.

Delivered at Labasa, this 4th day of March, 2019.



DAVID ALFRED
JUDGE
HIGH COURT OF FIJI