

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 27 of 2019.

Pratap Ajay Sen
Plaintiff

v

Rajnesh Sen
Rajneeta Devi Sen
Defendants

Counsel: Mr N. Lajendra for the plaintiff
The first and second defendants in person
Date of hearing: 2nd May, 2019
Date of Judgment: 24th May, 2019

Judgment

1. By originating summons, the plaintiff seeks the following reliefs that:

- (a) *either both the Defendants jointly or one of the Defendants purchase the Plaintiff's one third interest in Methodist Church Lease No. 369338 on a valuation to be obtained mutually.*
- (b) *..in the alternative Methodist Church Lease No. 369338 be put on the market for sale...*
- (c) *there be apportionment of the administrative expenses incurred in the administration of the Estate of Malti Devi and the Defendants jointly are required to reimburse the Plaintiff two thirds of the said expenses, the total cost of administrative expenses being \$9,179.44 and two third equivalent of it being the sum of \$6,119.63.*
- (d) *the sale proceeds of Methodist Church Lease No. 369338 be divided equally amongst the Plaintiff and the Defendants after deduction of expenses as apportioned.*

The application is made pursuant to section 119(2), (3) and (4) of the Property Law Act.

2. The plaintiff, in his affidavit in support states that the first and second defendants are his brother and sister. Ms. Malti Devi, their mother was the registered proprietor of Methodist Church Lease No.369338(the property). She died on 24 April,2004. Letters of Administration were granted to him on 27 April, 2017.
3. He instructed his solicitors to enquire from the defendants whether they are willing to sell their one third shares in the property to him or purchase his one third share. Parshotam Lawyers advised his solicitors that neither intend to sell their shares to him nor interested in purchasing his share or have the property sold. He transferred the property in their names, with each as one third owner .The plaintiff states that he has no objection to the defendants buying his shares on a valuation to be obtained mutually. He obtained the consent of the Methodist Church for sale of the land, as required by clause 3 of the Lease. Consent was provided as follows:
 - a) *That either Mr. Rajinesh Sen and Ms. Rajneeta Devi Sen together or by one of them purchase Mr. Ajay Sen's interest in Methodist Church Lease No. 369338; or*
 - b) *That Methodist Church Lease No. 369338 be put in the market for sale; subject to payment of \$550.00 consent fee..*
4. On 12th February, 2019, the first defendant informed Court that neither he nor the second defendant wish to file affidavits in opposition.

The determination

5. The question for determination is whether the plaintiff's application for sale of the property ought to be granted.
6. Section 119 of the Property Law Act reads as follows:
 - 1) *Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.*

- 2) *The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstances, a sale of the land would be for the benefit of the parties interested.*
- 3) *The court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.*
- 4) *On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.*
- 5) *Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations, provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.*
- 6) *On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters. (emphasis added)*

7. The property is in the names of the plaintiff, the first and second defendants.

8. The present application is governed by section 119(2).

9. Pathik J in *Thomas v Estate of Eliza Miller*, [1996] 42 FLR 268 (12 December 1996) stated that:

section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that "the sale would be for the benefit of the parties concerned".

10. Pathik J cited Middleton J in *Morris v Morris*, (1917) 12 OWN. 80 at p.81 as follows: "Sale as an alternative for partition is quite appropriate when a partition cannot be made."

11. Jessel, M.R in *Gilbert v. Smith*, (1879) 11 Ch.D. 78 at p.81 stated:

The meaning of the Legislature was that when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties.

12. The first and second defendants informed Court that neither of them wish to buy the plaintiff's or other party's share, in terms of section 119(3) of the Property Law Act. Both defendants oppose the sale of the property. The first defendant stated that he lives on the property.
13. No good reason was given to Court by either of the defendants as to why an order for sale should not be made.
14. The plaintiff has obtained consent from the Methodist Church for sale of the land, as required by clause 3 of the Lease.
15. The plaintiff seeks reimbursement of the costs of expenses that he incurred in the administration of the estate of his late mother. The affidavit contains a schedule with particulars of expenses incurred totaling \$9,179.44, and is supported by receipts
16. In my judgment, the plaintiff is entitled to be reimbursed by the first and second defendants, two third of the expenses he incurred in the administration of the estate of Malti Devi, in a sum of \$6,119.63 and the other orders sought.

17. *Orders*

- (i) Methodist Church Lease No. 369338 shall be sold.
- (ii) The plaintiff shall appoint a Valuer to carry out a valuation of the property. The Valuer shall be acceptable to the first and second defendants.
- (iii) Upon receipt of the Valuation Report, the plaintiff shall advertise the property for sale by written tender in two issues of a newspaper in Fiji. The tender shall be opened in the presence of the first and second defendants. The sale shall be to the highest tenderer.
- (iv) On the tender being accepted, all necessary documents including the document of transfer shall forthwith be prepared by the plaintiff's solicitors, who shall forward same to the first and second defendants for their execution and hold same until the purchaser of property is in a position to settle.
- (v) Forthwith upon settlement, the plaintiffs' solicitors shall pay into Court the settlement moneys and furnish an account of disbursements and all costs incurred in the sale of the property with documentary evidence of expenses incurred.
- (vi) The first and second defendants shall pay the plaintiff a sum of \$6,119.63.
- (vii) I make no order as to costs.
- (viii) Liberty to parties to apply generally.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
JUDGE

24th May, 2019