

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 29 of 2019

Vishwa Nadan Naidu

Plaintiff

v

Raghuval Naidu

Defendant

Counsel : Mr V. Mishra for the plaintiff
Mr Suresh Chandra for the defendant
Date of hearing: 5th February,2020
Date of Judgment: 23rd March,2021

Judgment

1. The plaintiff and defendant each own an undivided half share of CT 8159 at 11, Howell Road, Samabula,(the property). I granted by consent, the orders sought by the plaintiff in his originating summons with respect to the sale of the property and removal of the caveat lodged by the defendant.
2. The plaintiff also claims that the defendant has not paid him his share of the rental income from the four flats of the property. The plaintiff seeks that the defendant pay damages for: rental income not paid to him; lodging a caveat against his share of the property; and, breach of duty to the plaintiff, as co-owner. The defendant states that the flats have not been rented out for several years. He occupies one flat. Two are occupied

by a sister of the parties and her son with the consent of the plaintiff. The fourth is not rented.

3. The plaintiff, in his affidavit in support states that he has been the owner of half the property since 15th April,1992. Since he went to Australia in August,1997, he has not received any income from the property. The defendant collects the rentals from the four flats of the property. The defendant filed action against him in HBC 58 of 1999 and in Sydney, claiming that the plaintiff had agreed to transfer his half share to him. The defendant discontinued the proceedings in both cases. The terms of settlement entered into between the parties provided that each of the parties will pay a third party a sum of \$18,000.00. The plaintiff states that the defendant has not removed the caveat he registered on his half share of the property.
4. The defendant, in his affidavit in opposition states that Flat 1 has never been rented to-date. It was given to their younger sister and her family free of rent with the plaintiff's consent. Flat 2 was on rent earlier. The rents were "*mostly collected*" by the plaintiff. He has all the details of the income. Since 2005, Flat 2 is occupied by their younger sister with the plaintiff's consent. She has not been paying rent. The parties agreed that she takes the rent from Flat 3, till 2015. It was also agreed that her son Manish Mohan could live in the flat as caretaker. The plaintiff and he renovated Flat 4. Since 1997, it was never rented. He has fully accounted to the plaintiff for all the rent collected.
5. The defendant further states that he has not kept accounts since 1996, as he believed that the property belonged to him. The plaintiff has to account for rentals received when he was in control of the flats. He withdrew his action against the plaintiff in HBC 58 of 1999. The plaintiff has not complied with the terms of settlement of 18th March,2000. He has a caveatable interest in the property, as the plaintiff agreed to transfer his share to him by agreement of 29th December,1996. The plaintiff has a Receiving Order against him. He cannot file any action. The defendant paid \$50 a month towards his Receiving Order and \$ 18,000.00 to a third party on behalf of the plaintiff.

6. The plaintiff, in his reply states that he did not sign the deed of 29th December,1996. The defendant has used the blank sheets he signed when he,(the plaintiff) migrated in 1997. The terms of settlement signed by the parties on 18th March,2000, finalizes claims made on the property, as stated by the defendant in his affidavit. The defendant agreed to pay him half the rental income. The defendant did not take over his debts. The plaintiff states that he looked after the flats and renovated Flat 4, until he migrated in1997. When he migrated, Flat 1 was rented at \$ 200.00 per month by Ms R. Kaur. Mr Pradeep Kumar rented that Flat 2 at \$ 200.00 per month. Flat 3 was rented by their sister Satya Mani at \$ 200.00 a month. Flat 4 by Rudra Man at \$ 200.00 per month.He authorized the defendant to manage the property. The defendant migrated in 1998.
7. The parties moved to call oral evidence.

The hearing

PW1

8. PW1,(the plaintiff) in evidence in chief said that the defendant instituted proceedings against him in 1999, regarding the property. The defendant withdrew the case. On 18th March,2000, each party agreed to pay their sister Mrs Sita Manoranjan, a sum of \$18,000.00, as she discharged the mortgage over the property. On 25th April,2000, he authorized the defendant to manage the property and deal with tenants.
9. The defendant has the title of the property. Their sister, Subha Latchmi stayed in one flat. PW1 said that she “*must be paying rent*”. The other flat was rented to Rudra Mani. He was unaware of the rent paid by him. The defendant was living in another flat. The plaintiff agreed to their sister’s son Rahul, staying in the fourth flat. He did not pay rent. The plaintiff states that he paid his share of the rates. The defendant did the repairs from the rent without asking him. The defendant paid him \$ 5000.00 and made payments towards his Receiving Order from the rent collected. The Receiving Order against him was removed.

10. In cross-examination, the plaintiff accepted that the defendant helped him to go to Australia. He did not request the defendant to pay his sister \$ 18000.00 on his behalf. He authorized his sister to rent his half share of the 3 bedroomed flat on the ground floor and to use the top flat, No 3 for her own use as long as she liked. He did not give his sister notice to move out of the flat. He later gave her authority to manage the property. He cancelled that authority. He paid city rates of \$ 491.55. He was unaware of the amount collected by the defendant as rent.
11. In re-examination, the plaintiff said that the defendant paid \$ 750 to NBF, in respect of his card. His sister, Subha Latchas been residing in the flat for 10 years, He did not receive any rent from his sister nor her son.

PW2

12. PW2,(*Sat Narayan, Travel Agent*) in evidence in chief said that he knew the defendant for 30 years. He has been to the property 20 to 30 times. The sister of the parties is living in the property. One flat is occupied by the defendant. He operates his office there. He has seen a lot of tenants living in the property.
13. In cross examination, he said that he did not find out the names of the tenants and the rent they paid, as it was not his business. Satya Mani, a sister of the parties told him that she was paying \$ 250 rent monthly.

PW3

14. PW3,(*Ritesh Raj, Real Estate Agent of Harcourts*) said that when he visited the property, all four flats were occupied. The defendant and his sister stayed in the two flats on the top floor. He saw people in the other two flats and assumed they were tenants.

DW1

15. DW1,(*Subha Latchimi*) said that the property belonged to her father. She has been staying in the property since 1983. In 1997, the defendant went to Australia. The plaintiff continued to stay in the property. Both parties authorized her to stay in Flat 3 as long as she wanted. Neither asked her for rent.

16. She has been maintaining the property for 36 years. She was authorized to use flat 3. The flat was rented out to a lady for two years. She was poor and paid \$ 150 to \$ 200 a month. The witness said that she used the rent collected from the lady for maintenance of the property. In cross examination, DW1 said that she did not give that rent to the defendant. She denied that the property was rented for 2 years.

DW2

17. DW2,(*the defendant*) in evidence in chief said that he assisted the plaintiff to go to Australia. The property was transferred to the parties after the death of their father in 1990. When he,(*the defendant*) initially went to Australia, the plaintiff rented out the property. Their sister looked after the property. The plaintiff directed families from Australia to live in the property. Rudra Nath was his tenant.
18. The plaintiff gave him absolute authority in writing to manage the property and deal with tenants, but he did not exercise that authority. He paid \$650 to the Official Receiver on behalf of the plaintiff. He produced his accounts. From 1997, he did not receive any income from the property. He did not manage Flat 2 and 4 after 2000. The plaintiff said that two flats belonged to him. Prior to 2000, the plaintiff collected the rents. DW2 said that he was not in Fiji. He was advised to lodge a caveat, as he had given an unlimited guarantee on the mortgage of the property. He upgraded the property.
19. In cross examination, DW2 said that he lodged the caveat, as the plaintiff owed him money. The caveat refers to a Deed of 29 December, 1996. The terms of settlement provides that each of the parties were to pay \$18,000.00 to their sister Mrs Sita Manoranjan. He paid his sister \$18,000.00 on behalf of the plaintiff. It was put to DW2 that he had no authority to make a payment on behalf of the plaintiff. The terms of settlement entered between the parties did not require him to make that payment. It was also put to him that when the case was settled, he should have removed the caveat. He did not remove the caveat, as the plaintiff did not pay his sister \$ 18,000.00. It transpired that the defendant received rents from tenants by the name of Harry Nath, and Satya Mani from 1997 to 1999, as depicted in his accounts.

20. The defendant, in re- examination said that he accounted to the plaintiff for rents received from Harry Nath, and Satya Mani.

The determination

21. I will first deal with the defendant's contention that the plaintiff's action cannot be maintained, as he has a Receiving Order against him.

22. The defendant relies on a letter from the Official Receiver of 5th January,1999, which states that the Receiving Order against the defendant is still current. This summons was filed on 25th January, 2019.

23. The plaintiff states that the Receiving Order has been rescinded by the Magistrates Court. The Order of the Learned Magistrate of 4th April,2019, states that the Receiving Order should not have been made at all and there were defects in the bankruptcy petition.

24. In any event, the defendant's contention is unacceptable, as he consented to the other orders sought in this summons. It is an accepted principle of law that a party cannot approbate and reprobate.

25. In ***Express News Papers plc v News (UK) Ltd & Others*** [1990] 3 All ER 376 at pgs.383 to 384 Lord Nicholas Browne – Wilkinson V-C said:

*There is a principle of general application that it is not possible to **approbate** and **reprobate** . That means you are not allowed to blow hot and cold in the attitude that you adopt. **A man cannot adopt two inconsistent attitudes towards another: he must elect between them, and having elected to adopt one stance, cannot be permitted thereafter to go back and adopt an inconsistent stance.**(emphasis added)*

26. The plaintiff claims his share of the rental of the four flats of the property from August, 1997 .

27. The evidence reveals that the defendant was occupying one flat and the parties had agreed that their sister and her son occupy two flats without paying rent. There is conflicting evidence as to whether the fourth flat was rented.

28. PW1, in his evidence said that his sister must be paying rent. The defendant was living in one flat. "*Rudra Mani*" was in another.
29. The defendant states that "*Rudra Mani*" was the plaintiff's tenant.
30. PW2 and PW3 said that they saw tenants in the property, but neither were aware of the rent they paid.
31. DW1 said that the parties authorized her to stay in Flat 3 as long as she wanted. Neither asked her for rent. One of the flats was leased by her to a poor old lady. She used the rent for the maintenance of the property.
32. The defendant states that he did not receive any income from the property from 1997.
33. In my judgment, the plaintiff has failed to establish the rents received by the defendant. He was unaware of the rent collected by the defendant.
34. On 28th August, 2019, the plaintiff filed a summons to seek to adduce the affidavit of Priyanka Prasad and its annexures as evidence. Her affidavit in support attaches a valuation of the rental that could be obtained. Priyanka Prasad, in the introductory paragraph of her affidavit states that she "*sometimes assist Mr Vipul Mishra and Mr Ramesh Prakash regarding their legal cases*". Priyanka Prasad was not called as a witness.
35. The summons and affidavit of Priyanka Prasad is unacceptable and declined.
36. In my judgment, the plaintiff was required to establish the actual rents received by the defendant.
37. The defendant argues that he paid the plaintiff's debt of \$ 18,000.00. The plaintiff disputes that any payment was made on his behalf.
38. In my view, the alleged debt does not arise for consideration. The defendant has not filed a cross claim.

39. The plaintiff claims damages from the defendant for lodging a caveat against his share of the property.
40. The defendant, in his affidavit in opposition states that states that he has a caveatable interest in the property, as the plaintiff agreed to transfer his share to him by the agreement of 29th December,1996, attached to his affidavit in reply.
41. The plaintiff denies that he entered into that agreement.
42. The defendant, in evidence in chief stated that he gave an unlimited guarantee to ANZ Bank on the mortgage taken over the property. Since the plaintiff made no payment towards the mortgage, he was advised to lodge a caveat.
43. In my judgment, the defendant has not established that there was “ *reasonable cause* “ for him to lodge the caveat within the meaning of section 114 of the Land Transfer Act.
44. Section 114 provides that:
- Any person lodging any caveat with the Registrar without reasonable cause shall be liable to make, to any person who may have sustained damage thereby, such compensation as the court shall order and such compensation may be recovered by proceedings at law if the caveator has withdrawn such caveat and no proceedings have been taken by the caveatee as herein provided but, if proceedings have been taken by the caveatee, then such compensation shall be decided by the court acting in the same proceedings.* (emphasis added)
45. In ***Ram v Fiji Development Bank*** [2004] FJHC 399; HBC0323.2002L (6 April 2004) as cited by counsel for the plaintiff, the Court found that the plaintiff was entitled to redeem his property which was mortgaged to the defendant, as he had paid all the monies due. The evidence established that the plaintiff could not obtain medical treatment, as he could not raise funds without his title. The defendant had failed to release his Certificate of Title for three years.

46. In the instant case, the plaintiff has not established that he has sustained damages, as a result of the lodgment of the caveat.

47. Finally, the plaintiff claims that the defendant is in breach of duty as a co-owner.

48. The plaintiff has not provided particulars of the alleged breach of duty as a co-owner.

49. The plaintiff's claims for damages fails.

50. **Orders**

- a. The plaintiff's claim is declined.
- b. I make no order as to costs.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
JUDGE
23rd March, 2021