

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No HBC 237 of 2015

BETWEEN

INTIAZ KHAN and REHANA KHAN of Fletcher Road, Vatuwaqa, Suva,
Company Director and Cooperate Sales Executive respectively.

PLAINTIFF

AND

AKESH ANAND SWAMY of 17 Brighton Street, Greystanes, New South Wales, Australia.

DEFENDANT

Counsel	-	Ms. M. Chowdhury with Mr. S. Kumar for Plaintiffs Mr. I. Fa for Defendant
Date of Hearing	-	11 th July 2023
Written Submissions	-	04 th August 2023
Judgment delivered	-	25 th August 2023

JUDGMENT

[1] The Plaintiffs filed this Writ of Summons and Statement of Claim against the Defendant claiming the following;

1. Specific performance of the Sale and Purchase Agreement dated 11 March 2015.
2. A declaration that the Defendant is in breach of the Sale and Purchase Agreement dated 11 March 2015.
3. A declaration that the Sale and Purchase Agreement dated 11 March 2015 has been wrongfully rescinded/terminated by the Defendant.
4. An order that the Defendant do all such acts and execute all such documents as may be necessary to transfer the said property to the Plaintiff or alternatively, the Chief Registrar of the High Court of Fiji be appointed to convey in the name of the Defendant herein to the Plaintiff the property legally described as Certificate of Title No.6913 being Lot 4 on Deposit Plan No. 228, consisting an area of 20.5 perches and subject of the Sale and Purchase Agreement dated 11 March 2015, for all the estate, right, title and interest of the Defendant therein and may be directed to execute the conveyance in favour of the Plaintiff named herein.
5. Damages for breach of contract in addition to specific performance.
6. All necessary and consequential accounts, directions and inquiries.
7. Interest pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act on the amount found to be due to the Plaintiff at such rate and for such period as the Court shall think fit.
8. Costs on full solicitor client indemnity basis.
9. Further or other relief.

- [2] In the Statement of Claim the Plaintiffs state that pursuant to a written agreement dated 11 March 2015, the Defendant agreed to sell and Plaintiffs agreed to purchase the land subjected to this action for a sum of \$400,000. The agreement was subjected to a deposit of \$10,000 to be paid by the Plaintiffs to the Defendant's solicitors trust account upon execution of the said agreement and the balance purchase price of \$390,000 was to be paid on the date of settlement of transaction. Upon execution of the said agreement the Plaintiffs on 11 March 2015 paid the deposit of \$10,000 to the Defendant's solicitors K.S. Law.
- [3] On or about 12 March 2015 the Defendant informed the Plaintiffs that he was in dire need of immediate funds and enquired with Plaintiffs whether they were in a position to provide further deposit towards the purchase price.
- [4] In reliance upon Defendant's representations the Plaintiffs agreed to pay the Defendant a further sum of \$30,000 which was paid on 12 March 2015 by way of a cash payment. The Plaintiffs intended that payment of \$30,000 was to be applied towards reduction of the balance purchase price payable by them under the agreement. Plaintiffs state that thereafter they took all necessary steps to complete the sale of the said property. However in breach of the agreement the Defendant through his solicitor on 11 May 2015 sought to rescind the agreement. Despite repeated requests and demands by the Plaintiffs, the Defendant did not complete the sale of the property.
- [5] The Defendant in his statement of defence states that the agreement in question was an illegal agreement as it encompassed the payment of \$30,000 to the Defendant which was not disclosed in the terms and conditions of the agreement. Upon obtaining legal advice the Defendant proceeded to rescind the agreement and offered to refund the Plaintiffs the monies paid contrary to the agreement for the purchase of the land. Defendant denies a payment of \$10,000 made pursuant to the agreement 11 March 2015. Defendant states that the Plaintiffs conducted its affairs purchasing the property outside the agreement and as such he had no alternative but to rescind the agreement. The Defendant strongly opposes specific performance.
- [6] The only agreed facts at the pre-trial conference were Plaintiffs employment status and that the Defendant was the registered proprietor of the subject land described in Certificate of Title No. 6913.
- [7] At the trial the first named Plaintiff gave evidence and submitted 9 documents. During the Defendant's case the Defendant testified and submitted 17 documents. Neither party had any objection to any document produced during the trial.

- [8] The first named Plaintiff (hereinafter mentioned as Plaintiff) during his evidence stated that he first came to know about the subject land relating to the Certificate of Title No. 6913 through a billboard erected on the land by a real-estate agent. This was in year 2014. Plaintiff managed to contact the Defendant through the real estate agent to enter into an agreement to purchase the land for a consideration of \$370,000. Plaintiff states that he paid \$10,000 deposit to the real estate agent. However the settlement did not take place under this agreement.
- [9] Several months later with a renewed interest the Plaintiff entered into another fresh Sale and Purchase Agreement with the Defendant for a revised total sum of \$400,000. Plaintiff states that the agreement was signed by both parties on 11.03.2023 at the office of Neel Shivam Lawyers. The Plaintiff paid a deposit sum of \$10,000 through a cheque payment to the Defendant's solicitors K.S Law. The Plaintiff instructed his lawyers to do the necessary paperwork.
- [10] Plaintiff states that after signing the agreement on the 11th another cash payment of \$30,000 was paid to the Defendant at his request as he was in an urgent need for cash. After this payment the transfer document has been executed and the Plaintiff says that he paid \$12,000 as stamp duty to the Commissioner of Stamp Duties.
- [11] On 11.05.2015 the Plaintiff received a letter written by K.S Law through his lawyers. In this letter Mr. Kunal Singh as the solicitor for the Defendant states that making of a side deal which does not reflect in the initial agreement and making a cash payment of \$30,000 to his client was intended to defraud the government by avoid paying additional stamp duty. Therefore the Defendant wishes to rescind the agreement as it is illegal and *void ab initio*.
- [12] K.S Law wrote another letter to Neel Shivam Lawyers on 13.07.2015 with an enclosed cheque for \$40,000. Plaintiff states that they did not accept the money as he was desperate to acquire the land due to the high rental payments he had been making for his business premises. Plaintiff states he was surprised by this attitude of the Defendant.
- [13] During cross examination the Plaintiff stated that he did not know the Defendant before and came to know through the real estate agent. It was his intention to rezone the property for commercial purposes and this was not something proposed to him by the Defendant. The 2014 agreement was not completed before the settlement period. He states that he did not apply for specific performance of 2014 agreement. The learned counsel for Defendant suggested that the reason for not completing the 2014 agreement was because the Plaintiff was waiting for approvals on his applications for rezoning and building permit.

- [14] Plaintiff's attention was also taken into an initial draft of the 11.03.2014 agreement where it states the consideration sum was \$430,000 and the Plaintiff has to pay a deposit of \$43,000 upon execution of the agreement. Plaintiff stated that though he was aware of this draft he does not know the difference between this draft and the agreement signed as it was not explained to him point by point. All what he was wear of was the price hike. The Plaintiff stated that these changes were made on the day of the signing the agreement at Plaintiff's lawyer's office. The Plaintiff agreed that \$30,000 payment to the Defendant is not in the agreement. This payment was not received as well.
- [15] The Plaintiff further stated that he does not have a right to buy this land and all initiatives were made on his own will and not prompted by the Defendant.
- [16] Plaintiff did not call any other witnesses during the trial.
- [17] Defendant while giving evidence stated that the first agreement with the Plaintiff in 2014 was not completed and therefore that became null and void. The deposit of \$10,000 taken by the real estate agent under this agreement has been refunded. The Defendant states that the Plaintiff was waiting for necessary approvals from city council and he did not fulfil the agreement due to the uncertainty of obtaining the said approvals. Later the Plaintiff became interested again on buying the property. Defendant states this was due to the approvals he received. The second Sales and Purchase Agreement was drafted for \$430,000 as the consideration sum with an initial 10% deposit payment. This draft agreement had been changed by the Plaintiff's solicitors to reflect the consideration amount to \$400,000 and the deposit to \$10,000. This was communicated to the Defendant by way of an email on 03.03.2015. The Defendant states that Plaintiff wanted him to come down to Fiji for signing, hence he travelled from Australia to Fiji around the same time.
- [18] According to the Defendant the agreement was signed on 11.03.2015 at Neel Shivam Lawyers office. The Defendant states that he did not have any independent legal advice at the time of signing the agreement. He was not given the option to take the agreement to his lawyer for further legal advice. The Defendant denies that he requested for \$30,000 cash payment. It was given to him after signing the agreement in order to cater for Capital Gains Tax. This amount was not deducted from the balance amount of \$390,000. He kept this money for couple of weeks and met his solicitor to inform him the sequence of events. The Defendant was told by his solicitor that the \$30,000 payment was not proper and immediately he deposited that into his trust account. Subsequently Mr. Kunal Singh, solicitor acting for the Defendant wrote to Plaintiff's solicitors to rescind the agreement.
- [19] The Defendant further states that subsequently he was made to understand that payment of \$30,000 in cash and not reflecting the same in the agreement was done by the Plaintiff

to pay less stamp duty. The Defendant states that the Plaintiff did not show any evidence that he could perform the agreement at short notice.

[20] During cross examination the Defendant did not change his stance. He said that he wanted to seek legal advice before signing and it did not eventuate. He again denied requesting a cash payment of \$30,000 and said he had sufficient means. However it was offered by the Plaintiff. The Defendant states that there was no one else wanted to buy this land at the time of the transaction he had with the Plaintiff.

[21] I now move on to consider legal aspects of this action.

[22] The only remedy which the common law afforded for breach of contract was an award of damages. In equity however the due performance of the contract itself was in many cases enforced upon the ground of inadequacy of the damages recoverable for the breach. [Snell on Equity]. In **Hutton v. Watling** [1948] Ch 26 at 36 it was held that the jurisdiction in specific performance is based on the inadequacy of the remedy at law. Therefore the general principle is that equity will not interfere where damages at law will give a party the full compensation to which he is entitled and will put him in a position as beneficial to him as if the agreement had been specifically performed.

[23] The most common case where the Court specifically enforces a contract is sale and purchase of land or granting of a lease. However specific performance is a discretionary remedy. The Court will not order specific performance where damages would fully compensate a Plaintiff. Even if the damages as a remedy is not sufficient, there are instances where the Court would not order specific performance. However this does not mean granting of specific performance done arbitrarily. The discretion must be exercised judicially.

[24] The Court of Appeal in **Reddy v. Devi** [2017] ABU0026 of 2013 discussed some applicable criteria in a case of specific performance in the following manner;

(i) A purchaser (such as the Appellant in the instant case) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to him. (Vide: Fry, Specific Performance, paragraph 62). The 1st Respondent as the vendor could have repudiated the agreement only on the basis of Clause 12 of the Agreement. Consequently, the 1st Respondent was in breach of the Agreement when he refused to perform the bargain or dealing when the Appellant had been in the process of cultivating the farm for sugar cane, being his side of the bargain.

(ii) In those circumstances, damages could not have been a satisfactory substitute for specific performance.

(iii) A ground on which specific performance might be refused is where the granting of an order for specific performance could cause severe hardship to the party against whom the same is sought. (Vide: **Denne v. Light** [1857] S.D.M & G.774) and **Sullivan v. Henderson** [1973] I.W.L.R. 333). It is to be noted that, the 1st Respondent did not even address this Court on that aspect.

(iv) other grounds, on which Specific Performance might be refused are:-

Unfair Means

Where a contract has been obtained by unfair means springing an element of surprise by the purchaser on the vendor: (**Walters v. Morgan** (1861) 3 D. f. & j. 7/8 cf: **Quadrant Visual Communications Ltd. V. Hutchison Telephone (UK) Ltd** [1993] B.C.L.C.442 and Contra: **Mount Fond v. Scott** [1975] Ch 258.

Lack of or inadequacy of Consideration

Where there has been a lack of consideration in that where only a gratuitous promise had been involved (Vide: **Jeffreys v. Jeffreys** [1841] EngR 337; [1841] Cr & Ph. 138) or where there has been an inadequacy of consideration that shocks the conscience amounting to conclusive and decisive evidence of fraud (Vide: **Coles v. Trecothick** [1804] EngR 88; [1804] 9 Ves 234.

Unmeritorious Conduct

Unmeritorious conduct on the part of a claimant for specific performance is another ground on which specific performance might be refused. (Vide: **Gregory v. Wilson** [1852] EngR 383; [1851] 9 Hare 683).

Impossibility

Specific performance will not be ordered against a person who has agreed to sell land which he does not own because "the court does not compel a person to do what is impossible" (Vide: **Forrer. Nash** [1856] 35 Beau 165,171

Vagueness

An agreement may be couched in vague terms that it cannot be enforced specifically. (Vide: **Waring & Gillow v. Thompson** [1912] 29 T.L.R. 154 and **Tito v. Waddell (No.2)** [1977] Ch. 106 at 322-328.

Unilateral Mistake, Misrepresentation and Delay

These are the other grounds on which an order for specific performance may be refused. (See: **Chilty on Contracts**, Vol 1 29th ED. (2004) P 1504.)

- [25] In analysing the evidence it is clear to me that the agreed purchase price of the land was \$430,000. Plaintiff states that he does not know the legal basis for the changes in the draft agreement and the signed agreement on 11.03.2015. His position is that \$30,000 was paid on request to cater hardships faced by the Defendant. On the other hand the Defendant states that he did not have any difficulty with cash. However this payment of \$30,000 was offered to him at the place where they executed the agreement. Plaintiff did not obtain any receipt for this. This payment did not reflect in the Sale and Purchase Agreement. Only \$10,000 deposit was included. Therefore it is clear that the payment of \$30,000 was done as a part of initial agreement. However it was removed from the signed agreement.
- [26] The agreement Plaintiff seeks specific performance was changed before signing. Though the draft had been emailed to the Defendant, it is clear from the Defendant's evidence that he had to travel from Australia to Fiji around the same time he received the draft. Defendant specifically mentioned that he did not have any legal advice at the time of the execution of the agreement. The agreement was signed at the Plaintiff's lawyer's office and the solicitor acted for both parties. Same solicitor acting for both parties may seem alright when there is no dispute or disagreement between the parties. But in this case Plaintiff states that the earlier agreed document was changed on the day of the signing.
- [27] During the trial there was no suggestion made against Plaintiff's honesty, however it appears to me that Plaintiff's conduct afforded none or or very little protective assistance to the Defendant before entering into the agreement. Plaintiff without rushing into signing, should have allowed the Defendant to take independent legal advice on the changes made to the document. Unfortunately that did not happen. Therefore I am of the view that the Defendant was at a disadvantages position at the time of signing the agreement as he was not completely explained on the basis for \$30,000 payment.
- [28] Further to the above position, the Defendant states that reason for \$30,000 payment by the Plaintiff was to take advantage from making a lesser Stamp Duty to the Government. There was no evidence presented during the trail on the difference between applicable stamp duties for the purchase price of \$430,000 and \$400,000. However it was clear that the Plaintiff was liable to pay stamp duty on the purchase price. In fact he did make a payment of \$12,000 as stamp duty. On the other hand it came to light that the Defendant

was also liable for payment of Capital Gains Tax. Therefore in both instances the purchase price on the instrument plays an important role.

- [29] In a case of specific performance the Chancery Division in **Post v. Marsh** [1880] 16 Ch.D 395 specific performance or damages for breach of contract refused where the contract is tainted with fraud. Plaintiff in this case claimed specific performance of an agreement for the composition of a literary work by the Defendant. The Plaintiffs alleged that the Defendant had agreed that his name should not appear on the title page of the work as the author of it. The Defendant alleged that it was part of the agreement that his name should so appear. The Plaintiffs proposed to publish the book with a title page stating that it was edited by 'K' and assisted by 'M' (the Defendant). It was held that the proposed title page would be fraud on the public, and on this ground the Plaintiffs were disentitled to relief.
- [30] What is important here is whether or not there was an actual difference in the payment of taxes due to the reduced face value, the Defendant had no agreement to change the price on the agreement document. Thus the document itself does not reflect the party's correct intentions with regards to the agreed consideration. Presentation of such document to the entities like Commissioner for Stamp Duties would in my view amounts to fraud or misrepresentation.
- [31] But even if there is no fraud or misrepresentation sufficient to justify the rescission of the contract, the Court may still refuse equitable remedy of specific performance if the conduct of the Plaintiff has been tricky or unfair [Snell on Equity].
- [32] Be that as it may, I will now consider two other important clauses in the agreement. Clause 2 (ii) states 'the Purchaser shall pay the balance Purchase Price in the sum of \$390,000.00 [Three Hundred Ninety Thousand Dollars] to the Vendor by Bank Cheque on the date of the settlement'. Clause 5 states 'The date of settlement shall be within sixty (60) days or such other date as may be mutually agreed in writing between the parties. Settlement shall be at the Registrar of Titles Office, Suva'.
- [33] Plaintiff in his evidence stated that after entering in to the agreement with the Defendant, he has left other paper work for his lawyers to complete. Somehow the Plaintiff did not explain why he didn't settle the balance payment to the Defendant within the stipulated time frame of 60 days. It appears to me that 60 days from 11.03.2015 falls on 10.05.2015. There was no evidence led in the trial to establish that parties mutually agreed for an extension of time for the settlement.

- [34] It is imperative for a Plaintiff who seeks specific performance to establish that he has performed or has been ready to perform all terms and conditions of an agreement. The only exception to this would be any trivial conditions where there was no performance on it. Here the Plaintiff has failed to perform one of the main conditions he agreed as the purchaser of the property. That is to pay the due consideration within the agreed period of time. This I am unable to consider as a mere oversight of the Plaintiff.
- [35] In my view when the Plaintiff fails to perform a vital condition of the agreement within the stipulated time agreed, lapse of time would mean Plaintiff's failure to perform his part of the agreement. Thus it becomes a defence for the Defendant in this action for specific performance.
- [36] It is to be noted that the Defendant's letter through his solicitors to the Plaintiff's solicitors was written on 11.05.2015, a day after the lapse of settlement period. Which in my view Defendant was entitled to do. Therefore I am unable to draw any adverse conclusion on Defendant's decision to rescind the agreement he signed with Plaintiff.
- [37] In summary, at first the agreement was executed in a disadvantages position to the Defendant where he did not have independent legal advice. Secondly the agreement itself did not reflect the proper consideration, hence the document is misleading. Thirdly the Plaintiff has not established his readiness in a satisfactory manner to the Court to perform his obligations of the agreement.
- [38] For the foregoing reasons I am of the view that the Plaintiffs fail in their action for specific performance. Due to the fraudulent nature of the agreement the Court declines to have further consideration on awarding any damages.
- [39] The Court makes following orders.

ORDERS

1. The Plaintiff's claim hereby dismissed.
2. Plaintiffs to pay \$1000 (one thousand dollars in total) as cost to the Defendant within 14 days of the judgment.



A handwritten signature in blue ink, appearing to be "Yohan Liyanage", written over a horizontal line.

Yohan Liyanage

JUDGE

At Suva on 25th August 2023