

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 15 of 1965

Between:

FONG LEE

Plaintiff-Appellant

- and -

- 1. MITLAL s/o Samalia
- 2. RAM KISSUN s/o Ori

Defendant-Respondent
Third Party-
Respondent

JUDGMENT OF HAMMETT, J.A.

In 1957 the defendant, Mitlal, the registered proprietor of two leasehold titles known as Allotment Nos. 7 and 8 of section 3 in Raki Raki township, under Lease No. 21087, sold Allotment No. 7 to the third party, Ram Kissun.

The Agreement for sale, dated 20th February 1957 under which he sold Allotment No. 7, contained the following clause concerning Allotment No. 8:

"7. The vendor (i.e. Mitlal) undertakes not to sell allotment No. 8 being part of lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser (i.e. Ram Kissun) and shall give the purchaser right to first refusal."

In 1963 Mitlal entered into a formal written contract to sell Allotment No. 8 to the plaintiff, Fong Lee.

In the proceedings in the Court below Fong Lee who had had no notice of this clause in the 1957 Agreement, before he entered into his contract with Mitlal in 1963, sought an order against Mitlal for specific performance of his 1963 contract whilst Ram Kissun, the third party, sought to enforce his rights under Clause 7 of the 1957 Agreement.

The learned trial Judge held that Ram Kissun was entitled to an injunction restraining Mitlal from completing his contract to sell the property to Fong Lee until he, Ram Kissun, had been given the opportunity of buying the property from Mitlal, within three months, at the same price that Mitlal had agreed to sell it to Fong Lee.

Against this decision Fong Lee has appealed on a number of grounds of which the material part of ground 5 reads as follows:

"5. That Clause 7 contained in agreement dated 20th February 1957 ... was uncertain in terms of ascertaining the price at which the sale was to be made ... and not having defined how the price was to be ascertained the purported agreement was incomplete and unenforceable...."

This ground of appeal complains that the agreement contained in Clause 7 is void for uncertainty. This was one of the issues raised in the Court below as the records of counsels' addresses clearly show.

As was pointed out by counsel for Ram Kissun in his address in the Court below, Clause 7 purports to impose two obligations on Mitlal, namely:

- Firstly - an undertaking by Mitlal not to sell Allotment No. 8 to anyone other than Ram Kissun; and
- Secondly - to give Ram Kissun the "right to first refusal".

It was the contention of the appellant, Fong Lee, in this Court and in the Court below that Clause 7 contains neither the price at which the land was to be sold to Ram Kissun nor any agreed method by which it could be ascertained.

In the sixth Edition of Fry on "Specific Performance" at page 164 appears the following passage:

"In all sales it is evident that price is an essential ingredient, and that where this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement."

In Re Kharashkoma Exploring and Prospecting Syndicate (1897) 2 Ch. at page 464, Lindley, L.J. said:

"Now, what is meant by "a contract in writing"? I take it that nothing, whether it is under seal or not, answers that description which does not shew the consideration in writing; and if you have a document in writing which does not shew in writing what is the consideration, it is not a contract at all in writing - in other words, a document which only discloses part of a contract is not a contract in writing."

and Chitty, L.J. at p.467 says:

"A contract in writing must express as part of the contract the consideration."

On these authorities it is clear that Clause 7 in the 1957 Agreement, in so far as it does not express the consideration, is defective as a contract, unless the price was rendered ascertainable by its own terms or the Court implies a term in the contract to render the price ascertainable.

It was contended on behalf of Ram Kissun that by his being given the "right of first refusal" the consideration could be ascertained by finding out what a willing and able purchaser would be prepared to offer for the property. I concede that this may possibly be so but not that it is necessarily so. On the other hand since Clause 7 also contains an undertaking not to sell Allotment No. 8 to anyone other than Ram Kissun, it is difficult to know how one could ascertain what a willing and able purchaser, other than Ram Kissun, would be willing to pay for the property if in fact such a person knew the property could not be sold to him. The only way in which the price at which the property should be sold to Ram Kissun might be ascertained, therefore, would be by getting an offer from a person who did not know that, in fact, whatever offer he made, the property could not be sold to him. But even so, such a proposition does not take into account the fact that there might well be other persons who would have made an offer for the property but did not do so because they knew of the restriction imposed on its sale, and that whatever they offered they could not buy the property. It appears to me that the first part of Clause 7, i.e. the undertaking not to sell the property to anyone other than Ram Kissun, makes it impossible to ascertain the price at which Ram Kissun should be allowed to exercise any right of first refusal ostensibly given by the second part of Clause 7. Clause 7 appears to me to contain provisions which make it impossible to ascertain the price at which any sale of the property to Ram Kissun ought to take place.

In Fry on "Specific Performance" at pp.164 and 165 appears the following passage:

"Accordingly where A. agreed to sell an estate to B. for £1,500 less than any other purchaser would give, the contract was held void: for if the estate was not to be sold to any other purchaser than B, it was impossible to know what such a purchaser would give for it."
(Bromley v. Jefferies, 2 Vern. 415).

This appears to me to be the very position in which the parties found themselves in this case.

The two provisions of Clause 7 are mutually contradictory. The price at which Ram Kissun may buy the property was neither agreed nor stated in Clause 7 and no means of ascertaining it are expressly provided. The clause could therefore only be saved from being void for uncertainty if from its own terms the Court can and ought, by implication, to read into the contract a method by which the price at which Ram Kissun may buy the property can be ascertained.

In Hamlyn v. Wood (1891) 2 Q.B. at page 494, Kay, L.J. said:

"The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."

These words were quoted with approval by Lord Atkinson in the judgment of the Privy Council in Douglas v. Baynes (1908) A.C. at page 482.

In the particular circumstances of this case I do not think the Court ought to or can properly imply any term in Clause 7 whereby the price at which any sale of the property to Ram Kissun should take place. For these reasons I am of the opinion that the purported agreement in Clause 7 is void for uncertainty.

I would therefore allow the appeal. I concur with the resulting orders as to costs and otherwise that should follow the allowance of this appeal which are set out in detail in the judgment of the learned Vice President of the Court.

C.J. HAMMETT

JUDGE OF APPEAL.

SUVA,

14th January, 1966.