

IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO. 16 OF 1990
(High Court Action No. 1035 of 1983)

BETWEEN

GULAM ALI DIN

Appellant

and

THE ATTORNEY GENERAL OF FIJI
AND T.W. VESIKULA

Respondents

Mr. V. Parmanandam and S.J. Stanton for the Appellant
Mr. G. E. Leung for the First Respondent
Mr. G. P. Shankar for the Second Respondent

Date of hearing : 10th May, 1993
Date of Delivery of Judgment : 20th August, 1993

JUDGMENT OF THE COURT

The Plaintiff, Appellant, commenced this action on 17th November, 1983 naming as defendant the Attorney General. The action related to the purchase by the State of certain land owned by the plaintiff, the purchase being for the purpose of improvements to the Queens Road at Navutu. An agreement called a "Sale and Purchase Agreement" also referred to as a "Sale Note", was executed by the plaintiff and the Director of Lands or his representative on 24th August, 1981. It provided for the ascertainment of the price to be paid for the land as follows (record p.6):

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"The consideration, hereafter called the purchase price, shall be such sum being the true value thereof at the Date of this Agreement as shall be agreed or if in case of dispute such purchase price shall be determined by an agreed arbitrator or any court having jurisdiction to determine the same."

The plaintiff thereafter engaged a firm of valuers to value the land for the purposes of the Sale and Purchase Agreement; the second defendant was the person in that firm who conducted the valuation and acted for the plaintiff in connection with the purchase. On 4th October 1982 he prepared a report wherein he made two valuations, one as at 24th August 1981 for \$28,000 and one as at 30th September 1982 for \$30,700. On 10th November 1983 the plaintiff executed what has been termed a Price Agreement Form whereby he agreed to a sum of \$18,500 as the purchase price for the purpose of the Sale and Purchase Agreement. Various negotiations and correspondence between the parties had occurred in the period since August 1981 and leading up to the signing by him of the price agreement.

The plaintiff commenced proceedings against the Attorney-General as sole defendant on 17th November, 1983. The statement of claim disclosed no cause of action whatsoever. However, it sought a declaration that the Sale and Purchase Agreement was illegal, void and unenforceable. Perhaps this explains why the defendant filed a defence and a counter claim on 6th January 1984. The latter may have been based on the fact that about 24th November 1983 the defendant had tendered a cheque for \$18,500 to the plaintiff but the plaintiff refused to accept it; the counter-claim alleged a breach of the agreement and sought orders

for specific performance and damages.

On about 13th March 1987 the plaintiff filed an amended statement of claim which joined the valuer whom the plaintiff had engaged as a second defendant. According to the learned Judge, this statement of claim alleged three causes of action. The first was an assertion that the acquisition was one that fell within the scope of s.8 of the Constitution as it then existed, that is to say the 1970 Constitution (the matter is now dealt with in s.9 of the 1990 Constitution), and that as there had been no compliance with the provisions of the section the agreement for sale and purchase was null and void.

A second assertion was that the plaintiff was induced to enter into the agreement as the result of duress, the duress alleged being that of the second defendant, the valuer. The third claim is somewhat obscure. The trial Judge referred to it thus (record p.53):

"Thirdly the Plaintiff alleges that the amount of compensation was fixed without taking into account the value of timber and roadage material situated on the area in question."

The statement of claim makes no reference to this. It does allege negligence on the part of the second defendant in a way that is virtually meaningless so far as concerns any duty of care owed by him or any breach of that duty, and seems to suggest that the valuer was negligent in making representations to him, the plaintiff, that the value of the land was \$28,000 or \$30,700; how this would give rise to any cause of action is unexplained.

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The grounds of appeal alleged a breach of duty of care "to value and then negotiate a purchase price on his behalf with the State." This is elucidated by the reference in the skeleton argument thus:

"It is submitted that the evidence of the valuation exercise is such when considered against the allegation of duress sufficient to show a breach of duty of care and to warrant a new trial at least, in lieu of an order setting aside the contract which is the primary relief sought."

In fact there was no evidence of negligence at all, but we will refer to this later on. The written submissions of the plaintiff that were before the trial Judge do not deal with the matter at all.

The action came on for hearing in May and June 1989. The learned Judge gave judgment for the defendants and declared that the plaintiff was entitled to the sum of \$18,500, which, of course, had been tendered to him back in November, 1983.

He held firstly that s. 8 of the Constitution was not applicable in the present case. That section deals with a number of matters relating to the compulsory acquisition of land by the Crown or State. That section has no application in the case of an agreement to purchase land, to which one party is the State. There was such an agreement here. And if it were vitiated on the grounds of duress, then in that case there would be no agreement,

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so that the State never acquire land at all, making s.8 also inapplicable.

As to duress, the trial Judge found on the facts, as he was entitled to do on the evidence, that there was no duress, and that the agreement had been voluntarily entered into by the plaintiff. We do not believe that we need canvass the reasons of the learned Judge; they were simply findings of fact based upon the evidence before him. He did, however, rightly point out that in this transaction the second defendant, the valuer, was acting as agent for the plaintiff. Unless it could be shown that he was in some unalleged and unspecified way acting in the matter as the agent of the first defendant, then any duress which might have existed would not affect the validity of the agreement between the plaintiff and the first defendant. No such agency was established.

The matter of the clause in the Sale and Purchase Agreement relating to arbitration in the event of dispute as to the true value, which we have set out earlier herein, was adverted to by the Judge. He referred to the fact that the plaintiff had refused to accept the cheque for \$18,500 when it was tendered to him some two weeks after his execution of the price agreement form. It is true that in the meantime he had commenced proceedings (17th November, 1983) although the statement of claim makes no reference at all to any non-agreement to the purchase

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price or any dispute about the value. However, the Judge simply refers to the position thus (record p.61):

"In the present case the purchase price has been agreed in the price agreement. That being so there is no need to go into other questions raised in the action as to the method of valuation employed and the adequacy of otherwise of the sum offered by the First Defendant."

In the absence of any finding that there was duress, then this correctly states the position. The learned Judge also dealt with the evidence given by the plaintiff that he was dissatisfied with the price that had been offered to him, if this has any relevance in the light of the plaintiff's execution of the price agreement form. The Judge simply rejected the evidence of the plaintiff, and accepted the evidence of the witnesses who asserted that the plaintiff's execution of the document was voluntary. It is clear that the plaintiff repented of his bargain, but this does not affect the matter. The Judge sets out reasons other than those relating to credibility of witnesses for reaching a conclusion that the actions of the plaintiff at the time of signing were voluntary; he concludes, referring to the rejection by the plaintiff of the cheque tendered to him for the purchase price (record p.60):

"It seems to be common ground that such tender was made and was rejected, but there is not one word of evidence as to whether the Plaintiff indicated to any body the reasons for rejecting such tender. In any case that occurrence was ex post facto the signing of the price agreement. It is

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apparent that the Plaintiff is unhappy with the amount of the compensation he received for his land. However the question to be determined in this part of the case is whether or not he agreed voluntarily to accept \$18,500 as the price of his land. On the evidence before me I am satisfied and I find that the price agreement of 13th November, 1983 was entered into voluntarily by the Plaintiff."

(This should read 10th November, but nothing turns on it.)

No reasons have been advanced on appeal that would warrant these conclusions being departed from.

As mentioned earlier the matter of negligence was raised in the amended statement of claim and referred to in the appellant's skeleton argument in terms that we were at a loss to understand. We still are at a loss to understand any breach of a duty of care owed by the second defendant to the plaintiff. This defendant twice valued the land at a figure in excess of that eventually accepted by the plaintiff. As to the offer of \$18,500 the learned Judge said (record p.58):

"In cross-examination he said that when the Plaintiff came to his office he expressed his dissatisfaction with the price and that he told the Plaintiff that he could go to Court. The Plaintiff took the document away for a week or two. He subsequently told the Plaintiff that his view was now the same as that of the Government Valuers, having compared the evidence with them."

This passage is immediately followed by the findings of the Judge that "where the evidence as to the signing of the price

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agreement differs as between that of the Plaintiff on the one hand and that of the second Defendant and Mr. Josefa Dulaki on the other hand I prefer the evidence of the latter two. I do not accept the evidence of the Plaintiff as to that crucial episode." (ibid).

The Judge had earlier stated this as the evidence he accepted (record p.57):

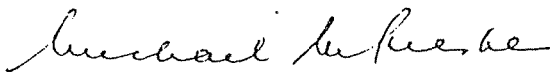
"He (the valuer) gave details of his process of valuation and that he had discussions with the Lands Department, as a result of which he had come to the view that his own valuation had been over-optimistic and that the figure offered by the Government was appropriate. He said that he had received a letter with the price agreement form. He had called the Plaintiff up and they had discussed the contents of the agreement; it had been a long drawn out matter and he advised the Plaintiff to consider the offer seriously. He gave the Plaintiff the form and asked him to come back when he was ready for his decision. He came back after some time. He came to his office, they had a chat, he acted like any willing vendor; he said he felt it was not enough but he was happy to agree."

We are unable to accept that there was anywhere any breach of a duty of care by the second defendant.

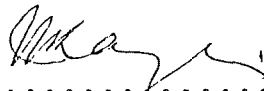
The appeal will be dismissed with costs.

The Judge's made an order that the appellant was entitled to the sum of \$18,500, and there is no complaint about this, so that

it can stand. The matter of the execution of a transfer can no doubt be dealt with between the parties. The matter could be brought back for the making of any necessary orders should this not occur (Court of Appeal Act s.13).



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Mr Michael M. Helsham
President, Fiji Court of Appeal



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Sir Mari Kapi
Judge of Appeal



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Sir Edward Williams
Judge of Appeal