

IN THE COURT OF APPEAL
FIJI ISLANDS

APPELATE JURISDICTION

[Civil Appeal No. ABU 0030 of 2008]

BETWEEN : **TOTA RAM SHARMA**
(Appellant)

AND : **AKHIL PROJECTS LIMITED**
(Respondent)

CORAM : **BYRNE, AP**
PATHIK, J.A
GOUNDAR, J.A

COUNSEL : **A. K. Singh for the Appellant**
: **K. C. Ramrakha and Ms I. Fifita for the Respondent**

Date of Hearing : **18th September 2009**

Date of Judgment: **18th February 2010**

JUDGMENT OF THE COURT

- [1] After a six-day hearing, in the High Court and after reading lengthy written submissions from the parties, on the 9th of May 2008, Phillips, J dismissed the claim by the appellant (Plaintiff) against the respondent (defendant) for damages of \$514,324.39, Special Damages, General Damages, judgment for future losses or future profits (spelt "Prohibits" in the statement of claim) and other ancillary orders including costs against the respondent on an indemnity basis.
- [2] Although the action was premised on three agreements for the sale of land between the appellant and the respondent, the Plaintiff sought damages only and not specific performance of the agreements. This, as the learned Judge said, and we agree was significant in the light of her findings in favour of the defendant, and her dismissal of the appellant's (plaintiff's) claim. It will be more convenient to refer in most parts of this Judgment to the parties by their titles in the High Court, namely plaintiff and defendant.

THE PLAINTIFF'S CLAIM

- [3] In his second amended statement of claim dated 26th June 2006, the plaintiff alleged that at all material times, he was an Assignee for Ram Kishore Sharma, Nand Ram Sharma, and Madhu Mangal Sharma.
- [4] He claimed that on 6th June 1988, an agent of the defendant obtained a loan of \$10,000 from him. In or about 1990, a further loan of \$10,000 was alleged to have been given. It was alleged that the defendant's agent gave assurances of repayment of the loans. Sometime in 1993, the plaintiff said he demanded "the refund of his loan of \$20,000.00"

THE FIRST AGREEMENT

- [5] When the alleged demand for refund was made the plaintiff claimed that the defendant made an offer to the Plaintiff to enable the defendant to clear his loan of \$20,000.00 by selling part of the defendant's freehold property at Johnson Road, Lautoka. On 28th July 1995 the plaintiff with others (namely his alleged Assignors) entered into a written agreement to buy vacant freehold land comprising 20 acres on D.P 4278 situated in Drasa, Lautoka being part of C.T 16280 in the sum of \$60,000.00.
- [6] The terms of this first agreement pleaded and relied on by the plaintiff in his statement of claim included, inter alia:
- (i) an acknowledgement by the defendant of a non-refundable deposit of \$35,000.00
 - (ii) the balance of purchase price of \$25,000 would be settled by the plaintiff on the date of settlement.
 - (iii) the plaintiff would carry out a survey of the property which was to be completed before the date of the settlement which was the 31st of December 1996 or such other date by mutual agreement in writing.
 - (iv) on settlement, the defendant would provide a registrable title in exchange for a bank cheque of \$25,000.00
 - (v) the defendant would procure a separate Certificate of Title to be handed to the Plaintiff provided that the plaintiff carried out the survey.
 - (vi) The plaintiff would take possession of the property on the date of settlement.
- [7] The plaintiff claimed that after execution of the first agreement he paid a deposit of \$35,000.00 which included the alleged outstanding loan of \$20,000.00 and \$15,000 paid on execution, without a receipt being issued. The plaintiff alleged that in breach of this agreement the defendant failed to provide a clear title to him.

THE 2nd AGREEMENT

[8] It was alleged that between 28th July 1995 and December 1996 the defendant entered into a further written agreement (the second agreement) wherein the defendant agreed to sell 3 more acres of land to the plaintiff for \$9,000.00. The plaintiff pleaded the following terms:

- (i) that the plaintiff would pay a deposit of \$5,000 at the time of execution, which he allegedly did and which was acknowledged in the second last paragraph of the second agreement;
- (ii) the balance of \$4,000 was to be paid by 31st December 1996.

[9] The plaintiff claimed that on 19th September 1996, he had the property surveyed and registered as required by the agreement of 28th July 1995. Further that on 5th February 1997 he paid \$30,500.00 in respect of the following properties:

- (i) \$25,000 the balance payable under the first agreement;
- (ii) \$4,000 the balance payable under the second agreement;

[10] It was alleged that in breach of the agreement, the defendant failed to provide a clear title to the plaintiff.

THE 3rd AGREEMENT

[11] The Plaintiff alleged that the defendant acknowledged an overpayment of \$1500.00. In paragraph 18 of the statement of claim, it was alleged that "since the plaintiff had paid \$1,500.00 extra to the defendant", the defendant in or about 1998, offered to sell a further ten acres of his land to the plaintiff.

[12] It was alleged that on 6th March 1998 the parties entered into another written agreement (the third agreement) whereby the defendant agreed to sell and the

plaintiff agreed to buy a further ten acres of land for the sum of \$30,000.00. The terms of this agreement pleaded that :

- (i) The defendant acknowledged receipt of a non-refundable deposit of \$3,000.00;
- (ii) The balance purchase price of \$27,000.00 was to be paid through sale of sugarcane proceeds payable by the Fiji Sugar Corporation (FSC) to the defendant;
- (iii) The date of settlement was 31st March 2008 or a date mutually agreed to in writing;
- (iv) On settlement date the defendant would hand over a registrable transfer of the property in favour of the plaintiff.

[13] The plaintiff alleged that on the 6th of March 1998 he made a cash payment of \$1500.00 to the defendant which, in addition to the alleged prior overpayment of \$1500.00, fulfilled his deposit obligation of \$3000.00. The plaintiff alleged that in breach of the third agreement, the defendant failed to provide a separate title to the Plaintiff in breach of the first agreement and the undated second agreement.

FURTHER PAYMENTS

[14] The plaintiff alleged that on 20th May 1999 he paid the defendant a cash sum of \$23,752.00. Further that in compliance with the 3rd Agreement he paid the balance sum of \$27,000.00 to the defendant well before the settlement date. He also alleged that by the year 2000 he had paid the defendant a total sum of \$128,383.00 which he alleged "was an extra from the total sale price of \$99,000.00".

PLAINTIFF'S ALLEGED AGREEMENT WITH THE THIRD PARTY

- [15] The plaintiff said that he entered into an agreement to sell the property to a third party for the sum of \$300,000.00. Further that due to the defendant's negligence (no particulars of which were pleaded) or due to the breach of the first agreement, the plaintiff lost his agreement with the third party and consequently the sum of \$300,000.00.

FRAUD

- [16] Paragraphs 41 – 45 of the statement of claim contain allegations of fraud. It is sufficient to say that this was alleged to have arisen by virtue of the execution of a partial transfer in favour of the plaintiff executing transfers in respect of properties not subject of the agreements, and executing a transfer of 10 acres on C.T. 29593 with the intention of unjust enrichment.

THE SECOND AMENDED STATEMENT OF DEFENCE

- [17] The defendant denied the alleged loan. He alleged that in relation to the first agreement, the true conditions of contract were not contained in the contract document. It was alleged that no deposit of \$35,000.00 was ever paid to the defendant and, further that this provision was inserted to enable the plaintiff to approach a bank and obtain a loan by sharing an equity in the property. It was alleged that possession was taken by the plaintiff immediately upon execution of the agreement. That prior to the settlement date of 31st December 1996 the plaintiff failed to complete the sub-division of the defendant's land so as to enable the defendant to procure a separate Certificate of Title to be issued to the plaintiff.

- [18] In relation to the 2nd agreement, the defendant alleged that this was null and void *ab initio* as being contrary to Section 4 of the Sub-division of Lands Act. The plaintiff's allegation of payment of the sum of \$5000.00 was denied and further, that if there was an agreement (which was denied) this did not contain all the essential elements of the purported agreement. All the allegations made in respect of payment under this agreement were denied.
- [19] The defendant denied the allegations relating to the third agreement and also alleged that there was no certain area of land described in the agreement. The allegations made in respect of the transfer documents were denied and it was claimed that the Transfer forms were not in registrable form.
- [20] The defendant alleged that the plaintiff, in any event, failed to fulfill all or any of the conditions imposed on him in relation to the three agreements and was therefore barred from commencing his action. The defendant also pleaded that the plaintiff did not at any stage make time the essence of any of the three agreements or, give the defendant any notice requiring completion by a certain date but instead proceeded unilaterally to terminate the agreements. It was alleged that by his actions and the bringing of the action, the plaintiff wrongfully terminated and repudiated the three agreements and was thus not entitled to sue the defendant.

THE TASK OF THIS COURT

- [21] Considering the volume of the written material before this court (the Record of the High Court is 874 pages long) and the written submissions of the parties to this Court, it is tempting to take a broad view of the proceedings in the High Court without saying over much about the evidence that was given. In the end we think we are doing justice to the parties by referring to the essential and relevant matters which called for the decision of the trial Judge and which now call for this court's attention.

THE ISSUES

[22] In paragraph 20 of her judgment Phillips, J stated that the plaintiff's pleadings as with much of the evidence heard from the plaintiff's witnesses and produced by the plaintiff was at best disjointed. In our view this was a fair comment. She then distilled the issues arising from the evidence and the pleadings and found the questions for decision of the Court to be as follows :

- (i) On whom does the onus of proving payment rest? What payments did the plaintiff make to the defendant?
- (ii) What breaches or failure to comply with the requirements of the three Agreements were alleged in the pleadings and proven by the plaintiff at the hearing?
- (iii) Did the plaintiff give any notice to complete or make time of the essence? Was it necessary and essential that the plaintiff should give such notice or make time of the essence before a breach could be alleged?
- (iv) Was the plaintiff entitled to rescind Agreements 1 and 2?
- (v) Are the parties both equally at fault on the issue of the proceeds of cane? If so, is the plaintiff entitled to recover those sums?
- (vi) What were the precise terms of Agreement 3? Was the plaintiff entitled to rescind this Agreement?

- (vii) What are the consequences of the three transfers prepared by Mr G.P. Shankar?
- (viii) What is the consequence of the transfer of the 23 acres more or less executed in G.P. Lala's office and subsequently lodged for registration?
- (ix) Have the allegations of fraud been established?
- (x) What damages, if any, has the plaintiff suffered and is entitled to?

[23] From her judgment, which, we say immediately was very thoughtful and analytical of the evidence, we are of the opinion that in rejecting the plaintiff's (appellant's claim) the learned Judge found three basic reasons for so doing:

- (i) that the appellant had no grounds for rescinding the three agreements as he had failed to give Notice to Complete and thus bring matters to a head. Rather than doing this the appellant preferred to repudiate the three agreements without having any grounds for so doing. A sub-divided title was available at the relevant time and the appellant had two Solicitors, the late Mr. G. P. Shankar and Mr. Abhay Singh who could have performed the necessary conveyancing.

All the appellant had to do, but failed to, was to instruct his solicitors to take the necessary action. He chose not to do so.

- [24] (ii) Having wrongfully repudiated the agreements the judge found that it followed that the appellant could not recover whatever he may or may not have paid pursuant to the Agreements. Any person who wrongfully repudiates a contract has no right in law to claim damages for any loss which he may have thereby incurred.

(iii) The respondent accepted the repudiation of the agreements by the appellant who consistently sought damages and damages alone for the purported rescission. In our judgment it is significant that the appellant has not appealed against this head of the Judgment.

[25] The learned Judge found correctly that the onus of establishing breach and right to repudiate lay with the appellant. She found, correctly in our view, that the appellant had not satisfied that onus. On pages 12 to 14 of the Record the Judge discusses the evidence that was given by the plaintiff on the 1st agreement. She described this in relation to the payments that were allegedly made under the agreement as “confused, inconsistent with what was pleaded in the plaintiff’s claim and tainted by the witnesses giving differing and vague accounts of the alleged payments made to the defendant”. She then said, “Given the inconsistency in the plaintiff’s evidence, I do not accept that the written acknowledgements constitute proof of payments or that the monies had in fact been paid”.

[26] We see no reason to disagree with her findings on this question.

[27] Dealing with the next alleged loan payment of \$10,000.00, the Judge said that she did not find convincing the plaintiff’s evidence that he lent a further significant sum of money to the respondent without recording the date on which he disbursed such a large sum of money or that he disbursed it without securing a receipt for such payment. Her conclusion was: “The plaintiff’s evidence in this regard lacked any credibility whatsoever”.

[28] As to an alleged cash payment of \$15,000.00 made to the respondent before the parties executed the first agreement, the Judge said that she found the evidence of the plaintiff and his witnesses on this lacked credibility. She said that it would have been fool hardy of the appellant to have made a further payment for such a substantial sum of money without proof of the payment being made. Particularly, as

according to the appellant the respondent had reneged on re-paying the previous loans, given supposedly unconditionally and without the stipulation of a date for repayment and having allegedly failed to receipt the appellant for the second loan of \$10,000.00.

[29] The Judge then gave other reasons for rejecting the appellant's claim under this head and for preferring the respondent's version which she found by far the more credible.

[30] Who better, we ask, to decide these matters of credibility than the Trial Judge? The answer is obvious and we uphold the learned judge's findings on this first agreement.

THE SECOND AGREEMENT

[31] The Judge found that notwithstanding the insertion of a deposit of \$5,000.00 said to be acknowledged at the time of execution, the sum of \$5,000.00 was in fact not paid by the appellant. She said that the failure by the appellant to produce any credible evidence evincing the source of the \$5000.00 and the inability of the witness, Nand Sharma to recall relevant dates of payment caused her to disbelieve the appellant's evidence on this.

[32] Again we ask, Who better than the trial Judge to assess the credibility of this evidence? Again to us the answer is obvious – the trial judge.

THE THIRD AGREEMENT

[33] Again, the Judge did not believe the evidence called by the appellant on this agreement. Her conclusion on all three agreements was that it was patently clear

after hearing the witnesses that the written agreements did not record the true position of the transactions. Although the agreements purport to acknowledge payments of substantial deposits, the judge found as a fact that not a single cent changed hands between the parties. She said that this conclusion was inescapable on the plaintiff's own evidence.

[34] Again we see no reason to disagree with her findings.

THE ACKNOWLEDGMENT IN THE THREE TRANSFERS

[35] It was common ground that all the transfer documents in the case were defective. They each contained the phrase "this day paid" but the learned judge was satisfied, and again we see no reason to disagree with her, that the amounts were not paid at all. This was probably the fault of the late Mr. G.P. Shankar who drew the transfers. It is significant in our view to note that even the appellant stated that the transfers were not genuine. It is a matter for some concern that a document, exhibit P12, being a transfer, a copy of which appears in page 589 of the record which refers to the sum of \$9000.00 paid to the transferor Akhil Projects Limited by Tota Ram Sharma, should be undated and was apparently sent by GP Shankar and Co. for registration in 2002 even though it bore no date. This was not the only example of laxity in the conveyancing practice of the late Mr. Shankar or his firm concerning the preparation of relevant documents for his clients.

[36] If the appellant was concerned about the delay in having the conveyancing progressed and having been informed by his brother-in-law, Mr. Abhay Singh's clerk that the documents prepared by Mr. Shankar were defective, it is surprising that neither Mr. Singh nor the appellant took any steps to address his concerns with Mr. Shankar or to have had the documents returned to him for rectification. Rather than address the so-called defects with Mr. Shankar, the appellant chose the course of rescinding all the agreements and making a claim for substantial compensation. It is

trite law that a person cannot rescind or repudiate a contract and claim to be entitled to its benefit. The appellant testified that he was maintaining his claim for Title for security purposes only. Such a right is unknown to the law. The appellant's only remedy lay in damages.

ISSUE (i) – PAYMENTS

- [37] Having found that the appellant had not in fact made any payments under the agreement except for the uncontested amount of \$31,131.00 from cane proceeds the learned judge was entitled to hold as she did that he was in breach of a material term and the purported repudiations by him were invalid. This part of his claim was founded in equity and he who seeks the aid of equity must come with clean hands. Rather, he participated in a scheme designed to deceive the Fiji Sugar Corporation by purporting to be entitled to the benefit of a cane contract which was not allocated to him as he was not a registered grower under the Sugar Industry Act. There was no proper assignment of the cane contract to him. Moreover, without any legal justification he lodged a caveat over the entire property owned by the respondent which resulted in paralyzing the respondent's business undertakings.
- [38] It is true that in his defence the respondent did not plead that the cane payments to him were tainted by illegality but Her Ladyship's comments on this matter are none the less fair. In paragraph 42 of her judgment, the judge said that she declined to aid the unlawful scheme by making an order that the appellant be re-imbursed monies paid by the Fiji Sugar Corporation (FSC) under cane contract no. 92 which was held by Akhil Projects Limited at the time. In this regard there was evidence from the Accounts Clerk of FSC who testified that from 1997, FSC directed funds payable under the contract to the respondent's account, lending weight to and substantiating the respondent's claim that the appellant, in contravention of the expressed terms of the first agreement took possession of the subject land notwithstanding that he was not entitled to possession until settlement.

- [39] If this was meant to be a claim by the appellant that he was hard done by the respondent then we reject it because we are satisfied, as was the learned judge, that it was the respondent who had cause to complain.
- [40] In Ground 9 of the amended grounds of appeal it is alleged that the Judge failed to consider the Power of Attorney duly executed by Mr. Akhil in favour of the appellant. It is also interesting to observe that nowhere in his submissions does the appellant mention a power of attorney.
- [41] In his submissions at page 68 paragraph 79, the appellant draws our attention to the fact that leave was given to the respondent by the Judge to withdraw any issue of illegality. However that may be, it remains to be one view of the evidence that these payments were made and accepted for some time by the appellant. Such is not the action of an honest man.

THE THIRD AGREEMENT

- [42] We agree with the learned Judge that the appellant was not entitled to rescind this agreement on the ground he relied on. Given the expressed settlement date of 31st March 2008 nothing more need be said on this.

THE G.P.LALA TRANSFER

- [43] Before dealing with this transfer we should mention that on Issue (vii), the three transfers prepared by G.P. Shankar and Company, these transfers were defective for reasons given by the trial judge in paragraph 44 of her judgment. To summarise, none of the documents was in registrable form; neither, in our view do they support the appellant's allegations of fraud to which we shall come later.

[44] This transfer to the appellant was made after the High Court proceedings were issued. It refers to a visit by Mrs. Pritibha Searle the daughter of the respondent who visited the appellant in the company of others on 4th December 2002 when the appellant showed her his Statement of Claim as originally filed in these proceedings. At page 460 of the record, she gives evidence of the appellant showing her the statement of claim. She testifies as follows:

"I read it and I made comments. First of all I said do you know what's written here, he said No. Then I said can you read English, he said No. I said whoever has written this, it's all wrong, and he said my Solicitor has written it then I just thought I explain to him what is wrong. I said what whoever written sueing the wrong company that CTS were wrong. I think Mr Sharma was quite shock, I was.....myself."

[45] After this conversation, she decided to see whether a transfer could be made to the appellant and so travelled to Suva with a Mr M.P. Singh, a Surveyor, and in Mr G.P. Lala's office signed the transfer to the appellant which she then registered. She then returned to the appellant and informed him of what she had done.

[46] Despite the respondent conveying the surveyed land to the appellant, the appellant rejected the transfer and instead sought monetary damages. In our view, concurring with the trial judge, this transfer demonstrates the extent to which Mrs Searle went to facilitate the conveyance of the property to the appellant in good faith, notwithstanding the appellant's failure to perform his part of the dealing. The appellant then argued that this transfer was a fraud.

HAS SUCH A CLAIM BEEN ESTABLISHED?

[47] The onus of proving fraud rests with the party alleging it. In *Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha, and Telegraph Works Co. (1875) 10 Ch. App.* 515, at p.530 Mellish, L.] says:

“No doubt the court is bound to see that a cause of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct”.

[48] There must be something in the nature of moral turpitude and personal dishonesty - *Assets Co.Ltd. v. Mere Roti (1905) AC 176 at p. 210.*

[49] There is nothing in the record to persuade us that the respondent was guilty of fraud on the appellant.

DAMAGES

[50] Part of the appellant's claim for damages was based on an agreement dated 15th September 1999 which he made with a third party one Salendra Kumar wherein he agreed to sell “the property being Lot 1 DP 4278 on CT 16280” for the sum of \$300,000.00. The date of settlement in the agreement was 30th of August 2000. The agreement was purportedly varied by a further agreement dated 10th February 2000 where the description of the property to be sold was 23 acres from CT 16280 on Lot 1 DP 4278 and further 10 acres within two years thereafter”.

[51] The learned Judge refused to find the respondent liable in any damages which might relate to that agreement because the initial agreement would have been unenforceable because the appellant purported to sell all the land contained in Lot 1 DP 4278 on CT 16280 which he clearly did not own.

[52] This, in our judgment is further evidence of the lengths to which the appellant was prepared to go in an attempt to obtain money unjustifiably from the respondent.

[53] The Judge rejected a claim for special damages amounting to \$514,324.39 in paragraph 46 of the second Amended Statement of Claim. She said the appellant completely failed to produce the requisite evidence to prove this part of his claim. She said, in paragraph 49 of her judgment :

"I am left with the distinct impression that all this claim represents is a blatant attempt to extort monies from the defendant by making fictitious and exaggerated claims when the plaintiff and his legal advisers would have been well aware from the outset that he stood no chance of proving his claims once the case was heard. All this exaggerated claim for special damages has succeeded in doing is fortify my conclusion that the plaintiff embarked upon an elaborate scheme using the litigation process to procure a substantial financial benefit from the defendant when it became apparent to him that the most valuable portion of the defendant's property containing the spring water sources was excluded from the agreements between him and the defendant".

[54] In this judgment we have not so far commented on a submission by Mr. Singh that the learned judge was biased against the appellant as shown by various exchanges which she had with Mr. Singh during the course of the trial. We find no merit in this submission. We consider that the Judge's conduct of the trial, which was one requiring continuous concentration, was fair to both parties.

[55] There remains for us to make a general comment on the conduct of the appellant and his legal advisers. We are satisfied, as the learned Judge said in the passage that we have just quoted, that the appellant embarked upon an elaborate scheme using the litigation process in an attempt to procure a substantial financial benefit from the respondent in circumstances in which he must have known that he had no grounds for making such a claim.

[56] Finally we note that there is no appeal against the High Court Order that the appellant pay the respondent the costs of and incidental to the entire action to be taxed on the full indemnity basis. In our judgment no lesser order would be justified on the evidence in this case. The result is that the appeal is dismissed, and the appellant is to pay the respondent's costs which we fix at \$5000.00.

We further order that the appellant must re-convey the property comprised in Certificate of Title 34778 being Lot 1, on DP 8041 by executing a transfer in favour of the respondent within 21 days of the date of this judgment.

Dated at Suva this 18th day of February 2010.



John E. Byrne

John E. Byrne, AP.

Devendra Pathik

Devendra Pathik, J.A.

Daniel Goundar

Daniel Goundar, J.A.