

**IN THE COURT OF APPEAL**

**APPELLATE JURISDICTION**

**CIVIL APPEAL NO. ABU0035 OF 2009**  
**(HIGH COURT OF LAUTOKA NO. HBC 289**  
**OF 2005L)**

**BETWEEN:**

**TAGAVELLU**

*Appellant*

**AND:**

**DHIRENDRA DEO AND DHIREND CHAND**

*Respondents*

**Coram:** Calanchini AP  
Basnayake JA  
Mutunayagam JA

**Counsel:** Mr. A Singh with Ms. P. Mataika for the Appellant  
Mr. A Pal for the Respondent

**Date of Hearing:** 15 February 2013

**Date of Judgment:** 30 May 2013

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## JUDGMENT

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### **Calanchini AP**

I have had the opportunity of reading the draft judgment of Basnayake JA and agree with his proposed orders.

### **Basnayake JA**

[1] This is an appeal filed by the plaintiff-appellant (plaintiff) seeking to have the judgment dated 1.10.2009 of the learned High Court Judge at Lautoka set aside. The plaintiff in a writ of summons dated 23.9.2005 inter alia claimed specific performance of a sale and purchase agreement. In an amended statement of claim the plaintiff also claimed that he suffered loss of about \$10,000.00 per annum from the year 2002 until the date of judgment. Thus the plaintiff claimed special damages in a sum of \$10,000.00 per annum from 2002 until the transfer of the land to the plaintiff and also general damages.

[2] Admittedly the defendant-respondents (defendants) are the owners of the land known as '*Bilalavu*', about five acres in extent and described in the Certificate of Title bearing No. 26101 (document Nos. 1 & 18 at pgs. 3 & 24 of the Supplementary Record of the High Court). This land was mortgaged to the Bank of Baroda by the defendants. The plaintiff states that the defendants decided to sell this land to the plaintiff as the defendants were not able to settle the debt owed to the Bank and as they wished to avoid a mortgage sale. The plaintiff and the defendants entered in to a sale and purchase agreement dated 26.11.1996 (Document Nos. 2 & 17 at pgs. 5 & 22 of the SRHC) to sell this land on the following terms, namely:-

#### The terms of the Agreement

- The purchase price to be fixed at \$15,000.00
- The plaintiff to pay the Bank in a sum of \$350.00 per month or a minimum of \$4200.00 per annum until the debt to the Bank is finally settled.

- Any balance left after settling the debt owed to the Bank is to be given to the defendants.
- In the event the plaintiff defaults payment, the Bank has the right to execute the mortgage.

[3] The plaintiff claims that the defendants had agreed to transfer the land to the plaintiff upon the payment of the purchase price. Although the plaintiff completed payment the plaintiff claims that the defendants have been refusing to transfer the property.

#### The Defence

[4] The defendants in an amended statement of claim stated that the amount agreed was \$30,000.00. The defendants state that the plaintiff had agreed to settle the mortgage debt and to pay another \$15,000.00 to the defendants. The defendants claim that the plaintiff also agreed to have a ¼ acre of land together with the defendants' house to be carved out and given to the defendants which the plaintiff has failed to do. The defendants claim that the plaintiff is estopped from relying on the agreement as the basis of his claim, since to do so would be inequitable and unconscionable and the agreement is uncertain and ambiguous.

#### The Evidence for the plaintiff

[5] The evidence reveals that the plaintiff knew the 2<sup>nd</sup> defendant, whose land was subject to a mortgage sale. On a proposal by the 2<sup>nd</sup> defendant the plaintiff had agreed to buy the land for \$15,000.00. Both of them thereafter had gone to the Bank. This was on 24.9.1996 where a rescue plan was discussed with the Manager of the Bank. They had come to an agreement. The plaintiff had declared his intention to buy the land. According to the agreement the plaintiff had to take over the debt amounting to \$14,872.06. (as per document 8 at page 13 of the SRHC) and settle the same. After the settlement the Bank was to discharge the property and the defendants would transfer the property in favour of the plaintiff. The plaintiff had agreed to pay \$2000.00 as the 1<sup>st</sup> installment and thereafter to pay monthly \$350.00 or a minimum payment of \$4200 per annum to the Bank.

[6] The plaintiff states that the Manager himself drew up a letter including the above terms purportedly written by the plaintiff to the Manager, to which the consent of the 2<sup>nd</sup> defendant was obtained. This letter was reproduced by the learned Judge in his judgment at page 9 of the High Court Record. (The letter is marked as document No. 3 in SRHC). From the Bank the plaintiff and the 2<sup>nd</sup> defendant had gone to the lawyers where the agreement marked No. 2 was prepared in English by a clerk. It was prepared as per the instructions received from the 2<sup>nd</sup> defendant. After the preparation the terms were explained in Hindi language being the language of the parties, to which both of them and the clerk had placed their signatures. Again they had gone to the Bank where the Bank Manager too had signed and placed the rubber stamp of the Bank to the document. The plaintiff denied to having agreed to pay another \$15,000.00 to the defendants. The plaintiff also denied that he had agreed to give the defendants a ¼ acre of land including the house.

The debt owed to the Bank was paid on the income received from the land

[7] The plaintiff said that after the agreement was signed the plaintiff took over possession of the land and planted papaw, eggplant and chilies for export. He said that the defendant was harvesting the land for the plaintiff. He also said that the planting was done in the land to pay off the debt. The fruits and vegetables were exported to Australia and New Zealand. He said that he got an income of about \$10,000.00 or more per annum from the land. However the defendants had asked him to leave in 2002 which he had done and claims \$10,000.00 per annum from 2002 until the land is transferred to the plaintiff. The plaintiff's evidence was not challenged with regard to the payments made to the Bank amounting to \$20,200.00 and the income received from the land from 1996 to 2002.

[8] The other witnesses for the plaintiff were the lawyer's clerk who prepared the sales and purchase agreement and a person called Durga Prasad who claimed to be present while the plaintiff and the defendant were negotiating the terms of settlement. Both these witnesses corroborated the plaintiff's evidence with regard to material particulars. Both these witnesses denied the existence of any agreement with regard to giving another \$15,000.00 and a ¼ acre containing the house to the defendants.

### Evidence for the Defence

[9] The 2<sup>nd</sup> defendant gave evidence for the defence. The 2<sup>nd</sup> defendant said that the plaintiff agreed to give \$15,000.00 to the defendants apart from settling the debt owed to the Bank. The 2<sup>nd</sup> defendant also said that the plaintiff agreed to give a ¼ acre of land from where the defendant has his residential house. The defendant admitted to having signed the agreement (P2) and the document prepared in the Bank (P3) prior to the preparation of the agreement. Both these documents were explained to him in Hindi; the language he understood. However he stated that he understood it as he would get a ¼ acre of land and another \$15,000.00.

### The Judgment

[10] The learned Judge in his judgment ordered the plaintiff to pay a sum of \$15,000.00 to the defendant within two years. He was also ordered to divide a quarter acre block containing the defendant's house to be given to the defendant. On payment of the said sum, the defendant to sign transfer documents for the balance portion of the land. The claim for damages for the loss of use of the land was dismissed.

[11] The learned Judge held that there was a promise to pay an extra \$15,000.00 and to transfer a quarter acre block containing Chand's house (2<sup>nd</sup> defendant's) out of the land to Chand after the mortgage was paid out. "These two promises were made orally before they went to the Bank and the lawyer's office. They were not to be written to the agreement but were nevertheless to be honoured" (pg 13 paragraph 20).

[12] I am of the view that the learned Judge has erred in coming to this conclusion as there was no cogent evidence to support it. The unchallenged evidence for the plaintiff is that all the terms were put in to the written agreement. The learned Judge found that the contents of the agreement were read over to the 2<sup>nd</sup> defendant (Chand) who understood it. Therefore he held that the defence of "*non est factum*" does not apply [paragraph 24]. However, the same breath he held that "**the contract between the parties was partly in writing (the Agreement) and partly oral**, the two promises I have referred to above" [para. 31]. The learned Judge has based his

judgment on the strength of two cases namely Gillespie Bros & Co v Cheney, Eggar & Co [1896] 2 QB 59, 62 and Evans Ltd v Andrea Merzario Ltd [1976] 1 WLR 1078, 1083. In order to rely on these authorities there should be evidence of such an agreement, partly oral and partly in writing. There was none. The 2<sup>nd</sup> defendant stated in evidence that he understood the agreement to mean that he would receive \$15,000.00 (in addition to the settlement of the debt) and a ¼ acre of land together with the house. Is this credible evidence? The learned Judge appears to have relied on the evidence of the 2<sup>nd</sup> defendant against the cogent evidence of the plaintiff and two witnesses.

The reply to the letter of demand does not support the defence

[13] Document No. 4 (pg 9 of the SRHC) is a letter of demand dated 16.9.2004 by the plaintiff to the defendants demanding the transfer of this land on the basis of the agreement. The defendants replied to this on 5 October 2004 (P 5 at pg. 10 of SRHC). By this letter the defendants state that the plaintiff had failed to pay the extra \$15,000.00. There is no mention of the ¼ acre of land. If there was an agreement to pay an extra \$15,000.00 and to give a ¼ acre of land, why did not the defendants mention about the ¼ acre of land in the reply.

[14] I am of the view that the learned Judge has erred in his analysis of evidence of the witnesses. All the documents in this case have been admitted. Document No. 2 is the agreement. Document No. 3 is the one that was prepared in the Bank. Parties signed these two documents having understood the contents. According to these documents the plaintiff agreed to buy the land belonging to the defendant. The land is subject to a mortgage. The mortgagee is a Bank. The plaintiff agreed to pay the bank debt. The purchase price is fixed at \$15,000.00. After payment to the Bank if there was any excess, that was to be paid to the defendant. After the settlement the mortgage was to be discharged and the defendant to transfer the land to the plaintiff. If the plaintiff defaulted payment, the Bank would have the right to take steps under the mortgage. The agreement was signed by the plaintiff and the defendant. It was also signed by the clerk who drafted it and the Manager of the Bank, who was the mortgagee. On the same day the plaintiff paid a sum of \$2000.00 to the Bank. Thereafter the plaintiff made payments until the entire debt was paid off. In all a sum of \$20,200.00 was paid to the Bank. The plaintiff gave evidence to this

effect. Two other witnesses corroborated the evidence of the plaintiff. The evidence of the plaintiff and the witnesses were not challenged. They all denied that there were other terms. All the documents and the evidence of the witnesses show that there were no other terms.

[15] There are two documents that supports the plaintiff's case, namely, the agreement proper [No. 2] and the document prepared in the Bank [No. 3]. The plaintiff on 16.9.2004 sent a letter of demand [Document No. 4] to the defendants demanding the execution of transfer of this property as per the agreement. The defendants replied to this letter of demand on 5 October 2004. In that the defendants have referred to the non-payment of a sum of \$15,000.00 to the defendants by the plaintiff. However no mention was made about leaving a ¼ acre of land together with a house. The defendant in his evidence stated that he told the plaintiff about a payment of \$15,000.00 and a ¼ acre of land. The plaintiff denied it. However the defendant did not say that he said the same to the Bank Manager or to the lawyer or his clerk. The defendant waited until the plaintiff settled all the dues to the Bank. It appears that the defendant knew that the dues were settled by 2002. In 2002 the defendant had asked the plaintiff to leave the land. From 2002 until 5 October 2004 the defendant did not tell anyone that the plaintiff defaulted payment. Considering the evidence it is abundantly clear that the evidence of the defendant cannot be accepted.

Could the court enforce specific performance?

[16] The only dispute in this case is with regard to the quantum of the purchase price and whether there was an agreement to allow the defendant to have a ¼ acre of land together with the house. However as already discussed above, there is no evidence of any extra payment and/or an agreement to give a ¼ acre of land to the defendant. Hence by putting the agreement in to force I am of the view that the plaintiff is entitled to specific performance.

Should the plaintiff be awarded special and/or general damages?

[17] The plaintiff claims damages on the basis that he should have got possession soon after the settlement of the loan to the bank. There is no dispute that the payments to the bank had been completed in the year 2002. Although the plaintiff demanded that the land be conveyed to him

this was not adhered to by the defendant. It is also not disputed that the income from this land was \$10000.00 or more per annum. On this information the plaintiff claims that he be awarded special damages from the year 2002 till the date of judgment at the rate of \$10000.00 per annum.

[18] It is not a condition in the Agreement that the plaintiff should take possession of the land prior to the settlement of the debt. There is no condition that the debt could be settled out of the income received from the land. The plaintiff himself states that he went in to possession immediately after entering in to the agreement and possessed the land through the defendant. The plaintiff also said that he planted vegetables and fruits and received an income of \$10,000.00 or more per annum. The agreement was signed on 26.11.1996. The plaintiff states that he was in possession till 2002. On the evidence of the plaintiff alone, the plaintiff would have been in possession for a period of five or six years. Considering that the income per annum was \$10,000.00, the plaintiff would have received anything between \$50,000.00 and \$60,000.00 during this period.

[19] Even if the plaintiff paid a sum of \$20,200.00 to the Bank, the plaintiff would have made a profit of \$30,000.00 to \$40,000.00 from the land. It appears that the plaintiff paid no rent for possessing this land. There is also no evidence that the plaintiff paid any wages to the defendant for the work done. These matters were not pleaded and no evidence had been led. I am of the view that the plaintiff has failed to set out the true facts regarding any loss that he incurred. For this reason I am of the view that the plaintiff should not be awarded any damages either special or general.

[20] Therefore I am of the view that the claim for specific performance should be allowed and the claim for damages should be refused. In view of the above decision the judgment of the learned Judge is set aside and the plaintiff's appeal is partly allowed without costs.

### **Mutunayagam JA**

[21] I agree with the reasons and the conclusions of Basnayake JA.



**Orders of Court**

1. The appeal is partly allowed.
2. No costs.

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**Hon. Mr. Justice William Calanchini**  
**Acting President**

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**Hon. Mr. Justice Eric Basnayake**  
**Justice of Appeal**

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**Hon. Mr. Justice Ariam Mutunayagam**  
**Justice of Appeal**