

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 13 OF 2017
(High Court No. HBC 088 of 2016)

BETWEEN : CHANDAR LOK

Appellant

AND : THE DIRECTOR OF LANDS
THE ATTORNEY-GENERAL OF FIJI

Respondents

Coram : Basnayake, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Mr V M Mishra for the Appellant
Mr J Mainavolau for the 1st and 2nd Respondents

Date of Hearing : 19 September, 2018

Date of Judgment : 5 October, 2018

J U D G M E N T

Basnayake, JA

[1] I agree with the reasons and conclusions of Almeida Guneratne, JA.

Almeida Guneratne, JA

[2] This is an appeal from a judgment dated 3rd February, 2017 of the High Court of Lautoka. By that judgment the High Court struck out and dismissed the Appellant's claims under Order 18 Rule 18(1) (a) to (d) of the High Court Rules. The Appellant's action which was instituted by way of originating summons (pages 114-116 of the Record of the High Court RHC) was for Orders that, the 1st Respondent;

- “(1) do give survey plans and/or registered survey plans for the area of two acres and seven perches covered by the First Defendant's Caveat No. 121064 against the Plaintiff's Native Lease No. 44656 on Lot 1 DP 1700 taken by the First Defendant pursuant sale and purchase agreement dated 7th January 1971 within 10 days.*
- (2) do pay the Plaintiff compensation agreed to be paid under agreement dated 7th January 1971 whereby the First Defendant 2 acres and 7 perches.*
- (3) do pay compensation to the plaintiff in the sum of \$108,000.00 or as assessed by the Court.*
- (4) do pay damages to the Plaintiff for not giving him possession of the old road area for not providing him with proper registered survey plan and proper varied lease to him which has stopped him from enforcing his rights to full usage of the area he is entitled to.*
- (5) Alternatively that Caveat No. 121064 against Native Lease No. 44656 on Lot 1 DP 1700 be removed.*
- (6) The Defendants do pay the Plaintiff the costs of this action.”*

[3] The Respondents then filed summons (vide: pp.94 – 95 of the RHC) to strike out the Appellant's claim on the grounds that,

- “(a) That it discloses no reasonable cause of action or defence as the case may be; or*
- (b) That it is scandalous, frivolous or vexatious; or*
- (c) It may prejudice, embarrass or delay the fair trial of the action; or*
- (d) It is otherwise an abuse of the process of the Court.”*

Brief account of the material (background) facts

- [4] The Appellant's father (Mr. Balliaya) was the original owner of the (larger) land in question. The reason for the reference to the word larger in parenthesis will become clear when I trace the background history of the matter in the ensuing paragraphs.
- [5] Mr. Balliaya and the Director of Lands had entered into a Sale and Purchase agreement (SPA) on 7th January, 1971 in respect of 2A 7P of the original registered lease No. 44656 of which he had become proprietor/ owner with the consent of the iTaukei Land Transfer Board (ILTB) as landlord. That was for the purpose of building a public road thereon and the then Director had registered a Caveat in respect of the said land and as the Record reveals, that Caveat remained on record when the Appellant purchased the land from his father in June, 1994 and the said transfer being registered (NB. which Caveat still remains in force and a public road has been built) (vide: page 126 of the RHC).
- [6] The said Director of Lands, to whom the said 2A 7P had been surrendered, having obtained possession thereof, moreover, having built a public road thereon and having entered a Caveat as aforesaid, to date has not done a survey of the land and taken that 2A 7P portion out of that larger land. The true value of the said acquired portion was provided for in the said SPA (although it must be noted that, a sum of \$730.00 had been paid to the Official Receiver for the 'acquired' piece of land as Mr. Ballaiya had been bankrupt at the time). The SPA is contained at pp. 128 – 131 of RHC. The portion of land of which (Mr) Balliaya was the proprietor and how it has been adversely affected can be seen (cut in two pieces) in the tracing at page 132 of the RHC.
- [7] At this point I note that the aforesaid background facts were not disputed by the Respondents which obliged me to look at and determine on the merits of the grounds of appeal urged on behalf of the Appellant.

The Grounds of Appeal (vide: pp. 4 - 5 of the RHIC)

[8] I shall for convenience of elucidation reproduce below the said grounds of appeal;

- “1. *The Learned Judge erred in law and/or in fact in holding that the Plaintiff's claim was statute barred 39 years ago and that the leave of the Court was required to pursue his claims out of time.*
2. *The Learned Judge erred in law and/or in fact in holding that the Appellant's claim was an abuse of process of the Court when after having signed the agreement dated 7th January 1971 to purchase the late Mr. Ballaiya's land of two acres and seven perches for a sum to be determined by the Court if not agreed and having taken possession the First Respondent had not complied with the agreement to:*
 - (a) *Effect all surveys relating to separation of and issue of new or amended title(s) which it still has not done despite having lodged a caveat.*
 - (b) *To pay the costs of such surveys and the Appellant's costs of any application to the Court and here the Court has in fact declined to give any relief regarding survey or issue of amended Title (or lease) to the Appellant and in fact ordered costs against the Appellant.*
 - (c) *Take its road portion of land out and return a registered title to the Appellant and give a survey plan and amended lease for many years when there was a positive duty on it to do so.*
 - (d) *The Respondents were obliged to specifically perform the agreement.*
3. *The Learned Judge erred in law and/or in fact in not making an order in the alternative claim to remove Caveat No. 1201164 on the basis that the Plaintiff could apply for the removal of the Caveat to the Registrar of Titles when that was the very issue the Appellant wanted to have determined by his claim under Section 109 of the Land Transfer Act.*
4. *The Learned Trial Judge erred in law in making finding of fact against the Appellant on affidavit evidence and in not taking into account the provisions of the Land Transfer Act in particular section 109 and 110 and the implication of the First Respondent having lodged a caveat under the Land Transfer Act.*

5. *The Learned Judge erred in law and/or in fact in not taking into account the compensation to be paid to the late Ballaiya or his representatives or successors was to be that which represented the true value of the land taken and that Court had jurisdiction to assess the amount to be paid despite any steps by the Official Receiver.*"

[9] The impugned Ruling/Judgment of the High Court is contained at pp. 6 -14 of the RHC.

[10] If one were to discern the essence of that ruling (or the basis), the learned High Court Judge is seen holding that:-

- (a) the SPA in question being in 1971, the cause of action pursued by the Appellant is statute barred under Section 4 of the Limitation Act (which the Judge construed as a simple contract, not agreeing with the Appellant's Counsel's contention that it had to be viewed under Section 8 of the said Act, to my mind, not making any difference probably the reason why Mr. Mishra for the Appellant did not labour on that aspect but in his characteristic forensic style argued that, the time bars had no application to his client's claim in that, his client's claim was based on a continuing cause of action in that:- (a) the Respondents to date had failed to conduct a survey of the (larger) land in relation to the 2A 7P which was taken for the construction of a public road and (b) failing to discharge their (the Respondents) part of the obligations in fixing the true value of the said portion acquired by them as envisaged by the SPA, (though a sum of \$7,300 had been received by the Official Receiver when the Appellant's predecessor (his father) had been bankrupt) and therefore, in my view, the Appellant's father not being in a position to protest to the said valuation for compensation for he would not have had a right in law in terms of *locus standi* to object to the same. He becoming deceased sometime after 1994, when he had parted with his title to the Appellant (his son) in 1994 it was only then that the Appellant could have put the said valuation in issue.

[11] These aspects being put forward by Mr Mishra, in the context of the affidavit contained at page 97 of the RHC, I felt it was incumbent on the part of the Respondents to have conducted a survey in terms of Clause 4 of the SPA?

[12] That, in my view, stood as sufficient ground *per se* for the Appellant to have proceeded with his claim in the originating summons and for which reason the High Court could not have struck off his claim on the basis of Order 18 or any of the Rules feeding that Order, the criterion on which the Master had gone in his Order and affirmed in effect by the High Court. That factor, apart from even having to go any further in considering as to the issue on the “true value” of the compensation to be paid for the acquisition of a 2A 7P of the land which the Appellant had purchased in 1994 – nevertheless, remained on foot. Consequentially, in failing to do so, the High Court, as urged by the Appellant’s Counsel, fell into error.

Final Determination of this Appeal

[13] On the basis of the aforesaid reasoning, I am of the view that:-

- (a) the Official Receiver receiving the payment of compensation for the 2A 7P did not put the final lid on the compensation that Appellant was entitled to agitate and claim as being the ‘true value’ as envisaged in the SPA;
- (b) the delay (to date) in failing to conduct a survey by the Respondents, given the fact that, the Caveat entered by the Respondents is still in operation, I am in agreement with Mr. Mishra’s argument that his client’s cause of action is still alive.
- (c) In any event, the aforesaid matters could not have been determined in the context of an application/action on originating summons and in counter thereto in an opposition thereto in a summons to strike such an application.

- (d) Given the nature of the matters/issues involved – they had to be gone into in a *viva voce* trial. They could not have been determined on the basis of what is prescribed in Order 18 Rule 18 of the High Court Rules.

[14] Accordingly, I am of the view that, the impugned Order / Judgment dated 3rd July, 2017 cannot be allowed to stand for which reason I set it aside and allow the Appeal in all the terms as urged in the Appellant’s Notice and Grounds of Appeal.

[15] In saying so, I have paid due regard to the provisions of the Land Transfer Act, (LTA) (particularly Section 109 and 110 thereof, the considerations flowing from concepts such as “specific performance in a contractual relationship, (partially performed), function of “a Caveat” in law. In that regard I also went through the written submissions relied upon by the parties, at the end of which I was compelled to reach the conclusion that this appeal had to be allowed (NB. for which reason I felt it was not necessary for me to respond to the further argument raised by (Mr.) Mishra for the Appellant based on a breach of Article 2(1) of the Constitution of Fiji.

Jameel, JA

[16] I have read the draft judgment of Almeida Guneratne, JA and am in agreement with the reasons, conclusions and proposed orders.

Orders of Court

Accordingly, the Court makes final orders in this appeal as follows:

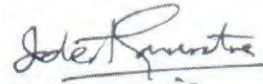
1. *The Appeal is allowed and the judgment of the High Court dated 3rd February, 2017 is set aside.*
2. *The Orders sought by the Appellant (plaintiff in the original action/ by originating summons) are granted.*

3. *In the event of the Respondents failing to comply with Order 2 above within 2 months of this Judgment, the Appellant shall be entitled to take further steps that he may be advised to/take against the Respondents.*

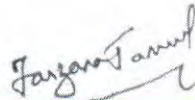
4. *In the aforesaid circumstances, the Respondents shall pay costs in a sum of \$5,000.00 as being costs of this Appeal to be paid to the Appellant within 21 days of this judgment.*



Hon. Justice E. Basnayake
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL