

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

CIVIL APPEAL NO.ABU 59 OF 2018
(High Court of Lautoka Civil Action No. HBC 86 of 2012)

BETWEEN : **iTAUKEI LAND TRUST BOARD**

Appellant (1st Defendant)

AND : **SALESHNI GEETA RAM**

Respondent (Plaintiff)

Coram : **Almeida Guneratne, AP**
Basnayake, JA
Lecamwasam, JA

Counsel : **Ms. C. Komatai for the Appellant**
Ms. A. Naidu for the Respondent via skype

Date of Hearing : **10 May 2021**

Date of Judgment : **28 May 2021**

JUDGMENT

Almeida Guneratne AP

[1] I agree with the reasons, conclusion and judgment of (His Lordship) Justice Basnayake.

Basnayake JA

[2] This is an appeal filed by the appellant (1st defendant and referred to as the defendant) to have the judgment of the learned High Court Judge dated 16 June 2016 set aside. By this judgment the court had ordered the following reliefs, namely;

- a) *Specific performance of the contract for Residential Lease.*
- b) *Specific performance of the contract for Agricultural Lease.*
- c) *Defendant to pay the plaintiff \$8000.00 as exemplary and punitive damages.*
- d) *Interest at 4% on the \$8000.00 from the date of the judgment till the date of payment.*

The Grounds of appeal

1. *THAT the Learned Judge erred in fact and in law in upholding that the lease document was not induced by the Respondent when the evidence suggest otherwise.*
2. *THAT the Learned Judge erred in fact and in law in upholding that the Respondent did not misinterpret facts to the Appellant herein in order to obtain the leases for the subject lands when the facts systematically proves that she had taken advantage of information known to the Bal Govind family and used it to influence the Appellant in issuing out leases for the subject lands.*
3. *THAT the Learned Judge erred in fact and in law by maintaining that the leases in favour of Bal Govind's Estate had expired without any chance of renewal of the leases in favour without taking into consideration the right of renewal that belongs to the outgoing tenants or the last lessee of the expired leases or that compensation to improvement to outgoing tenants.*
4. *THAT the Learned Judge erred in fact and in law by holding that the Respondent is entitled to exemplary and punitive damages in the awards stated in the judgment when she did not own such improvement or building.*

[3] As per the Statement of Claim (pgs. 30-32 of the Record of the High Court (RHC)) on 16 November 2011 the defendant offered the respondent (plaintiff) a Residential Lease over the land known as Lomolomo Lot 1 DP 1418 in the Tikina of Naiaga, in the province of Ba, containing an extent of 0.5893 hectares, for a period of ninety nine (99) years, commencing from 1st January 2012. The plaintiff states that this offer was accepted by the plaintiff and after the required payments were made the plaintiff executed a Residential Lease prepared by the defendant and delivered the same to the defendant for execution by the defendant and, stamping and registration.

- [4] On the same day the plaintiff executed an Agricultural Lease over the land known as Lomolomo Lot 1 DP 415, Tikina of Nailaga, in the province of Ba, containing an extent of 4.2795 hectares for a period of ninety nine years commencing from 1st January 2012 (The period of lease as per the application (pg. 51-52) is for 30 and not 99 years). Having made a part-payment the plaintiff had on 16 November 2011 executed the lease and delivered the same to the defendant for execution, stamping and registration.
- [5] The plaintiff submitted that the plaintiff performed her part of the contract although the defendant has refused and neglected to perform its part by failing to execute, stamp and register both leases; that the defendant had wrongfully and /or unlawfully attempted to repudiate the contract for Residential and Agricultural Leases. The plaintiff claimed that due to the failure to execute the Residential Lease the plaintiff had to rent out an alternative premises at a rental of \$250.00 per month.
- [6] In the Statement of Defence the defendant takes up the position that the offer was induced by the plaintiff through acts of misrepresentation. The defendant claims that the acts of the defendant were “subject to contract”. The defendant states the following acts as amounting to acts of misrepresentation of facts, namely;
- a) That she is still living with her husband,*
 - b) That she and her husband owned the residential dwelling erected on the land in question,*
 - c) That her husband is working overseas,*
 - d) That her husband supports her financially,*
 - e) That she had been managing the printing press business in the building adjoining the residential dwelling and that she closed the same in 2009,*
 - f) That her husband had been cultivating the cane land for the past three (3) years,*
 - g) That she brought Dharam Singh into the property as a caretaker.*
- [7] The defendant stated that the contract was rescinded on the basis of the plaintiff’s fraudulent misrepresentation. The defendant further stated that it was the plaintiff’s scheme

to swindle the land in question away from the members of her husband's family, who were the beneficiaries of the Estate of Ram Dulari.

- [8] At the pre-trial conference (minutes at pgs. 259-262) the defendant accepted the fact of offerings and up to the point of delivery of the executed leases for its execution and registration. Of the issues, the main issue was whether the leases were induced by the plaintiff through acts of misrepresentation as stated above. The defendant also raised an issue as to whether the acts of the parties were, "subject to contract".
- [9] In the judgment the learned Judge stated that in terms of the agreed facts (pgs. 259 to 262) and the evidence at the trial that the previous leases in respect of the land in this case had expired and the said leases were under the Estate of Bal Govind's family. There was no dispute with regard to the offers made to the plaintiff by the defendant and the execution of the leases by the plaintiff. The learned Judge stated that as per the evidence, an offer and acceptance is clearly seen and therefore the leases cannot be subject to contract.
- [10] With regard to the misrepresentation the learned Judge stated in paragraph 6.5 (pg. 16 of the RHC) that, if the 1st defendant proves the allegation of misrepresentation on a balance of probabilities the contract becomes voidable and the innocent party gets the right to rescind the contract and/or claim damages. In paragraph 6.6 the learned Judge stated as follows with regard to her producing her marriage certificate. "*She said further that on the request of iTLTB officer's she submitted her marriage certificate to them before the offer letters were issued. She said the marriage certificate which was given to the iTLTB was the certificate of the present marriage. She also said at the time the investigations were done by the iTLTB officers they never questioned her whether she was separated or whether her ex-husband owns the house on the land to be leased*".
- [11] In paragraph 6.7 the learned Judge stated as follows; "*she said she divorced her husband in 2002 but stayed with him after the divorce for some time....She admitted that she was not with her former husband when the offers were given by the 1st defendant*". Referring to a field note that was marked the learned Judge said that as per the field note the plaintiff

has told the officers of the defendant that both houses on the land are owned by them. However the application screening form (pg. 95) was signed by the same officer and noted that the plaintiff is not in occupation of the land. It is to be noted that the screening form is dated 11.5.2009. That is one day after the Agricultural Lease Application was lodged (51-53). The field note was made on 15.11.2011. That is one day before the date the leases were executed by the plaintiff, that is, two and a half years after the two lease applications were lodged. There is another field note made on 8.11.2011. (pg. 93). According to this note the plaintiff has claimed that they (meaning the husband and wife) owned both houses and the printing shop and that Sanjeev is the manager. (Sanjeev was the former husband of the plaintiff). These facts were confirmed by the plaintiff. The report dated 15.11.2011 further states that (pg. 101), "cane on the land, Management by Applicant's husband (applicant was the plaintiff). The plaintiff on 8.11.2011 (pg. 93) gives the name of the husband as Sanjeev. Sanjeev was her husband prior to 2002. However throughout this application the reference to her husband was to no one but Sanjeev who is connected to the Bal Govind family.

[12] The plaintiff stated in evidence (pgs. 310-324 at 310to 312) that she was married for 10 years. Married in 1996 and divorced in 2002 the number of years of marriage should be six years. Father of Sanjeev Kumar was Lekram. Lekram's father was Bal Govind.

Q. When did you separate?

A. 2009-2010.

Q. You divorced finally when?

A. 2012. (sic)

Q. You still stayed with him?

A. Yes

Q. Where?

A. Namousau

Q. Family House?

A. Yes.

Q. 2009 where you were?

A. Still Namosau.

(At page 317)

Q. was there any house on it?

A. Yes.

Q. How did you know?

A. Family background.

Q. This is the house you stayed?

A. No next to our house, neighbor land.

Q. You lived beside?

A. Yes.

At page 320

Q. Where were you and children stay?

A. Namosau next to the land

Q. What is your relationship with your former husband?

A. I still stay with ex-husband and in-laws

Q. Residential lease, did you live there?

A. No.

At page 321

Q. How long married to Sanjiv?

A. Over 10 years.

Q. When did you divorce?

A. In 2012.

Q. After divorcing stayed with him?

A. Yes after divorce always been hard.

Q. you stayed with him more than 10 years?

A. Yes.

At page 322

Q. When offer was given you were no longer with him? (Referring to Sanjiv or Sanjeev)

A. Yes.

She said that Ashok (Bal Govind) used to visit them when overseas and was in good terms. He stopped talking after the application for the lease. She further said that the NLTB asked for the Marriage Certificate on the day the offer was given. (at page 323)

Q. When did NLTB ask for Marriage certificate?

A. On the date offer given in 2011. Some date I gave it.

Q. The current Marriage Certificate was it part of the requirement for the lease?

A. No still I gave it.

[13] The defence case is that the plaintiff was never in occupation of any of the lands to be leased and was not living with Sanjeev Kumar, a descendant of Bal Govind family. The plaintiff misrepresented these facts to the defendant to obtain the leases. The Application Screening Form (p. 95) was completed on 11.5.2009. That form was completed for the residential lease application. In that the plaintiff said that she is married. The husband's monthly income was stated as \$120. With regard to security she claims that she could pay the full amount of the offer, and that her husband is working overseas. Who is this husband that she is talking about? Throughout, the plaintiff did not speak of any man other than Sanjeev who is connected to Bal Govind family, the previous lessee. She has divorced Sanjeev in 2002 and married Chand in 2010.

[14] The picture given just prior to the making of the offer on 16.11.2011 is that the residence to be leased is occupied by the plaintiff and therefore the plaintiff is the most eligible candidate. One reason is the occupancy or owning the premises and secondly the connection to the Bal Govind family. The defendant's position is that these are the reasons to make the offer and prepare the lease documents for execution. Both these facts turned to be false. She had divorced Sanjeev in 2002 and was not occupying the property. She was occupying a property in the neighbourhood and not in the property wherein the lease was applied for. In her evidence reproduced at paragraph 12 above she admits to this fact. Although she has claimed to be living in the family house it appears to be false when she says that she lived in the neighbourhood.

[15] The learned judge stated in paragraph 6.10 (pg. 17) that, "*in my view if the leases in favour of Bal Govind's estate have expired and Bal Govind has not made a formal application for renewal the plaintiff is entitled to make applications for the leases whether she is related to Bal Govind or not. The 1st defendant does not come out with any legal provision which*

states upon expiration of a lease it has to be offered to the same lessee or his or her relatives". The learned Judge further stated that the plaintiff had submitted her marriage certificate to the iTLTB before others...The learned Judge also stated that there is no evidence to establish that the plaintiff had misrepresented facts to the 1st defendant's officers by stating that she was still living with her husband.

[16] In paragraph 6.11 (pg. 18) the learned Judge said that, "*In analyzing the evidence as above I find that the iTLTB had done investigations and offered the leases to the plaintiff but later revoked the offers due to the directions given by higher authorities to review its decision*". On that footing the learned Judge states that the 1st defendant has failed to prove on a balance of probabilities that the lease documents were induced by the plaintiff through acts of misrepresentation of facts. Having found that the 1st defendant has wrongfully refused to execute the leases, the learned Judge declared the plaintiff entitled to get the contracts specifically performed.

[17] The applications of the plaintiff on both leases are at pages 48-49 and 51-52. The application to lease the residential property was made on 14.4.2009. The application to lease the agricultural property was made on 10.5.2009. Admittedly both these leases were given to 'Bal Govind's Estate and the leases expired in April 2011 (as per the field note at page 101). Although the learned Judge states (6.10) that the plaintiff had applied for the two leases after the expiration of the earlier leases, this fact is not correct. The leases had expired in April 2011. The plaintiff made both applications as evident from pages 49 and 52, in 2009. In both these applications the plaintiff was required to disclose her marital status where the plaintiff had stated that she was married.

[18] To whom was the plaintiff married to in 2009? The plaintiff said in evidence that she divorced her first husband in 2002. He is the father of her two children. He was a grandson of Bal Govind. Then, she said she married Arvin Salesh Chand (MC pg.91) on 18 November 2010. She said that she continued to live with her first husband. There was no one to dispute this evidence. The plaintiff was admittedly married to Sanjeev Kumar F/N Lekh Ram Bal Govind (pg.99) of Namosau, Ba, Fiji. The plaintiff said in evidence that Bal

Govind was her father-in-law. The offers with regard to both leases were given on 16 November 2011. At the time that these offers were made the plaintiff was not living with Sanjeev Kumar or in his house. She was living in the neighbourhood. By this time she was married to Arvin Chand (pg. 91). The residence of Chand is No. 76, Hoklanga Street, Mangere East, Auckland, New Zealand. Her residence is given as Ba, Fiji. According to the evidence the plaintiff had been living in Ba. She states that she had been living in the house of her previous husband. At page 317 of her evidence she says that she lived beside the family house. She would have lived away from him when she got married the second time in 2010. At page 320 of her evidence she states that (6th August 2015), *“I still stay with ex-husband and in-laws”*.

[19] Although the plaintiff attempted to show that her application for the leases were made as new applications, the plaintiff had followed the procedure as laid down by Regulations for renewal of leases under the iTaukei Land Trust (Leases and Licenses) Regulation 1984. This Regulation shall apply in relation to a person holding iTaukei land under a lease for a term of fixed duration or by virtue of an agreement for a lease for such a term, whether such term commenced before or after the commencement of these Regulations except where (a, b, c, d,) e. “Such lease or agreement for a lease contains a stipulation as to the renewal of the lease and such term commenced before the commencement of these Regulations”.

[20] In terms of these Regulations the person who desires to take a new lease has to be one who has held a lease as per Regulation 18. This is the reason the plaintiff had to be attached to Bal Govind who held the lease. In fact, by applying for a new lease, the new lessee steps into the shoes of the old lessee. In terms of these regulations the application has to be made upon the expiration of the current term and shall not be earlier than 2 years and not later than one year before the expiration of the current term and serve on the Board a notice in writing of his or her desire (hereinafter referred to as a “notice to renew”). The plaintiff has made her application as per Regulation 18 of the ITAUKEI LAND TRUST (LEASE AND LICENSES) REGULATIONS. The Regulation 18 is as follows:-

“Renewal of Leases

18. (1) *This regulation shall apply in relation to a person holding iTaukei land under a lease for a term of fixed for a term of fixed duration or by virtue of an agreement for a lease for such a term, whether such term commenced before or after the commencement of these Regulations, except where –*
- (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) *such lease or agreement for a lease contains a stipulation as to the renewal of the lease and such term commenced before the commencement of these Regulations: or*
 - (f) ...
- (2) *Subject to sub-regulation (9) a person in relation to whom this regulation applies who desires to take a new lease of the land held by him or her as mentioned in sub-regulation (1) upon the expiration of the current term (that is to say, the term of the lease or the term agreed to be granted under the agreement for the lease by virtue of which he or she holds that land, as the case may be) shall, not earlier than 2 years and not later than one year before the expiration of the current term, serve on the Board a notice in writing of such his or her desire (hereinafter referred to as a “notice to renew”).”*

[21] Inspection Report (pg.101) was made on 15.11.2011. That is just one day prior to the date the offer was made by the defendant. The offer was made on 16.11.2011. This report was made at the instance of the plaintiff. According to this report the residence to be leased, was owned by the plaintiff when it is not. According to the report the cane field to be leased, was managed by the plaintiff’s husband. In 2009 the plaintiff declared in the applications for the leases in answering a question with regard to her marital status that she was married. Oxford Dictionary defines marital status as one’s situation with regard to whether one is single, married, separated, divorced or widowed. As she was divorced she should have said, “Divorced” instead. Why did she lie about the marital status if that did

not have a bearing on the decision of the iTLTB (or the defendant). Evidence shows that she wanted to impress upon the defendant that her marriage to Sanjeev Kumar still existed.

[22] By the time of the execution of leases plaintiff was married to Chand who has no connection whatsoever to the leases. It was the plaintiff's former husband Sanjeev who was connected to the family that held the lease. It was due to this connection that she was able to make an application for the lease. In terms of regulation 18 this was in fact a "notice to renew" (Regulation 18 (2)). Why did the defendant ask for her Marriage Certificate? Was not it not to confirm her marriage to the person connected to the Bal Govind family. According to her evidence at page 323 the defendant asked for the marriage certificate on the day the offer was given. She says, "Some date I gave it". Why did she wait to give the marriage certificate until the offer was made? Did she delay in handing over the marriage certificate until after the date the offer was made? Did the plaintiff make the defendant believe that she was married to Sanjeev until the offer was made? If the connection to Sanjeev was not relevant her marital status would not have been an issue. If this lease is a renewal as per Regulation 18 (2), then it becomes relevant. That is why the plaintiff continued to maintain that although she was divorced to Sanjeev that she continued to live with him. Even while giving evidence on 6 August 2015 she said that she was living with her ex-husband and in-laws. There was no one to controvert her position as she was the only person who testified.

[23] The 2nd defendant was Ashok Bal Govind. He was the Administrator of the estate of Bal Govind. On 2 April 2013 the Master made order in his Ruling (pg.22 at 28) to add the estate and for the plaintiff to amend the writ of summons and to serve the same within 7 days. This order was not complied with. In an Interim Order (pgs. 20-21) the learned Judge on 12 April 2016 made order to add the estate of Bal Govind and to put off the hearing. After the estate of Bal Govind was added, Ashok Govind was noticed as the Administrator of the Estate of Bal Govind. On 27.4.2016 the plaintiff filed an amended writ of summons and an amended statement of claim (288-292).

- [24] Although the 2nd defendant was added there was no mention of the 2nd defendant in the statement of claim and no claim was made against him. On 31 May 2016 the 2nd defendant was represented by a lawyer and stated that as there is no claim made against the 2nd defendant that he would not be filing a statement of defense. Due to the fact of filing an amended statement of claim the plaintiff was recalled to give evidence. The plaintiff stated that no claim is made against the 2nd defendant Ashok Bal Govind. There was no cross examination and the trial was finally concluded for the judgment to be delivered on notice.
- [25] It is interesting to note how cleverly the plaintiff has maneuvered her case making the 2nd defendant to believe that she has no claim against the 2nd defendant. In the event the plaintiff wins and it is the 2nd defendant who loses. All what the plaintiff made in her claim is presently enjoyed by the 2nd defendant. Although this case was filed against the iTLTB as defendant and as the lessor, the effect of this claim would be totally against the 2nd defendant. However the plaintiff duped the 2nd defendant in to believing that no claim was against him. It appears from some documents filed of record that the day after the plaintiff got the offer from the 2nd defendant the plaintiff sent a quit notice to the caretaker of the 2nd defendant to vacate the premises and took over the property. The plaintiff did not have to wait until the defendant executed the lease and sent it for registration.
- [26] I am of the view that the above material clearly shows how much the plaintiff tried to convince the defendant to believe the plaintiff's connection to her former husband without whom the plaintiff would not have been entitled to make the application for these leases. I am of the view that it becomes abundantly clear from the evidence that the plaintiff misrepresented to the defendant that she was still living with her husband. I am of the view that the learned Judge erred when he said that as the leases had already expired when the plaintiff made her applications and as she is applying for a new lease her connection to the former husband is without any significance. Although it was a new lease, in terms of Regulation 18, this was a renewal lease. As already stated, the plaintiff followed the procedure laid down by Regulation 18. Therefore I am of the view that the learned Judge erred in his finding that there is no proof of misrepresentation. I am of the view that there

is ample evidence of misrepresentations which made the defendant make the initial offers of the leases. Therefore I am of the view that the revocation of the leases is valid.

[27] The first two grounds relate to misrepresentations. I answer the first two grounds of appeal in favour of the Appellant. The 3rd and 4th grounds will not arise due to the affirmative answer given as regards the first two grounds of appeal. Due to the foregoing reasons I am of the view that this appeal be allowed and the judgment of the High Court dated 16 June 2016 be set aside. The defendant appellant is entitled to costs in a sum of \$5000.00 in this court. The defendant appellant is also entitled to tax costs in the High Court.

Lecamwasam JA

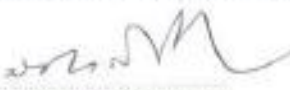
[28] I agree with the conclusion of Basnayake, JA.

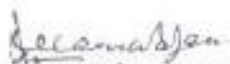
Orders of Court are:

1. *The Appeal is allowed.*
2. *The Judgment of the High Court dated 16 June 2016 is set aside.*
3. *The Appellant is entitled to costs \$5000.00 payable by the Respondent.*
4. *The Appellant is also entitled to tax costs in the High Court.*




Hon. Justice Almeida Guneratne
ACTING PRESIDENT, COURT OF APPEAL


Hon. Justice E. Basnayake
JUSTICE OF APPEAL


Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL