

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 0099 OF 2019**  
**[High Court, Lautoka Civil Action: 196 of 2017]**

**BETWEEN** : **AMI CHAND KARAN** *Appellant*

**AND** : **RANGANNA NAICKER** *1<sup>st</sup> Respondent*

**DIRECTOR OF LANDS** *2<sup>nd</sup> Respondent*

**Coram** : **Dr. Almeida Guneratne, P**  
**Lecamwasam, JA**  
**Dayaratne, JA**

**Counsel** : **Mr N.R. Padarath for the Appellant**  
**Mr. S. Nand and Mr. Reuben for the 1<sup>st</sup> Respondent**  
**Mr J Mainavolau for the 2<sup>nd</sup> Respondent**

**Date of Hearing** : **9<sup>th</sup> November, 2022**

**Date of Judgment** : **25<sup>th</sup> November, 2022**

**JUDGMENT**

**Almeida Guneratne, P**

**The essential factual context to the dispute**

[1] This is an appeal against a decision of the High Court in which specific performance of “an agreement (contract)” between the Appellant and the 1<sup>st</sup> Respondent was ordered in

respect of the purchase of a state lease. The claim for the said “*specific performance*” is recounted by the learned High Court Judge at paragraph [5] of his judgment.

[2] The Appellant in resisting the 1<sup>st</sup> Respondent’s claim averred that, there was “*no consent*” as envisaged in Section 13 of the Crown (State) Lands Act. (vide: paragraph 4 of the Statement of Defence at page 41 of the Copy Record).

[3] The Appellant (1<sup>st</sup> Defendant in the High Court) also averred at paragraph 2 of his statement of defence that, the 1<sup>st</sup> Respondent’s (plaintiff in the High Court) action was barred for lack of a written sale and purchase agreement as contemplated in Section 59 of the Indemnity, Guarantee and Bailment Act (vide: page 41 of the Copy Record).

[4] After trial, the learned Judge ordered specific performance as claimed by the 1<sup>st</sup> Respondent.

[5] It is in consequence thereof that the Appellant preferred the present appeal.

### **The Grounds of Appeal**

[6] These are contained at page 2 of the Copy Record which I reproduce as follows:

- “1. *The Learned Judge of the High Court erred in law in ordering specific performance of a contract alienating or dealing with State Land without the written consent of the Director of Lands first had and obtained as required by Section 13 of the **State Lands Act 1945**, and in not considering that the purported contract for the sale and purchase of the State Land without such consent was void for illegality.*
2. *The Learned Judge of the High Court erred in law and in fact in finding that the Appellant signed transfer documents voluntarily and that there was a contract for sale of land when:-*
  - 2.1 *The Appellant gave credible evidence (supported by documents and the respondent’s evidence) that the Appellant was not aware of what he was signing;*

- 2.2 *There was no credible evidence showing a completed sale and purchase of the Appellants leasehold property; and*
- 2.3 *There were no signed documents or any agreement for the transfer of the Appellant's renewed lease.*
3. *Such further grounds of appeal as maybe added upon receipt of the record."*

[7] I shall take ground 2 first and deal with it at the outset in the light of the High Court judgment.

### **What the High Court found and held**

[8] On the evidence led on behalf of the 1<sup>st</sup> Respondent, the learned judge found as follows:

- “10. *At the trial, the plaintiff called 4 witnesses namely, Mr Yogesh Navin Chand ('PW1'), Ms Sabeen Lata ('PW2'), Mr Ranganna Naicker, the plaintiff himself ('PW3') Ms Eceline ('PW4').*
11. *PW1 who is a Commissioner of Oaths in his evidence states:*
  - (a)The plaintiff and the first defendant came to him to have the letter drafted and executed ('P1').*
  - (b)He drafted the letter as they wanted and explained the contents to them and they both signed it.*
12. *Under cross examination he confirmed that the letter was given to the plaintiff and the first defendant and thereafter the letter was explained in the Hindustani language before both of them signed.*
13. *PW2 is a JP. Her evidence was that:*
  - a) She had authority as a JP to witness transfer documents up until 2014.*
  - b) She went through the transfer documents with the plaintiff and the first defendant. Both of them understood the contents of the document and signed voluntarily. There was no pressure on them to sign the transfer document ('P2').*
14. *During cross examination, PW2 was firm that the plaintiff and the first defendant came with the transfer document and they both signed it*

*voluntarily having understood and have agreed to the contents of the document. She said she was simply discharging her duty as a JP.”*

[9] Without having to go further on the evidential content as recounted above, on the aforesaid ground 2 urged by the Appellant, I could not find any error, misdirection or non-direction in the conclusion the learned Judge arrived at, when he held that,

*“On the evidence and on the balance of probability, I find that the first defendant agreed to transfer and transferred the property to the plaintiff for valuable consideration. I also find that the first defendant signed the transfer documents voluntarily. I further find that the first defendant unlawfully refused to sign the amended application for consent to transfer and the transfer documents.”*

(vide: paragraph [40] of the High Court judgment).

[10] For the aforesaid reasons I reject the Appellant’s said ground 2 of appeal and consequently, the Appellant’s contention based on Section 59 of the Indemnity, Guarantee and Bailment Act.

[11] I shall now take the 1<sup>st</sup> ground of appeal urged and deal with the same as against what the High Court had said and held.

### **Contention on the part of the Appellant in that regard**

[12] Mr Padarath for the Appellant submitted that, in terms of Section 13 of the Crown (State) Lands Act, no agreement entered into between any parties could be regarded as legal for which reason no specific performance could have been ordered.

### **Section 13 of the Crown (State) Lands Act**

[13] It provides that:

*“(1) Whenever in any case under this Act there has been inserted the following clause –*

*“This lease is a protected lease under the provisions of the State Lands Act (hereinafter referred to as protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any manner whatsoever, nor a mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of land, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*

*Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.”*

**What the learned Judge said in regard to the said provision**

[14] At paragraph [36] of his judgment, the learned Judge said thus:

*“Section 13 issue does not arise here. The first defendant is not entitled to raise that issue after signing the transfer document with consent to transfer. The consent was never denied by the Director of Lands. The witness called by the second defendant (the Director of Lands) told the Court that the consent was not refused but the parties were requested to submit the correct application for consent to transfer with the transfer documents for further processing.”*

[15] This was the finding of the learned Judge which Mr Padarath placed on issue as being an error, in as much as, the said finding is repugnant to the said section and therefore, any agreement (Contract) between parties would be rendered illegal for which reason no specific performance could have been ordered in consequence thereto.

[16] That is the crunch issue for determination in this appeal which I propose to deal with in the ensuing paragraphs.

### **Illegal agreement or unenforceable agreement?**

[17] I do agree with what I felt was in the learned Judge's thinking when he said there was *prime facie* a legal agreement between the parties (on the principle of *consensus ad idem*). (The interpolation is mine).

### **However, the approach of the Judge was like a curate's egg**

[18] While the '*consensus*' part was correct, when he ordered specific performance, he could not have done so, for the reason that, there was lack of "*consent on the part of the Director of Lands (2<sup>nd</sup> Respondent)*." Thus, the agreement was rendered unenforceable. That requirement was a super-added factor to make the agreement an enforceable contract.

### **Consideration of the authorities relied upon by the parties**

[19] Having said what I have said in paragraph [18] I gave my mind to the authorities relied upon by the respective parties.

### **The authorities (precedents) relied upon by the Appellant**

[20] In **Phalad v. Sukh Raj**, [1978] FJCA 46, the lessee of a native lease had entered into a sale and purchase agreement with 'X' who then had taken possession. The Native Land Trust Board only subsequently gave its consent to the transaction and it was held that, the agreement was null and void, the consent not having been obtained before 'X' had obtained exclusive possession of the land. In **Chalmers v. Pardoe** (PC) [1963] 3 ALLER 552, "*a dealing*" contemplated under the statute involved in that case was held to be unlawful since prior consent of the statutory authority concerned had not been obtained. The case of **Gonzalez v. Akhtar** [2004] FJCA 2, which was a decision that was considered under the Land Sales Act (Cap 137) also was to a similar effect for there being lack of prior consent of the relevant statutory authority.

**Authorities (Precedents) relied upon by the 1<sup>st</sup> Respondent**

[21] It is with some regret I say that, the authorities cited I found to be unhelpful. In the case of **Reddy v. Devi and The Director of Lands**, ABU0026 of 2013, 23<sup>rd</sup> February, 2017 (where I had penned the principal judgment with Calanchini P, and Mutunayagam, JA agreeing), “initial consent” had been given by the statutory authority but later withdrawn. Thus, it stood on a different footing.

**The 2<sup>nd</sup> Respondent’s position**

[22] Learned Counsel for the 2<sup>nd</sup> Respondent submitted, relying on the case of **Phalad v Sukh Raj** (supra), being on a comparable theme to the instant case that, statutory conditions precedent are absolute which do not permit conditional acts that contravene the said conditions precedent.

[23] I agree with the said submission and hold that, absence of statutory pre-consent cannot be construed, by any stretch of imagination and/or be equated to expectant consent.

[24] For the aforesaid reasons, I allow the appeal on Ground 1 of the Appellant’s Notice of Appeal and set aside the judgment of the High Court in granting specific performance of the agreement/contract in question.

**Consideration of availability of relief to the 1<sup>st</sup> Respondent in equity on the facts and in circumstances of the case**

[25] The Appellant (as the 1<sup>st</sup> Defendant) and the 1<sup>st</sup> Respondent (the Plaintiff) entered into the agreement in question.

[26] In consequence of my conclusion, specific performance which the 1<sup>st</sup> Respondent sought has been defeated. That was not due to any fault of the 1<sup>st</sup> Respondent.

[27] The High Court on the evidence led at the trial had made the following findings of fact, viz:

- (a) the plaintiff (1<sup>st</sup> Respondent) made (“a”) final payment of \$5,000.00 to the Appellant (paragraph 3 of the High Court judgment at page 6/3 of the Copy Record);
- (b) The Appellant (1<sup>st</sup> defendant) obtained a loan of \$15,000.00 from the 1<sup>st</sup> Respondent (plaintiff). The Appellant could not repay the loan and he requested the plaintiff to purchase the property for a consideration sum of \$20,000.00. The plaintiff agreed to buy the property for \$20,000.00 and paid the balance \$5,000.00 to the first defendant making \$20,000.00 (loan of \$15,000.00 and \$5,000.00 = \$20,000.00. (vide: paragraph [23] pf the High Court judgment;
- (c) The property has been unique for the plaintiff. He has been living on the property; he has renovated the lease which is on the property. (see: paragraph [45] of the High Court Judgment).

[28] It is to be borne in mind that, those findings of fact made by the learned High Court Judge have not been put in issue by the Appellant at any stage.

[29] It is also to be kept in mind that, the 1<sup>st</sup> Respondent in his Statement of Claim never sought any alternative reliefs either, whether by way of damages or otherwise in lieu of specific performance which he sought and obtained from the High Court (which has been set aside by this Court on the application of Section 13 of the Crown (State) Lands Act.

[30] In the result, what would be the 1<sup>st</sup> Respondent’s fate? Is the moneys expended by him to be regarded as a loss to remain where it has fallen?

[31] I cannot in my judicial conscience resolve this dispute on those lines.



**The Orders I propose to make in consequence**

[32] Given the established fact on the evidence on record that, the 1<sup>st</sup> Respondent is on the land in dispute, I hold that the 1<sup>st</sup> Respondent shall be entitled to remain there (in the form of a lien) as a *bona fide* occupier thereof until the Appellant pays a sum of \$20,000.00.

[33] Accordingly, I propose the orders for this Court as follows:

- 1) The judgment of the High Court ordering specific performance is set aside and the Appeal is allowed.
- 2) The 1<sup>st</sup> Respondent (plaintiff in the High Court) shall be entitled to remain on the land on considerations of equity as a bona fide occupier until the Appellant pays a sum of \$20,000.00 to him upon which payment, the 1<sup>st</sup> Respondent is ordered to vacate the said land and hand over quiet and vacant possession thereof to the Appellant.
- 3) I propose no order for costs taking into consideration the circumstances of the case..

**Lecamwasam, JA**

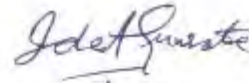
[34] I agree with the orders, reasons and conclusions of Almeida Guneratne, P except the reasons given in 33(2) and I propose the Appellant should be ordered to pay legal interest for the full amount of \$20,000 from the date of acceptance of last \$5,000 until full payment is made.

**Davaratne, JA**

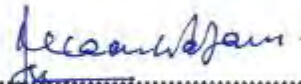
[35] Having read in draft the judgment of Dr. Almeida Guneratne P, I agree with his reasons and conclusions.

**Orders of Court:**

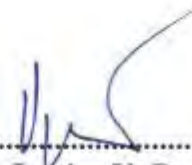
- 1) *The judgment of the High Court ordering specific performance is set aside and the Appeal is allowed.*
- 2) *The 1<sup>st</sup> Respondent (plaintiff in the High Court) shall be entitled to remain on the land on considerations of equity as a bona fide occupier until the Appellant pays a sum of \$20,000.00 to him upon which payment, the 1<sup>st</sup> Respondent is ordered to vacate the said land and hand over quiet and vacant possession thereof to the Appellant (by majority of Court).*
- 3) *There shall be no order for costs.*



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**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**



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**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



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**Hon. Justice V. Dayaratne**  
**JUSTICE OF APPEAL**