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

CIVIL APPEAL NO. ABU 042 of 2020
[In the High Court Civil Action No. HBC 144 of 2015]

BETWEEN : **SUNIL GUPTA SEN**

Appellant

AND : **RAIDU BHIM KRISHNA**

Respondent

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

Counsel : **Mr N. R. Padarath for the Appellant**
Mr E. Maopa for the Respondent

Date of Hearing : **09 November 2022**

Date of Judgment : **25 November 2022**

JUDGMENT

Almeida Guneratne, P

[1] I agree with the judgment of His Lordship Justice Lecamwasam.

Basnayake, JA

[2] I agree that this case should be remit back to High Court for a fresh trial as proposed by Lecamwasam JA.

Lecamwasam, JA

[3] This appeal is preferred by the Appellant against the judgment of the learned High Court Judge at Lautoka dated 1st May 2020.

[4] The following is a brief exposition of the factual background:
The Appellant (the original Plaintiff), is the registered owner of all the land contained in Certificate of Title No. CT. 30453. The Respondent on the other hand, is the registered proprietor of freehold land contained in Certificate of Title No. CT 20584. These two lands are situated adjacent to each other. The dispute at hand had arisen due to an alleged encroachment by the Respondent of the land belonging to the Appellant.

[5] After the matter was fixed for trial, the parties had invited the court to determine two preliminary issues raised at the pre-trial conference. The said issues were;

A. whether the Plaintiff is prevented from instituting this action pursuant to Section 59(d) of the Indemnity Guarantee and Bailment Act, Cap 232?
B. whether the action herein is statute barred pursuant to Section 4 of the Limitation Act?

[6] It was incumbent on the court to answer the above preliminary issues at the outset, prior to proceeding to trial. An affirmative finding in relation to one or both of the preliminary issues raised, would have dispensed with the need for a trial. However, it appears that the learned High Court Judge had answered only preliminary issue No. 1 before proceeding to trial. He had failed, for reasons best known to him, to deal with the second preliminary issue based on the Limitation Act raised by the Respondent.

[7] Against the above factual background, the Appellant raises the following grounds of appeal:

1. *The Learned Judge erred in law and in fact at paragraph 13 of the judgment by incorrectly applying the requirements of Section 59(d) of Indemnity Guarantee and Bailment Act, Cap 232 (herein referred to as the **"Act")** by not considering that*
    - *1.1 Written documents were produced to establish that there was an agreement and/or some memorandum in writing signed by the party to be charged and/or some other person lawfully authorized to sign.*
    - *1.2 The statutory requirement of Section 59(d) was only limited to produce written agreement and/or some memorandum in writing to support the bringing of the action.*
2. *The Learned Judge erred in law and in fact by determining the enforceability of the written document produced by not considering the entirely of the evidence available when the evidence reveals;*
    - *2.1 That each subsequent purchaser was aware of the legal title holder and elected to purchase an interest in the contract for sale*
    - *2.2 That each subsequent purchaser paid consideration to obtain an assignment of the right to purchase conferred upon Deo Narayan by virtue of his agreement dated 30th January 1981.*
3. *The Learned Judge erred in law by misinterpreting that land can only be sold by the registered title holder when the law recognizes assignment of contracts and equitable conversion.*
4. *The Learned Judge erred in law by misapplying the principles of equitable conversion when the contract dated 30th January 1981 bestowed Deo Narayan with equitable title which was capable of being assigned to a third party for value.*
5. *The Learned Judge erred in law by not considering the principles enunciated in **Tolhurst v Associated Portland Cement Manufactures Ltd (1904) UKHL 456** when Macnaghten J identified that the rule is a benefit of a contract is assignable in equity and may be enforced by the assignee.*

[8] In responding to the above grounds of appeal, I find that the treatment of the preliminary issues by the learned High Court Judge warrants scrutiny at the outset. While it is clear that the learned High Court Judge has completely failed to respond to preliminary issue 2, I take it upon myself at this juncture, to advert to the contents of section 59(d) of the Indemnity, Guarantee and Bailment Act, Cap 232 in order to determine whether the learned High Court Judge had responded adequately to preliminary issue 1. The said provision states:

> "*No action shall be brought:*

(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them…

Unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized".

[9] The exception to Section 59 of the above Act contains certain threshold requirements which will permit the court to entertain an action in relation to any contract of lands. These are;

(i) the existence of an agreement or a memorandum or note;

(ii) executed in writing;

(iii) Signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

[10] Preliminary issue 1 necessitated the learned High Court Judge to examine if the Appellant fulfilled the above requirements. An affirmative finding in this regard would have led to a trial, whereas a negative finding would have resulted in the dismissal of the action.

[11] After a careful examination of the judgment of the learned High Court Judge beginning from p.245 (vol. 1 HCR), referring especially paragraphs 12 & 13 of the judgment, I cannot ignore the fact that the learned Judge had embarked on an irrelevant voyage of discovery which had led the matter at hand astray.

[12] Instead of appropriately delving into the threshold requirements contained in 59(d) of the Indemnity, Guarantee and Bailment Act in order to determine if the action could be entertained or otherwise, the learned High Court Judge had examined issues such as the chain of title, the absence of certain links of the chain of title, and the concept of assignment etc. Even though these are issues of undeniable relevance, such an exploration would only have been appropriate at the conclusion of the proceedings, had the matter gone to trial. The discussion was premature at the outset where the court was invited only to answer the preliminary issues raised.

[13] Therefore, I find that the learned High Court Judge has not answered the preliminary issues at all. The learned High Court Judge has missed the wood for the trees when he chose to consider the facts of the main case without answering the preliminary issues before him.

[14] For the foregoing reasons, I answer the cumulative grounds of appeal in favour of the Appellant and hold that the learned High Court Judge had not answered preliminary issues raised by the parties. Hence, the judgment dated 1st May 2020 is set aside and the case is remitted back to the High Court for a fresh trial. The parties shall bear their own costs.

Orders of Court:

1. *The High Court judgment is set aside.*
2. *Parties to bear their own costs.*
3. *Remit the case back to the high court for a fresh trial.*

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

COURT OF APPEAL FIJI

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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