

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

**CIVIL APPEAL NO. ABU 0091 of 2018**

**[Labasa High Court Civil Action No. HBC 51 of 2016]**

**BETWEEN** : **ALFAAZ ROUF ABDUL KHAN**

***Appellant***

**AND** : **HASIM KHAN**

***Respondent***

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

**Counsel** : Mr. S. Kumar for the Appellant  
Mr. A. Sen for the Respondent

**Date of Hearing:** 13 May 2022

**Date of Judgment:** 27 May 2022

**JUDGMENT**

**Basnayake, JA**

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

**Lecamwasam, JA**

[2] The Appellant, being aggrieved by the interlocutory order of the High Court dated 4<sup>th</sup> July 2018 appealed to the Court of Appeal on the following grounds of appeal:-

Grounds of Appeal

1. THAT the Learned Judge erred in law in failing in correctly interpret the meaning and/or definition of “Dealing” in the context of Section 12 of the I-Taukei Land Trust Board Act Cap 134.
2. THAT the Learned Judge erred in law in failing in correctly interpret the meaning and/or definition of “Trust Deed” and whether it constituted a “dealing” as per the Section 12 of the I-Taukei Land Trust Act Cap 134.
3. THAT the Learned Judge erred in law in failing to uphold that the oral agreement had led to the drafting of Trust Deed that parties entered as a result did not fall within the meaning of “a dealing” as envisaged by Section 12 that required “Consent” by the I-Taukei Land Trust Board because the agreement was private arrangement between Parties.
4. THAT the Learned Judge erred in law by making a finding that an Oral Agreement that subsequently led to the drafting of Deed of Trust referred to in the Statement of Claim was in breach of Section 12 of the I-Taukei Land Trust Board Act in the following circumstances:-
  - a. The Oral Agreement that subsequently led to the drafting of Deed of Trust and Deed of Trust were made when no lease was in existence under the name of the Defendant;
  - b. Failing to follow the principals of stares deices and or not making a finding that he himself was bound by the Court of Appeal decision cited to his Lordship where Section 12 did not apply to an oral agreement when no lease is in existence;

- c. *Ignoring the absurdity test used by the Court of Appeal decisions cited to his Lordship that of necessary that there must be prior negotiation agreement and deed of trust before Section 12 is invoked;*
- d. *In not applying the mischief rule applied by the Privy Council and by the Court of Appeal decision cited to his Lordship that Section 12 of the I-Taukei Lands Trust Act only applies to avoid further mischief to the Board and not finding that there was not mischief suffered by the Board by virtue of the Oral Agreement and Trust Deed referred to in the Statement of Claim or alternatively;*
- e. *Not accepting, ignoring and not following the Court of Appeal's interpretation of section 12 of the I-Taukei Lands Trust Act that dealing in land be confined to same category as sale transfer and sublease where title to land and possession will pass;*
- f. *In not ruling that section 12 of the I-Taukei Land Trust Act did not apply to all business relations and did not restrict them in terms required by the Court of Appeal in decisions cited to his Lordship;*
- g. *In not accepting that only if the Plaintiff/Appellant had entered into occupation and/or possession would there be a dealing in land it would be to the contrary where the Plaintiff has not entered into occupation and/or possession there would be no dealing and I-Taukei Lands Department will be made redundant.*
- h. *In not applying the purposive approach of legislation given if there will be no agreement or Deed of Trust executed prior to application of section 12 of the I-Taukei Land there would be no dealing and I-Taukei Lands Department will be made redundant.*

5. *THAT the Learned Judge fell into error in failing to take into account the letter dated 10<sup>th</sup> day of January, 2018 from the I-Taukei Land Trust Board who are custodian of all I-Taukei Land who advised the Appellant that the consent was not required for Deed of Trust but only required at the time of lease being transferred from Defendant to Appellant.*
6. *THAT the Learned Judge fell into error when he failed to realize that Plaintiff /Appellant had done all what was necessary to obtain Consent of the I-Taukei Land Trust Board and the Boards decision in stating “the contents of your trust deed does not fall within the ambit of Section 12 of the I-Taukei Land Trust Act” made the Appellant of a victim of governmental processes where the judiciary and the executive are contrary to each other in their interpretation.*
7. *THAT the Learned Judge erred in law in failing to take into account the intention of the Legislature which had bestowed the control of the Native Land and/or indigenous Fijian land pursuant to Section 4, Section 5 and Section 8 of the I-Taukei Land Trust Board Act vesting all administration, alienation, and dealing of any native land with the I-Taukei Land Trust Board thus the Learned Judge fell into error and was biased in his decisions whilst interpreting Section 12 of the Act in isolation therefore his decision was prejudicial to the Appellant.*
8. *THAT the Learned Judge erred in law in paragraph 21 of his decision in usurping the role of the I-Taukei Land Trust Board in stating “if I say so with respect it is not for the Board to interpret the law and decide that the trust deed does not fall within the ambit of S.12. That is for the Court to decide and as the custodian of public interest it is my bounden duty to carry out the intention of the legislature that the sanctity of the indigenous ownership of the land’s preserved and protected,” as it is the I-Taukei Land Trust Board who are custodian of all I-Taukei Land as per Section 12 of the I-Taukei Land Trust Board Act which states that the granting and withholding consent is a sole and absolute discretion of the Board therefore the Learned Judge acted ultra vires.*

9. *THAT the Learned Judge erred in law in failing to take to consider the huge amount of investment made by the Appellant in reliance of the oral assurance of the I-Taukei Land Trust Board that no consent is required for the Deed of Trust hence it has caused serious prejudice to the Appellant.*

10. *THAT the Appellant reserves the right to file further and or other amended grounds that will be made out at the time of the production of the copy record of the proceedings at the High Court.*

[3] The decision of the Learned High Court Judge which appears in page 184 of Volume 1 of the record pivots around the interpretation of the word “*dealing*” found in Section 12 of I-Taukei Land Trust Board Act Cap. 134. Before dealing with this decision, it is pertinent to briefly set out the factual background of the case as narrated by the Plaintiff in his Statement of claim.

[4] The Plaintiff, an Australian citizen who had visited Fiji in 2011, had come across a business opportunity regarding a lease of the Seaqaqa Shopping Centre. Initially inclined to purchase the property, the Plaintiff had opted for a lease of the commercial premises in the name of the defendant, who was a close relative of his, as the Plaintiff was an Australian citizen and therefore barred from purchasing property. The parties allegedly had a verbal agreement, which *inter alia* required the defendant to manage and operate the business on behalf of the Plaintiff.

[5] According to the Plaintiff, the parties had agreed on the arrangements regarding the intended business, which required the Plaintiff to bear all expenses while the defendant was required to run the business in the name of the Plaintiff and to obtain a lease of the land in question in the name of the defendant. The Plaintiff further alleged (paragraph 7 of his Statement of Claim) that he had transferred \$71,484.00 to the defendant on 18<sup>th</sup> January 2012 and another \$20,000.00 on 5<sup>th</sup> March 2012 for the purchase of stock, fuel, and operating expenses. The defendant had in turn agreed to pay a certain sum of money from the profits of the business into the Westpac Bank account held by the Plaintiff.

[6] The defendant and plaintiff documented part of their agreement by way of a Deed of Trust on 22<sup>nd</sup> November 2013, which deed was registered on 7<sup>th</sup> January 2014. However, the defendant refutes the legality of the said Deed of Trust on the basis of fraud. He posits that the Deed of Trust is a “*dealing*” as envisaged under Section 12 of the I-Taukei Land Trust Board Act Cap 134. As such, it required the Plaintiff to obtain consent of the I-Taukei Land Trust Board which he failed to do. Hence, it is important at this juncture to determine if the consent of the I-Taukei Land Trust Board is necessary for a transaction of this nature under Section 12 of the Act.

[7] Section 12 of the I-Taukei Land Trust Board Act Cap 134 reads thus:

***Consent of Board required to any dealings with lease***

*“12. (1) Except as may be otherwise provided by regulation made hereunder it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as Lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sub lease or other unlawful alienation or dealing effected without such consent shall be null and void, provided that nothing in this section shall make it unlawful for the lessee or a residential or commercial lease granted before 29<sup>th</sup> September 1948 to mortgage such lease”.*

[8] The phrasing of the above section makes it clear that the consent of the Board is required to have obtained by a **lessee** under the Act to alienate or deal with the property. It was not open for the defendant or the plaintiff to have any manner of dealing without the consent of the board. However, before lending my mind to the issue of whether the Deed of Trust falls within the definition of a dealing as envisaged by Section 12, another related issue must be dealt with to the satisfaction of this Court. It must be borne in mind that for the plaintiff to enter into an agreement under the Deed of Trust, the threshold requirement is for the defendant to be a lessee of the board, without which Section 12 (1) will not apply.

Therefore, it is imperative for the Court to be satisfied that the defendant was a lessee at the time of the execution of the Deed of Trust, i.e. on 22<sup>nd</sup> November 2013, as the outcome of this appeal hinges on such determination and may make it redundant to delve into any other aspect of the case.

- [9] For Section 12(1) to apply, the first requirement is for the defendant to be a lessee. But on the facts available, I find the defendant became a lessee on 21<sup>st</sup> January 2014, which date is subsequent to that of the date of the Deed of Trust. This position is taken up in paragraph 18 of the Statement of Claim of the Appellant which was denied by the defendant at paragraph 20 of his Statement of Defence. However, the Statement of Defence is silent as to the date on which the defendant became a lessee.
- [10] A perusal of the defendant's affidavit found on page 388 of the Record sheds light on the date of acquisition of the lease. At paragraph 3(b) of the said Affidavit, the defendant states: "*I was never the registered proprietor of Native lease No. 17544 on 22 November 2013 as the same was transferred to me on 21<sup>st</sup> January 2014*". This admission affirms the position taken by the Plaintiff/Appellant that the defendant became a lessee of the Board subsequent to executing the Deed of Trust. The defendant has not adduced any evidence to refute this position.
- [11] Therefore, it is safe to conclude that Section 12 of the Act did not govern the Deed of Trust between the parties because the contractual relationship of lessor and lessee between the Board and the Defendant arose subsequent to the execution of the Deed of Trust. As Section 12 has no bearing on any person other than a lessee, the defendant cannot take cover behind Section 12 of the above Act.
- [12] Having come to the above conclusion, I find it becomes redundant for this Court to engage in a voyage of discovery as to whether the above Deed of Trust is a dealing under the above Act. Accordingly, this court cannot uphold the decision of the Learned High Court Judge dated 4<sup>th</sup> July 2018. Therefore, I set aside the interlocutory order and return the case record to the High Court for further steps.

[13] The Appellant is entitled to costs of this appeal in the sum of \$5,000.00 payable by the Respondent within 28 days from the date of this Judgment.

[14] I answer the cumulative grounds of appeal in favour of the Appellant.

**Guneratne, JA**

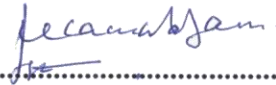
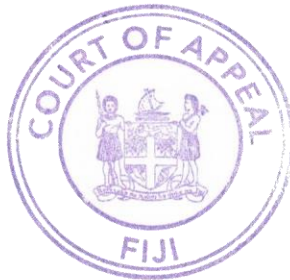
[15] I agree that the cumulative grounds of appeal of the Appellant should be answered in favour of the Appellant and that the appeal be allowed.

*The Orders of the Court:*

1. *Order dated 04/07/2018 is set aside.*
2. *Appeal allowed.*
3. *Case record to be returned to the High Court for further steps.*
4. *Respondent to pay \$5,000.00 as costs to the Appellant within 28 days from the date of this judgment.*



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**Hon. Justice E. Basnayake**  
**Justice of Appeal**



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**Hon. Justice S. Lecamwasam**  
**Justice of Appeal**



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**Hon. Justice A. Guneratne**  
**Justice of Appeal**