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

CIVIL APPEAL NO. ABU 106 OF 2019
[High Court at Lautoka Civil Action 1998 of 1990]

BETWEEN : **SUMINTRA ARJUN**

Appellant

AND : **1. VIRENDRA KUMAR**
2. SHALENDRA KUMAR

Respondents

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

Counsel : **Ms L Prasad for the Appellant**
Mr W. Pillay for the Respondents

Date of Hearing : **8 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Almeida Guneratne, P

Introduction

[1] This is an appeal by the Defendant-Appellant against the judgment of the High Court wherein the learned High Court Judge granted the declaration prayed for in the plaintiffs-

respondents (Respondents) Statement of Claim (pages 54 – 64 of the Copy Record (CR) that, the Defendant-Appellant was holding the property in question in trust for the Respondents having created an equitable interest or charge over the land in question.

[2] The said claim was resisted by the Defendant-Appellant in the Statement of Defence (pages 65 – 66 of the (CR)).

A brief recount of the relevant background history of the case leading upto the dispute

[3] Originally there was a land in extent of 1378 acres. There had been some partitioning over the years and consequential transfers. Three generations of stakeholders were involved within the make-up of a broad family through the inter-relationships of its members. Eventually, the Defendant-Appellant party had become seized and possessed of relatively a larger extent of and than the plaintiffs-respondents party on the strength of paper title.

[4] The dispute in the matter arose from the Respondents Party's claim for an extent of 45 acres out of the extent the Defendant appellant was holding on paper title which was claimed as his beneficial entitlement premised on the existence of a constructive trust with the allied fact of a creation of an equitable interest or charge feeding the constructive trust as claimed.

The evidence led at the trial

[5] The plaintiff-respondents had called two witnesses (PW1 and PW2) and the Defendant-Appellant one (DW1).

[6] The learned Judge noted that, both PW1 and DW1, appeared to be truthful and their respective accounts were based on what their respective fathers had told them years ago in regard to "*an arrangement*" which they had made (vide: page 11 of the Copy Record).

"***<u>The arrangement</u>***"

[7] This was the crucial issue for determination as to whether that arrangement could have been construed as having given rise to a constructive trust based on a free hand note.

<u>The free hand note</u>

[8] The learned High Court Judge reproduced that note at page 26 of the Copy Record *viz*:

> *"I Arjun agree that as soon as the survey is finished will proceed with further sub division of lots and transfer 45 acres to Ami Chand. Boundaries to be finalized in field in course of survey."*

<u>The learned Judge's reception thereto</u>

[9] His Lordship observed thus:

> *"_ _ _ the note records a promise by Arjun (Appellant's predecessors) to Ami Chand (Respondents' predecessors). That promise is conditional only upon the demarcation of the boundaries. . . . "*

(vide: page 26 of the Copy Record, paragraph 124 of the High Court judgment)

[10] The learned Judge proceeded further and gave his mind to a letter written by Arjun (Appendix 1 – at pages 36 to 51 of the Copy Record) which the learned Judge held as Arjun's view of the said free-hand note.

> *"That agreement on a piece of paper should not have any value. Because it is not registered and does not even make clear why I should give 45 acres to Ami Chand. Does not say it is a part of estate of Baij Nath. Most of the wordings are in short hardly visible. Actually that part of land is the most valuable . . . in the whole property. It is the frontage, close to the road, electricity and water and if subdivide into residential lots it will value more than all our property. Therefore the property of that value should produce in proper agreement if it is to be given away."*

(vide: paragraph 127 of the judgment page 27 of the Copy Record).

[11] The learned Judge responded to that at paragraphs 128 to 133 of the judgment.

> *"128. I refuse to accept that the arrangement which the note records is one where Arjun had agreed to sell the 45 acres in future to Ami Chand Prasad. I hold this view for the following reasons.*
>
> *(i) firstly, it is highly unlikely, in all probabilities, that the personal representatives of the estate of Baiju would accept a partitioning scheme which would jeopardise its members' settlement on the land. Why would the estate want to incur money in purchasing the said 45 acres when it could simply insist on a scheme of partition which would secure the 45 acres in its favour, given its history of continuous uninterrupted possession?*
>
> *(ii) secondly, there is not even the slightest hint in the wording of the note that it was meant to record an agreement to sell, or to confer a right of first refusal or an option to purchase.*
>
> *(iii) thirdly, the note was recorded before the survey instructions were given to HGP. Given that timing, together with the Baiju family's long sense of entitlement over the 45 acres, it is highly probable that a trust-like arrangement was intended, rather than a sale and purchase agreement.*
>
> *129. I state here for the record that the question was put to PW1 in cross-examinations as to why Ami Chand Prasad did not just insist on including the 45 acres in his title during pre-partition talks? That is a valid question.*
>
> *130. It is clear from the evidence that no lawyer was involved in talks between the original owners of CT 7006 as to how to sub-divide. It is clear also from the evidence that the late Arjun was much more sophisticated than the late Ami Chand Prasad in terms of education.*
>
> *131. The evidence of Ami Chand (Surveyor) at paragraphs 78 and 79, when read between the lines, seems to suggest the following:*
>
> *(i) that it was he (Ami Chand) who discovered that the 45 acres which Ami Chand Prasad and Hans Raji were occupying would go to Hans Raji, if sub-division was to be carried out to completion.*
> *(ii) that Ami Chand Prasad and Hans Raji were one way or another, oblivious to that fact.*

(iii) that Ami Chand then alerted Ami Chand Prasad and Arjun accordingly.

(iv) that the arrangement in question was then entered into between the two.

132. Ami Chand also deposed that carving out the Lot 45 even at pre-partition stage, would entail extra survey and legal costs, which would have to be borne by the plaintiffs. They were not able to afford that, at the time. I accept this.

133. I accept PW1's evidence which is corroborated by the affidavit evidence of Ami Chand's on this point. Accordingly, I find that the arrangement between Arjun and Ami Chand Prasad was that the former would hold the 45acres on trust for the latter in the latter's capacity as executor-trustee of the Baiju estate and would transfer it back to the latter at some point in future."

[12] Those are strong findings of fact which an Appellate Court should be slow to interfere with.

[13] I could not find in those findings anything perverse or any error that might have prompted me to interfere with.

[14] That view expressed above applies to what the learned High Court Judge said on Section 59 of the Indemnity Guarantee and Bailment Act as well.

[15] Therein, his Lordship drew a distinction between the requirements of "*an express trust*" and "a *constructive trust*." (vide: paragraphs 136 to 142 of the High Court Judgment).

[16] I am in agreement with the judicial exposition contained in the said paragraphs which effectively answers ground of appeal 6 urged by the Appellant which ground I reject.

[17] I now turn to the other grounds of appeal urged by the Appellant.

The Grounds of Appeal

"1. ***THE*** *Learned Trial Judge erred in law and in fact by declaring that the Defendant holds 45 acres as constructive trustee for the Baiju estate when there was no evidence before the court to establish the elements of a constructive trust namely:*

a. There was no evidence of any detrimental reliance suffered by the Plaintiffs in regards to the purported arrangement (between Arjun and Ami Chand Prasad) for the Plaintiffs to acquire the 45 acres; and
b. There was no evidence of any wrong doing on the part of the Defendant in order to impose a constructive trust on the Defendant.

2. ***THE*** *Learned Trial Judge erred in law and in fact by declaring that the Defendant holds 45 acres by proprietory estoppel when:*

a. There was no evidence of either detriment or reliance on the part of the Plaintiffs in regards to the purported arrangement (between Arjun and Ami Chand Prasad); and
b. There was no evidence of unconscionability on the part of the Defendant.

3. ***THE*** *Learned Trial Judge erred in law and in fact by ordering the Defendant to execute transfer to the Plaintiffs when there was no evidence of consideration given either by Ami Chand Prasad or the Plaintiffs to effect the purported agreement between Arjun and Ami Chand Prasad for the acquisition of the 45 acres.*

4. ***THE*** *Learned Trial Judge erred in law by failing to uphold* ***Section 37 and 38 of the Land Transfer Act (Cap 131****) when:*

a. The Defendant holds indefeasible title as the executrix and trustee of the Estate of Arjun against any informality or document previous to the registration of the instrument of title in favour of the Defendant; and
b. The Defendant holds indefeasible title as the executor and trustee of the Estate of Jaganath against any informality or document previous to the registration of the instrument of title in favour of the Defendant.

5. ***THE*** *Learned Trial Judge erred in law by failing to uphold* ***Section 39 of the Land Transfer Act (Cap 131)*** *in that the Defendant holds indefeasible title as the executrix and trustee of the estate of Arjun and estate of Jaganath especially where the Plaintiffs failed to plead and prove fraud against the Defendant."*

Submissions (both written and oral) of respective Counsel

(A) Grounds of Appeal 1 and 2

(a) Detrimental reliance

[18] On that aspect the learned Judge referred to the view expressed by Lord Denning in **Greasley v. Cooke** [1980] 2 All ER 710 and reasoned at length as follows:

"147. If I may say so again, the Baiju estate's pre-partition possession and occupation cannot be the basis of a beneficial entitlement per se. However, in this case, it seems nonetheless that all those involved in CT 7006, including Arjun, recognized the Baiju estate's sense of entitlement over the 45 acres. That, coupled with Ami Chand Prasad's insistence, led to the separate agreement that he had with Arjun.

148. The original co-owners severed their tenancy in common and unity in possession when they partitioned CT 7006.

149. PW1 said in chief that Ami Chand Prasad only signed the survey instructions after making the arrangement in question with Arjun. The arrangement, as I have found, constituted an assurance by Arjun that he (Arjun) would hold the said 45 acres on trust and would transfer it back to the Baiju estate at such time convenient to the Baiju estate.

150. The evidence is clear that, without that assurance from Arjun, the alternative for Ami Chand Prasad was to not sign the survey instructions. If he had refused to sign, the result is that CT 7006 would remain undivided in whole as it was. Alternatively, at the very least, sub-division could proceed anyway with other shareholders getting their individual shares whilst the Baiju estate and the Jaganath estate's respective shares remain lumped together undivided. Either way, the Baiju estate would, thus, continue to at least have some reprieve and security in its continued occupation and cultivation of the 45 acres by virtue of the principle of unity possession.

151. The bargain which Ami Chand Prasad made with Arjun was:

"Give us the 45 acres, or no partition."

152. When Ami Chand Prasad signed the note, he was, thereby, treading on delicate ground and placing the security of the Baiju estate on the line. Therein lies his detrimental reliance on Arjun's promise.

153. When Arjun agreed, and signed the note, Arjun was then, by agreement, creating an equitable interest in the Baiju estate.

154. I believe that the note is evidence of an arrangement whereby Arjun had committed the estate of Jaganath to hold the said 45 acres on trust for the estate of Baiju until such time when the latter desired the said land to be transferred back to it. I believe that the late Ami Chand Prasad, in reliance on the assurance on that note, then signed the Survey Plan which would see the said 45 acres being included in the Jaganath estate's share from CR 7006.

155. If the defendants were to be allowed to keep the 45 acres in question, they would be unjustly enriched. They already have more land in terms of acreage, as well as having to keep the valuable 45 acres. They all have lived abroad for many years. Their only intention is to sell the 45 acres.

156. The Plaintiff on the other hand have settled on the land for generations up to the present day. Even if the 45 acres were to be transferred to them, they would still have 30 acres less that the defendants; share."

[19] Consequently, on those primary facts I hold that there was a preponderance of evidence for the judge to have been satisfied on the aspect of detrimental reliance. The wrong doing and/or unconscionability on the part of the Appellant was the conduct in refusing to acknowledge the alleged constructive trust.

The judge's finding on proprietory estoppel

[20] The same primary facts as recounted in paragraph [18] above would apply to the doctrine of proprietory estoppel on account of the essential link between that doctrine and the aspect of detrimental reliance in the context of an alleged constructive trust addressed above.

[21] The broad (or general) rule that brings into consideration the doctrine of "*proprietory estoppel*" is where a claimant has acted to his detriment upon a promise or representation by the owner of property. (*vide*: to refer to some precedents. I refer to page 257 of the Oxford Dictionary of Law 9th Edition.

[22] In the present appeal it is true that there was no expressed promise or representation made by the "*the Appellant*" as "*owner of the property*". (the paper title holder).

[23] This is not such a case. It is a case where absolute legal ownership in title of a property has been put in issue – suggesting therefore a schism in the concept of such ownership viz: legal ownership (on paper title) and "*beneficial ownership*" (on the basis of a Constructive trust), which consequentially needed a look at the conduct of parties over three generations coming down to the present times. Indeed, the criterion of "*attendant circumstances on the evidence*" thus, became the decisive criterion.

[24] That is what was required to be looked into and which the learned Judge did, requiring an extension to what was referred to in paragraph [22] above.

[25] Accordingly, for the aforesaid reasons, I reject ground of appeal 2 urged by the Appellant.

Ground of Appeal 3

[26] This ground, I regret to say is misconceived in law.

[27] The issue involved was not a transfer due for consideration and/or for a purported agreement for the acquisition of the said 45 acres.

[28] The plaintiff-respondent's claim was based on "*a constructive trust*" on antecedent circumstances spanning over three generations which the learned judge took note of (as re-counted earlier by me). Thus "*consideration*" could never have been an impacting

factor in such a scenario. The "*purported agreement*" which the Appellant appeared to have urged was not a normal transfer agreement. (Sale and Purchase) but rather an agreement giving rise to a claim/case based on a constructive trust on primary antecedent facts.

[29] Accordingly, I reject the said ground of appeal 3 urged by the Appellant.

Grounds 4 and 5 urged by the Appellant

[30] These grounds are based on the provisions of Sections 37, 38 and 39 of the Land Transfer Act (Cap 131) and linked to those provisions "*the concept of indefeasibility of paper title"* (vide: The "*Torrens System*" operating in Fiji as the Rule).

[31] Such title, it has been held by the Fiji Supreme Court, could be challenged on the ground of fraud.

[32] One deviation from that proposition was by a Court of Appeal decision such *"registered title*" could be challenged if the Registrar had made wrong restrictions for whatever reason. I shall not take time however to refer to those precedents for those situations are not relevant to the instant case for the reason that, the instant case is not one which has challenged "*a registered paper title*" (of an owner of a property) but as between a dichotomy of ownership between "*legal ownership on paper title*" and "beneficial ownership on the basis of a constructive trust."

[33] Accordingly, agreeing with Mr Pillay's submission that, the concept of "*indefeasibility of title*" had no relevance to the present case where the issue was in regard to a claim based on a contract trust, I reject the said grounds of appeal 4 and 5 urged by the Appellant.

[34] Finally, it is to be noted that, earlier I have already rejected ground 6 of the grounds of appeal urged by the Appellant (vide: paragraph [16] above.

Appellant's Reliance on the Supreme Court decision in Wati –v- Kumar & Anr. [2019] FJSC 5, 26th April, 2019.

[35] Ms Prasad for the Appellant relied on the above-mentioned case and submitted that was a case similar to the instant case. Learned Counsel contended that the High Court had placed reliance on the Court of Appeal decision in **Wati's case** (supra) which was overturned by the Supreme Court. The Supreme Court ruling had been antecedent to the High Court judgment.

[36] Ms Prasad's submission carried the trappings of a ground of appeal.

[37] To begin with, such a ground has not been urged in the Appellant's notice of appeal as contemplated by Rule 5 of the Court of Appeal Act.

[38] Be that as it may, having gone through the said Supreme Court decision, although the learned High Court Judge had referred to the Court of Appeal decision in **Wati's case** (supra), I could not find any error or misdirection on the judge's part in his analysis of the evidence on the attendant circumstances giving rise to a constructive trust. I dare say that, even if the Supreme Court decision in **Wati's case** had been cited to him, the same conclusions would have been reached.

[39] On the basis of the aforesaid reasons I proceed to propose the following orders.

Lecamwasam, JA

[40] I agree with the conclusion arrived at by Almeida Guneratne, P.

Jameel JA

[41] I agree with the conclusions and proposed Orders of Almeida Guneratne, P.

Orders of Court:

1. *The Appeal is dismissed.*
2. *The Appellant to pay the Respondent as costs a sum of $2,500.00 within 21 days of notice of this judgment.*
3. *Orders 2, 3, and 4 made by High Court in its judgment are affirmed viz:*

> *"2. I order that the defendant cause a survey to be carried out and a Survey Plan be registered with Registrar of Titles to facilitate the transfer or vesting of the 45 acres unto plaintiffs as Trustee of Baiju estate and plaintiffs.*
>
> *3. The plaintiffs are to bear all survey and legal costs.*
>
> *4. The defendant is then to execute transfer to plaintiffs."*

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

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

.....
Hon. Justice Farzana Jameel
JUSTICE OF APPEAL

Solicitors

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