

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CASE NUMBER: HBC 0049 OF 1997L

BETWEEN: SHAFIH MOHAMMED
PLAINTIFF

AND: AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD.
1ST DEFENDANT

AND: BARAVI HANDICRAFT LTD.
2ND DEFENDANT

AND: WESTPAC BANKING CORPORATION
3RD DEFENDANT

AND: THE ATTORNEY GENERAL OF FIJI
4TH DEFENDANT

Appearances:
Mr. G. P Shankar for the Plaintiff.
Mr. K. Kumar for the 1st Defendant.
Mr. A. Patel for the 2nd Defendant.
3rd Defendant Discharged.
Mr. A. Tuilevuka for the 4th Defendant.

Date/Place of Judgment: *Tuesday 18 March, 2014 at Suva.*

Judgment of: *The Hon. Justice Anjala Wati.*

JUDGMENT

Catchwords:

Amendment of claim to introduce fraud against third party- the amendment sought does not have a bearing on the case before Court- mortgagor seeks injunction to retrain new purchaser from building on property- no

serious question to be tried against the purchaser- application by purchaser for striking out claim and removal of caveat- no cause of action against the purchaser of the property under mortgagee sale.

Legislation:

The High Court Rules 1988 ("HCR").

The Cause

1. The proceedings have been discontinued against the 3rd defendant. The 4th defendant is nominal.
2. There are 4 applications before the Court. Two are filed by the plaintiff and two by the 2nd defendant.
3. The plaintiffs' applications are for:
 - a. *Leave to amend the statement of claim; and*
 - b. *An injunction restraining the 2nd defendant, its servants and agents from making any building or development on the land comprised in CT 12593.*
4. The 2nd defendant's applications are for:
 - a. *An order to remove the caveat on CT 12593 lodged by the plaintiff; and*
 - b. *An order that the plaintiff's claim be struck out against the 2nd defendant as it discloses no cause of action against it, the plaintiff has failed to provide the particulars of fraud against it, and had failed to prosecute his claim with due diligence.*

The Substantive Cause

5. The plaintiff says that he was the registered proprietor of CT 12593. Bank of New Zealand ("BNZ") had a mortgage over the said property.

6. Sometimes in 1990s, ANZ Bank took over the operations and the securities of BNZ. The mortgage over the plaintiff's property was also taken over by ANZ. That was done without the consent of the plaintiff. The plaintiff says that he did not sign any variation of mortgage.
7. Subsequently, under mortgagee sale, ANZ sold the land to one Mrs. Anna Mohammed. On the same date the land was transferred from one Anna Mohammed to the 2nd defendant. The two transfers took place on 8 December 1995.
8. The mortgagee sale was carried out without due compliance with the Property Law Act and was unlawful. The mortgage did not have or grant adequate powers of sale to ANZ to carry out the acts it did. The said mortgage was expired and was at the relevant time void and/ or unenforceable and/or defective.
9. The sale to Mrs. Anna Mohammed was expressed to be for the sum of \$95,150.00. The subsequent sale to the 2nd defendant was for the sum of \$100,000. There was no actual sale to Mrs. Anna Mohammed who merely paid a deposit of \$10,000 which was the only sum that was refunded to her.
10. In the alternative and in the event it is held that there was a proper mortgage which was enforceable, the plaintiff claims that the said sale and transfer to the 2nd defendant took place in breach of the duties owed to the plaintiff and in breach of a banker's duty to its customer.
11. The 1st defendant, without due authority, deducted monies from the sale of the land to pay off debt owed by one Navosa Sawmilling Company, a limited liability company in which the plaintiff is a Director. The plaintiff had given a guarantee to secure the debt of the company but no proceedings under the guarantee had been instituted by the 1st defendant against the plaintiff. The company had given its own securities to the 1st defendant such as debenture over the assets and the 1st defendant did not exercise the rights under the said debenture.
12. After the mortgagee sale proceeds were applied to the debts of the company, there should have been substantial funds left over. Some monies ought to have been refunded to the plaintiff but none was.

13. The plaintiff says that the 1st and 2nd defendant and/ or its servants or agents have acted fraudulently and in collusion with each other in selling the plaintiff's property without proper authority or have disposed of his assets improperly. The particulars of fraud have been pleaded as:

- a. *Selling the said property without there being a third party or proper mortgage to secure the loan to Navosa Sawmilling Company Ltd.*
- b. *Not refunding excess funds received from the mortgagee sale to the plaintiff.*
- c. *Fraudulently converting the excess funds received under mortgagee sale to their own use.*
- d. *Selling the said property under the mortgage without giving proper demand under the same.*
- e. *Deliberately putting the property for sale with the furtive intention to transfer the property to the 2nd defendant.*
- f. *Selling the said property without proper authority.*
- g. *Purporting to sell to one Anna Mohammed when no actual sale to her occurred and when she was only refunded her deposit and in effect using the mechanism of a mortgagee sale to transfer the said property to the 2nd defendant.*
- h. *Transferring the property from Anna Mohammed to Baravi Handicraft Limited without proper authority from either the plaintiff or Anna Mohammed.*
- i. *Selling the property when there was no actual default by the plaintiff.*
- j. *Encouraging and persuading the 1st defendant and/ or its servants and /or agents to put the property on mortgagee sale and selling the same.*
- k. *Submitting an incorrect or false declaration to achieve registration of mortgagee sale.*

14. The plaintiff says that the 2nd defendant took loan from the 3rd defendant to purchase the property. The transfers to the various parties are unenforceable and or fundamentally defective and / or unlawful.

15. The plaintiff says that it will rely on the provisions of the Fair Trading Decree and the Stamp Duties Act.

16. The plaintiff prays that the transfer to the 2nd Defendant be set aside and the relevant mortgage to the 3rd defendant be also set aside. The said memorials on the relevant title be cancelled. He also asks for damages and costs.

Grounds in Support

A. Application for Amendment

17. The plaintiff seeks an amendment that the following paragraph 15(A) be inserted after paragraph 15 of his claim.

15 A - That the purported transfer of CT No. 12593 in favour of the 2nd defendant is false and/or fraudulent.

Particulars

- a. That the purported transfer document in respect of CT No. 12593 is neither the Deed of Anna Mohammed nor she ever intended to sign the transfer of CT No. 12593 in favour of the 1st defendant.*
- b. The signature of Anna Mohammed on the document purporting to be transfer of CT 12593 (if in fact her signature) was obtained by fraud, deception and/ or false representation in that she was told to sign for withdrawal of her tender and refund of \$10,000 deposit but she was never told that she was being asked to sign a document purporting to be transfer of CT No. 12593 in favour of 2nd defendant. The said transfer is therefore vitiated by dishonesty and/ or moral turpitude, and is not entitled to protection of s.40 of Land Transfer Act because Anna Mohammed's name and/ or purported instrument have been falsely and/ or fraudulently used to deprive the plaintiff of his interest.*

B. Application for Injunction

18. The plaintiff says that the 2nd defendant has started making development namely building on the land comprised in the disputed CT 12593. Since the legality and validity of the transfer is being challenged, the status quo should be maintained. In the event the

transfer is set aside, the plaintiff says that it does not wish to compensate the plaintiff for improvements made by the 2nd defendant. It has done some minor development on the land and is collecting \$4,000 monthly rental.

19. The plaintiff subsequently alleged that the 2nd defendant's tenant, servants and/ or agents John Garber trading as LA CAFÉ, currently occupying the 2nd defendant's premises, has started making developments by building on the said land.
20. The plaintiff says that it gives the usual undertaking as to damages.

C. *Removal of Caveat and Striking Out.*

21. The managing director of the 2nd defendant filed an affidavit and stated that in mid 1995, in response to a newspaper advertisement by Sir Vijay R Singh and Co., Solicitors Lautoka, he submitted a tender to purchase a property at Korotogo contained in CT 12593. The property was owned by the plaintiff and was up for mortgagee sale.
22. A few weeks after the close of tenders and not having heard from Sir Vijay R. Singh & Co., he called at their office to inquire about the outcome of his tender. He was informed that the bank had accepted the tender of Anna Mohammed but that he could buy it from her. He was invited to make an offer.
23. After considering the matter for a few days, he informed Sir Vijay R. Singh & Co. that he was willing to buy the property for \$100,000. His offer was accepted and in due course the purchase was completed and the property registered in the name of his company. During the course of his transaction, he had come to know that Ana Mohammed had been unable to raise the money to buy the property and there was some question concerning the deposit she had paid upon the bank's acceptance of her tender.
24. Neither him nor anyone else acting for him or his company had any dealing with ANZ Bank or the plaintiff in connection with purchase of the property.
25. The 2nd defendant had applied to have the caveat on CT 12593 removed but the plaintiff has obtained an order for continuance of the said caveat. The plaintiff had not served or notified about its application to the Court. The same applies to the order for continuance of the caveat.

26. The purchase of the property was financed by the 3rd defendant. This proceeding against Westpac Bank has been discontinued.
27. The plaintiffs' action against the 2nd defendant has no basis in fact or law.

Grounds in Opposition

28. I have not found any affidavits in opposition to any one of the applications except for the affidavit of one Anna Mohammed in which she deposed that she submitted a tender to ANZ Bank to purchase CT No. 12593. She decided that she would take the property, and if the plaintiff who is her late husband's brother would like to take it from her, she would sell the same to him in the same price.
29. As advised by the bank she deposited \$10,000 with Sir Vijay R. Singh & Co. Later the bank asked her to withdraw her tender and that she would get her refund of \$10,000 otherwise she would lose her deposit because the bank preferred one or two other buyers. She has never signed a transfer in favour of anyone. She had no knowledge of the transfer document. If she had bought the land, she would never have transferred it to the 2nd defendant. She does not know who the buyer the bank preferred.
30. If the signature on the transfer document is hers then the same was obtained by deception without explaining to her or letting her read the contents of the document because she was told to sign for withdrawal of the tender and refund of her \$10,000 which is the only amount she received back.

The Submissions

31. Mr. Shankar submitted that the Court has wide and unfettered powers and discretion under order 20 Rule 5 of the HCR to grant amendment to allow the real matter in controversy to be decided. If the amendment is allowed, the issue of fraud against Anna Mohammed can be vindicated.
32. On striking out, Mr. Shankar submitted that such powers are only allowed sparingly and in plain and obvious cases. Fraud has been pleaded against the 2nd defendant. Anna

Mohammed also indicates that she was deceived and/ or misled by false representation. There is a valid cause of action against the 2nd defendant and the claim against it should not be struck out.

33. The counsel for the 2nd defendant submitted that on 27 May 1998 they wrote to the plaintiff's solicitors seeking further and better particulars in respect of fraud, in particular, details of allegations of collusion between the 1st and 2nd defendant. Particulars were also sought in respect of the provisions of the Fair Trading Decree and the Stamp Duties Act relied upon by the plaintiff. There was no response to this letter.
34. On 31 July 1998 the 2nd defendants' solicitors again wrote to the plaintiffs' solicitors reminding them that the letter of 27 May 1998 had not been responded to. Particulars were also sought in respect of:
 - a. Paragraph 4, as to who transferred the property to the 2nd defendant;
 - b. Paragraph 5, particulars of breach of the Property Law Act;
 - c. Paragraph 7, particulars of each of the allegations in respect of the mortgage, that is, expired, void, unenforceable and/ or defective; and
 - d. Paragraph 15, particulars of fraud and / or collusion alleged against the 2nd defendant.
35. By the same letter, the plaintiff was invited to discontinue the action against the 2nd defendant. This letter was also not responded to.
36. The 2nd defendant did not purchase the property on mortgagee sale from ANZ Bank. The 2nd defendant had purchased the property from one Anna Mohammed so it cannot be alleged to have colluded with the bank to sell the property to it.
37. Paragraphs 1-14 of the statement of claim does not relate to the 2nd defendant. No allegations are made against it.
38. Paragraph 15 is the only paragraph in which some nebulous allegations of collusion are made between the 1st and 2nd defendant. It should be noted that the plaintiff has not provided any details of the collusion that were requested by Sir. Vijay R. Singh & Co; on behalf of the 2nd defendant. The Particulars of fraud also do not contain anything against

the 2nd defendant except one which says “*transferring the property from Anna Mohammed to Baravi Handicraft Limited without proper authority either from the plaintiff or Anna Mohammed*”.

39. Any transfer from Anna Mohammed to the 2nd defendant does not require the authority from the plaintiff. It only requires authority from Anna Mohammed and only Anna Mohammed can challenge the transfer in an action instituted by her. In this case there is no action instituted by her. She has merely filed an affidavit which is quite vague and on the one hand says that she did not sign any transfer in favour of Baravi Handicraft Limited and on the other hand says that her signature was obtained by deception without explaining to her or letting her read the contents of the documents. This merely seems like a last minute attempt by the plaintiff to sustain this action. It should be noted that Anna Mohammed was the person who tendered for the mortgagee sale and the transfer was done in her favour. If she is alleging that the transfer to Baravi Handicraft Limited was not signed by her or was obtained by deception then she must institute an action and be a plaintiff in it.
40. The other paragraphs of the statement of claim also do not make any allegations against the 2nd defendant and it was submitted that in this case the plaintiff has no reasonable cause of action against the 2nd defendant.
41. The plaintiff has acquired its title by registration and this can only be set aside on the grounds of its fraud in relation to the transfer from Anna Mohammed. That transfer can only be challenged by Anna Mohammed and has not been done so far. In the circumstances, the plaintiff’s action is really against the ANZ Bank for payment of surplus funds or damages for wrongful exercise of mortgagee sale. The plaintiff cannot therefore maintain a caveat against the 2nd defendant’s property and he cannot get any injunctive relief stopping the 2nd defendant from developing the property. In any event no injunction can be granted because the plaintiff has failed to establish the threshold question that there is a serious issue to be tried. In this case, events cannot be turned back and if anything the plaintiff can only claim damages and damages is an adequate remedy. ANZ Bank and the 2nd defendant are in a good position to pay any damages if it is awarded. On the other hand, the plaintiff has failed to establish any ability to pay damages.

42. The plaintiff in this case claims that the mortgage was defective, expired and/ or unenforceable. If that was the case then the plaintiff should have restrained the mortgagee sale rather than allowing it to proceed and then coming to Court and filing an action fourteen months after the sale had been concluded.
43. The plaintiff has withdrawn the case against the Westpac Banking Corporation thereby admitting that Westpac's mortgage is valid and should continue to remain valid. At the same time he is still seeking to impugn the 2nd defendant's title. What it means is that Westpac is free to do a mortgagee sale of this property to a third party whereas a 2nd defendant cannot develop its own property. That surely cannot be right.

The Law and Analysis

44. I will first of all deal with the aspect of amendment. The amendment intends to introduce fraudulent act against Anna Mohammed and seeks to impugn the transfer to the 2nd defendant. The plaintiffs claim is fraud against him when Anna Mohammed is the 1st buyer of the property. Fraud against Anna Mohammed is not in issue or will affect the real issue in controversy. The proposed amendment does not have a bearing on the claim before the Court.
45. If the plaintiff feels that the 2nd defendant persuaded the bank to carry out mortgagee sale, then why did Anna Mohammed who is related to him tender for the property? Was she also part of the fraudulent act that she would purchase the property and then sell it to the 2nd defendant? She should have insisted that the property must be sold to her as the bank had accepted the tender. If there was any collusion, the bank would have accepted the tender of the 2nd defendant immediately than going through the first transfer to Anna Mohammed.
46. If Anna Mohammed is aggrieved at the transfer to the 2nd defendant; she would either be a plaintiff in this action or a separate action against the bank and the 2nd defendant.
47. The bank had exercised its powers of mortgagee sale when Anna Mohammed tendered for the property and her tender was accepted. The 2nd defendant had also tendered for the property but he did not buy it from the bank. He bought it from Anna Mohammed.

By the time the 2nd defendant purchased the property, the bank had exercised its powers as a mortgagee to sell the property.

48. If there has to be any allegation of fraud, it should be against Anna Mohammed as she was the first buyer of the mortgagee sale. It cannot be against the 2nd defendant. If the plaintiff feels that the sale to Anna Mohammed was a disguise then Anna Mohammed should stand up for her rights. The plaintiff could have also restrained the bank from proceeding with the sale but he took no action.
49. From the claim or the affidavits, I do not find any actual but bare allegations of fraud against the 2nd defendant to rope the 2nd defendant in the claim.
50. The plaintiff's entire claim is against the mortgagee being the ANZ Bank. The 2nd defendant has been roped in here and there to say that it committed fraud by persuading the bank to sell the property but that allegation in itself is negated by the sale to Anna Mohammed. I do not find there to be a cause of action against the 2nd defendant.
51. The 2nd defendant has an indefeasible title which can be impugned if there can be shown actual fraud, that is, dishonesty of some sort on the part of the 2nd defendant. There is no such allegation or evidence. The plaintiff is only assuming fraud on the 2nd defendant. That is not enough to establish fraud on the 2nd defendant's part.
52. The 2nd defendant came in picture after the mortgagee sale. There is not actual evidence or allegation that it had any dealing on the property before the mortgagee sale. There is nothing to indicate that the 2nd defendant knew about the plaintiff rights as stated in the claim to avoid purchasing the property. What appeared to the 2nd defendant was a clear exercise of mortgagee sale so it tendered for the property. It had all the rights to do so. If there was an injunction or some other action against the bank before the sale, making those allegations of unenforceable mortgage and likewise, the 2nd defendant would have had some knowledge to at least impute fraud of the kind alleged on its part.
53. There being no cause of action against the 2nd defendant and the 2nd defendant being a bonafide purchaser, it ought to be allowed to develop its land after having it registered in its name. The caveat ought to be removed and the action against the 2nd defendant struck out.

54. There is no serious question of fraud against the 2nd defendant. The issue is against the bank. The plaintiff has also failed to show that he is really financially worth to pay any damages to the 2nd defendant should it sustain any as a result of this application.
55. The property has been sold. There is a new mortgagor. That mortgager ought to be paid its monies. The action for the plaintiff now lies in damages against ANZ Bank which can be paid given the financial capability of the bank.

Final Orders

56. The applications for amendment of the claim and injunction against the 2nd defendant are refused.
57. The caveat by the plaintiff on the property is to be removed. The Registrar of Titles is directed to implement this order.
58. The claim is struck out against the 2nd defendant.
59. The matter is to be listed before the Lautoka Master for completion of PTC and thereafter for fixing of a trial date.
60. The plaintiff is to pay the 2nd defendant costs of the proceedings in the sum of \$1500.00

Anjala Wati

Judge

18.03.2014

To:

1. *G.P. Shankar & Co. for the Plaintiff.*
2. *Young & Associates for the 1st Defendant.*
3. *Messrs Sherani & Company for the 2nd defendant.*
4. *AG's Chambers for the 4th Defendant.*
5. *File:HBC No. 0049 of 1997L.*