

IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL JURISDICTION

Civil Action No. 37 of 2012

BETWEEN : **MOHAMMED SALIM** s/o Fakir Mohammed of Bocalevu, Labasa, Cultivator as Executor and Trustee in the Estate of Fakir Mohammed, Deceased.

PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD** a body corporate established under the iTaukei Land Trust Act having its principal office at Suva.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**
COUNSEL : **Mr. A. Ram** for the Plaintiff
Ms. E. Raitamata for the Defendant
Date of Hearing : **7th March 2014**
Date of Decision : **28th March 2014**

DECISION

INTRODUCTION

1. The Plaintiff has filed a motion dated 24th January, 2014 purportedly in terms of Order 33 rule 3 and 7 and Order 25 of the High Court Rules of 1988. The orders sought by the Plaintiff are that the Defendant had breached the orders of the Court of Appeal and unable to comply with the said orders and the Plaintiff is entitled for damages, hence it be referred for assessment of damages. The Plaintiff was unable to submit any case law that allows such procedure in terms of the provisions of the High Court he relied on. The

provision contained in Order 33 is used in exceptional circumstances and there should be a reason to justify proceeding under such provision. The motion seeks determination on the non compliance of the Court of Appeal order and the impossibility of compliance of that by the Defendant, but the statement of claim is based on ‘deliberate and malicious’ act of the Defendant for failure to comply with the consent order of the Agricultural Tribunal in 1992.

FACTS

2. The Plaintiff and his late brother had a dispute regarding an agricultural land and the lease for the said land was granted to the late father of the Plaintiff by the Defendant.
3. The Plaintiff inherited the title for the said land as the sole beneficiary of his father’s will. The said lease to the late father of the Plaintiff, expired in 2006, but before that the dispute was resolved by mutual agreement with all the parties (i.e. two brothers and Defendant) in the Agricultural Tribunal in 1992.
4. The consent order of the Agricultural Tribunal inter alia was to apportion the farm between the two brothers equally and the Defendant as the landlord be responsible to oversee and facilitate the subdivision and issuance of the two new leases.
5. The arrangement did not eventuate and the Plaintiff instituted a purported action in the High Court for the execution of the said agreement in the Agricultural Tribunal and the said action was dismissed on the basis that said action was statute barred in terms of the Section 4(4) of the Limitation Act (Cap35).
6. The said High Court decision was appealed and in Fiji Court of Appeal Case No ABU0017 of 2008s decided on 16th March, 2009 it was held that Section 4(4) of the Limitation Act (Cap 35) did not apply to a decision of the Agricultural Tribunal. According to the Court of Appeal decision, the principles of estoppel also applied to the case and the decision of the High Court made on 27th September, 2007 was quashed.

7. The Court of Appeal in its judgment further ordered the Defendant to ‘perform and carry into execution the orders of the Tribunal made on 6th November 1992.’
8. The Defendant by this time had already issued a new lease upon the expiration of the lease granted to late father of the Plaintiff on 11th March, 2008 to one Khatoon Bi.
9. The Plaintiff seeks to obtain damages against the Defendant for alleged ‘deliberate and malicious’ act contrary to the Agricultural Tribunal orders that deprived the Plaintiff from ½ of the land he held as the executor of the estate of his father.

ANALYSIS

10. The Plaintiff now seeks following orders
 - a. The Defendant has breached the Court of Appeal orders and is unable to comply with the said orders.
 - b. That the Defendant is liable to the Plaintiff for damages resulting from such breach.
 - c. That the matter be referred for assessment of damages before a judge or Master of the High Court.
11. The motion is filed in terms of Order 33 rule 3 and 7 and also Order 25 of the High Court Rules of 1988. I do not think that there is any justification in the application of Order 33 rule 3 and 7 to the present scenario. In the paragraph 2 of the affidavit in support the Plaintiff states

‘That this matter be heard and determined pursuant to issues relating to law and fact or partly of fact and partly of law.’
12. Admittedly, the issue is mixed law and fact and needs the hearing of the witnesses in this matter by the court. This type of case is not justified to deal in terms of Order 33 of the High Court Rules of 1988, as the matter is not complicated and will not serve any purpose except the delay and cost by proceeding this path. It is the court that needs to decide to proceed in terms of Order 33 and when there is no justification there is no need to proceed with Order 33 of the High Court Rules of 1988.

13. In *Tilling and Another v Whiteman* [1979] 1 All ER 737 Lord Wiberforce (p738- 739) stated,

'I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.'

14. The Defendant needs to explain its defence and reasons for their actions. One cannot be driven from the judgment seat that the actions of the Defendant was deliberate and malicious as claimed by the Plaintiff. They may have an explanation and that needs to be heard with evidence supporting it.

15. The Plaintiff's argument that the Defendant's contention in this case was already dealt by the Court of Appeal cannot be accepted as it was not an appeal from an action seeking damages from the Defendant. The Court of Appeal in paragraph 28 held,

*'In the light of these matters we find **no valid defense has been established against the appellant for an order for specific performance of the agreement of 3 July, 1991.**' (emphasis added)*

16. The Court of Appeal determination was regarding **specific performance**, and cannot be in *toto* applied to the present action as the basis of rejection of the defence and for an order in terms of Order 33 that the Defendant is liable for damages for alleged deliberate and malicious acts of the Defendant. The burden of proof is fairly and squarely with the Plaintiff and the determination of the Court of Appeal, was regarding a different cause of action.

17. The decision of the High Court in 2007 held that the consent order of the Agricultural Tribunal cannot be enforced in terms of Section 4(4) of the Limitation Act, but this determination was overturned in 2009. The lease issued to deceased expired and new lease granted in 2008 to one Khatoon Bi. Admittedly, the lease was issued before the

Court of Appeal determination, and what Plaintiff needs to prove deliberate and malicious acts of the Defendant as per the alleged statement of claim.

CONCLUSION

18. The burden of proof of this action is with the Plaintiff. The decision of the Court of Appeal in 2009 relates to specific performance and or execution of the agreement entered in the Agricultural Tribunal. The cause of action in the present action is for damages for alleged ‘malicious and deliberate’ acts of the Defendant. The burden on the Plaintiff cannot be by passed using the Court of Appeal decision regarding a different cause of action, namely specific performance. Apart from that, in my judgment there is no justification to resort to Order 33 of the High Court, too. The motion dated 24th January, 2014 is struck off. The cost of this application is cost in the cause.

FINAL ORDERS

- a. The motion dated 24th January, 2014 is struck off.
- b. Cost of this application is cost in the cause.
- c. Matter to take normal cause.

Dated at **Suva** this **28th** day of **March, 2014**.

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Justice Deepthi Amaratunga
High Court, Suva