

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action # HBC 209 of 2005

BETWEEN : **SHANTI** of Koronivia, Nausori, Domestic Duties

Plaintiff

AND : **INDAR LAL** of Koronivia, Nausori, Businessman, the sole surviving Administrator of the Estate of DHANWANTI (*daughter of Musafir*) late of Koronivia, Nausori.

Defendant

COUNSEL : **Mr Chandra S** of **MC Lawyers** for the **PLAINTIFF**
Mr Kumar S of **Sunil Kumar Esq** for the **DEFENDANT**

DATE OF JUDGMENT : **8th May 2014**

JUDGMENT

1. Before considering the summons filed on 5th March 2012 which is the subject matter of this case, I set out the chronology as follows:

1.1 The Writ of Summons filed by the Plaintiff against the Defendant being the sole surviving Administrator of the Estate of Dhanwati claiming:

“(a) Order for extension of Caveat No. 548781 until the action is heard and determined by this Honorable Court;

(b) An order for distribution of assets of the estate property;

(c) *Damages;*

(d) *Costs.*”

1.2 By the Notice of Motion dated 10 May 2005, the Plaintiff seeks an order for Extension of Caveat No. 548781.

1.3 Having heard the said motion, Hon. Singh J. made order on 11 May 2005 and extended the Caveat No. 548781 until further order of the court.

1.4 The extension of the Caveat No. 548781 remained in force until 22nd May 2008 Hon. Singh J. made the following orders by the consent of both parties:

1. *The Defendant to give house site to the Plaintiff which is approximately 30 perches upon survey.*

2. *The Plaintiff to retain the residual interest in the balance estate vacant land on the side of Koronivia Road.*

3. *The Defendant had given house sites to other sisters between the Plaintiff's house and Toga River.*

4. *The Plaintiff will bear the full costs of subdivision to obtain her house site.*

5. *Agreed that no party is to block access from Koronivia Road to Toga Road.*

2. This matter before this court is to decide on the summons filed on 5th March 2012 by the Defendant stating that the action was settled as per Deed of Settlement and an Order was made by this court on 22nd May 2008 by consent of the parties. Before the summons were taken up for hearing the Plaintiff had made an application to substitute Shalendra Prasad in place of the Plaintiff who was deceased on 30th April 2010. The Learned Master of this court made the Order on 7th August 2012 substituting Shailendra Prasad also known as Shalendra Prasad in place of the Plaintiff.

3. The summons filed on 5 March 2012 was taken up for hearing on 19 October 2012 and Mr S Chandra counsel for the Plaintiff and Mr Sunil Kumar for the Defendant made their submissions and both parties filed written submissions too.

4. **Submissions Analysis and Determination**

4.1 Mr S. Chandra for the Plaintiff stated:

4.1.1 There are two orders made by this court:

- (a) *Hon. Singh J.'s order on 12 May 2005 extending the Caveat No. 548781 until further orders by this court;*
- (b) *Consent order made on 29 November 2007 by Hon. Singh J. and it was reconfirmed by the Learned Master on tendering of the Deed of Settlement on 22nd May 2008.*

4.1.2 When the said consent order was made, there was no mention of caveat and it remains in force to date.

4.1.3 Substantive action has to be heard before the discharge of the caveat.

4.1.4 Caveat is not an obstacle for dealing of the land, development and subdivision and can be controlled by the Administrator. Caveat should remain in force until the subdivision is completed.

4.1.5 Mr Sunil Kumar counsel for the Defendant stated referring to the Affidavit dated 25 April 2012. Document marked *ILI* is the Agreement between the Trustee of the property (part Lot 3 DP3715) Moti Lal (*f/n Ram Sewak*) and the Plaintiff dated 3 September 2003.

4.1.6 Order made on 29 November 2007 was sealed on 26 May 2007. This was by consent of the parties. Once the consent order is signed and sealed parties are bound by it. Several authorities were cited by the Counsel.

4.1.7 The Defendant's counsel also referred to the Sections 47(1), (2) and (3) of the Succession Probate and Administration Act Cap 60 and stated there is no necessity to have a caveat in this matter. There are certain Sales and Purchase Agreement to be registered.

4.1.8 In reply, the Plaintiff's counsel stated the Plaintiff waits her land to be recovered; orders made will be redundant if the caveat is removed and this case should be fully heard before removing the caveat. The counsel states the consent orders are not final and the caveat should remain until the consent orders are sorted out.

5. In the written submissions of the Plaintiff and Defendant were considered by me and now I make analysis of the submissions to arrive at a conclusion on the issues in this case.

6. The following two issues has to be decided in this matter:
- (a) *As to whether the settlement made before Hon. Singh J. on 29th November 2007 which was confirmed by the Master J.J. Udith on 22nd May 2008 and sealed on 26th May 2008 disposed the action before this court?*
 - (b) *If the above issue is answered in affirmative as to whether the orders sought by summons dated 5th March 2012 be granted?*

All other issues raised in these proceedings should be considered only if the above paragraph (a) is answered negative.

7. By the Writ of Summons endorsement of claim the Plaintiff claimed:
- (a) *Order for extension of Caveat No. 548781 until the action is heard and determined by this court; and*
 - (b) *Order for distribution of the estate property.*
8. I reproduce the proceedings taken place before Jiten Singh J. on 29th day of November 2007:

“Mr Suresh Chandra for the Plaintiff.

No appearance for the counsel for the Defendant.

Shailendra Prasad – Power of Attorney holder from Shanti the Plaintiff.

- *Inar Lal*
- *Har Lal*
- *Rati Lal present.*

Indar Lal - *Sister is happy with land we gave her. It was house site. She can have it surveyed. We are happy to give house site and Shanti can retain residual interest in the balance of vacant land on the other side of the road.*

- *Agreed that sister Shanti can have her house site which was given to her. It is about 30 perches subject to survey.*
- *She would still retain some residual interest in the vacant land on the other side of Koronivia Road.*

- *We had given house sites to two other sisters between Shanti's house and Toga River. They have not built their houses on their sites but I want to keep to my word.*
- *I want to keep to my word.*
- *I am happy if a deed is made.*
- *Plaintiff will have to bear costs of sub-division to get her house site.*
- *No one is to block access from Koronivia Road, Toga.*

Plaintiff - *I agree*

Court - *Adjourned to 22/2/08 – Mention only to see if deed is prepared and signed by all the beneficiaries before the Master at 10.00am.*

(Sgd) J Singh

JUDGE

9. As agreed by the parties, the Deed of Settlement was tendered before the Learned Master on 22nd May 2008 counsel for both parties appeared and confirmed the settlement. Order was sealed on 22nd May 2009.
10. The sealed order states:
 - (1) *The Defendant to give house site to Plaintiff which is approximately 30 perches upon survey.*
 - (2) *The Plaintiff retain residual interest in the balance estate vacant land on the side of the Koronivia Road.*
 - (3) *The Defendant had given house sites to other sisters between the Plaintiff's house and Toga River.*
 - (4) *The Plaintiff will bear the full costs of sub-division to obtain her house site.*
 - (5) *Agreed that no party is to block access from Koronivia Road to Toga Road.*

11. I conclude the above terms agreed are finality of the Orders applied by the writ. In the Writ of Summons under paragraph (b), it was claimed:

“An order for distribution of the assets”

which was entered in the sealed order preciously, and the Deed of Settlement was properly executed and file of record.

12. In such a situation, it is the well settled law the Plaintiff has to bring a fresh action, since a new contract being created by consent. The Judgment in case of **Huddersfield Banking Co. v. Henry Lister & Sons** [1895] 2 Ch 273 was cited in Fiji case of **Bimal Vimlesh Narayan v. Reena Kumari Bray** [Civil Appeal No. ABU 0063 of 2011] (*unreported – decided on 28 September 2012*) where it was held that the judgment is drawn up, simply expressed what the parties consented to, and contains the very words consented to and it certainly carries out what the court decided and intended to decide.

In the present case Hon. Singh had noted that the Plaintiff had stated, I agree and Judgment was sealed thereafter.

I conclude if the Plaintiff waited to vary the Judgment, he had to bring in a fresh action. I conclude and determine that in terms of the consent Judgment the Caveat No. 548781 was lapsed.

As held in case of **Wilding v. Sanderson** [1897] 2 Ch. 534, 544, the ground of application was based on the consent of the parties at the trial, was consented to under a mistake Romer J. stated *“I think a fresh action must be brought and that I have no jurisdiction to hear the matter on motion, at any rate without the consent of the parties.”*

It is evident that the consent by parties even by a mistake will have to be corrected by a fresh action. In this case there is no such mistake.

13. I also cite the Lord Denning MR Statement made in case of **Siebe Gorman & Co. Ltd v. Pneupac Ltd** [1982] 1 All ER 377 at 389:

*“We have had discussions about ‘consent orders’. It should be clearly understood by the profession that, when an order is expressed to be made ‘by consent’, it is ambiguous. There are two meanings to the word ‘ambiguous’. That was observed by Lord Green MR in **Charles-Chandles v. Nicholson** [1942] 2 All ER 315 at 317, [1942] 2 KB 321 at 324. One meaning is this: the words ‘by consent’ ‘may evidence a real contract between the parties’. In such a case the court will interfere with such an order on the same grounds as it would with any other contract. The other*

meaning is this: the words ‘by consent’ may mean ‘the parties hereto not objecting’. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case, it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order without obligation?’

14. There were no steps taken by the Plaintiff to proceed with the substantive matter until the summons was filed by the Defendant on 5th March 2012. It was after 5 years of the Judgment, the Plaintiff alleged that caveat to remain until final conclusion of the substantive matter. I conclude, there is no substantive matter to be decided and the consent Judgment had created a binding contract between the parties and the caveat has no effect from the date of the consent Judgment entered by Hon. Singh J. on 29 November 2007 which was subsequently confirmed by the Master on tendering of the Deed of Settlement on 22 May 2008. I determine this matter is concluded and the caveat cannot stand.
15. Having decided on the issue stated in paragraph 6(a) in favour of the Defendant, I hold that the Caveat No. 548781 should be formally discharged.

Accordingly, I make the following **Orders**:

- (1) *The Caveat No. 548781 lodged by the Plaintiff discharged and ordered to remove from the Certificate of Title.*
- (2) *The Plaintiff/the substituted Plaintiff is ordered to pay summarily assessed cost of \$1,000.00 to the Defendant within 30 days from this Judgment.*

Delivered at Suva this 8th Day of May 2014.



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C. KOTIGALAGE
JUDGE