

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 273 of 2013

BETWEEN : **BANK OF BARODA** a Government of India undertaking incorporated in India and carrying on its business in Fiji

PLAINTIFF

AND : **BIJEND PRASAD RAM** C/- Mehboob Raza & Associates, G.P.O Box.12548, Suva

DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. D. Sharma with Mrs. Kumar J.** for the Plaintiff
Mr. Fa I. for the Defendant

Date of Hearing : 25th February, 2014

Date of Ruling : 20th June, 2014

RULING

A. INTRODUCTION

1. This is an Originating Summons filed by the Plaintiff pursuant to section 109(2) and 168 of the Land Transfer Act (hereinafter referred as the "Act") seeking following orders inter alia ;

- i. *That the Defendant show cause why caveat No 766848 registered against certificate of title No 20104 and lodged by the Defendant should not be removed immediately,*
- ii. *That the caveat 766848 registered against certificate of title No 20104 be removed forthwith,*

- iii. *That the Registrar of Title be directed to remove the caveat 766848 registered against the certificate of title No 20104,*
- iv. *That the Defendant do pay the costs of this application on an indemnity basis,*

2. The Plaintiff's claim is founded on the grounds deposed in the Affidavit of Usha Narayan who is the manager of the Plaintiff bank. Upon being served with this Summons, the Defendant appeared in person and filed his affidavit in opposition. The Plaintiff then served their affidavit in reply. At that point, the new solicitors of the Defendant sought leave to file a supplementary affidavit which was granted with the consent of the Plaintiff. The Plaintiff was granted permission to file an affidavit in reply to the supplementary affidavit of the Defendant. Subsequently, this Summons was set down for hearing on the 24th of January 2014. On the hearing day, the counsel appeared the Defendant sought an adjournment as the counsel in carriage of this matter has left their law firm and the Defendant had indicated her that he will retain another solicitor. The Plaintiff's counsel consented for a short adjournment; accordingly the hearing was adjourned to 27th of January 2014. The hearing begun on 27th of January 2014 and continued on 25th of February 2014. The Counsel for the Plaintiff and the Defendant made their oral arguments and submissions during the cause of the hearing. The counsel for the Plaintiff tendered his written submissions at the hearing. The Defendant was given time to file his written submissions which he filed accordingly; thereafter the Plaintiff filed his reply written submissions. Having carefully considered the Summons, respective affidavits, oral and written submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND,

Plaintiff's case;

3. The Plaintiff claims that Tropichealth Incorporated (Fiji) Limited (hereinafter referred as "the Mortgagor) is the registered proprietor of all that property contained and described in certificate of title No 20104 being Lot 1 on D 2229. The Tropichealth Incorporated (Fiji) Limited mortgaged the said property in favour of the Plaintiff pursuant to mortgage No 600557 which was registered on 18th of December 2006.

The Plaintiff had to issue a demand notice under the said mortgage consequent upon the default of the repayment by the Mortgagor. The Mortgagor had failed to pay the debt as demanded. The Plaintiff then proceeded to exercise its rights as mortgagee and called for tendered for the sale of the said property. In the meantime, the Defendant has lodged this caveat No 766848 against the said property claiming an interest as a shareholder of the Mortgagor Company. The Plaintiff claims that they are prejudiced by the Defendant's caveat and prevented them to proceed with the sale of the property under the mortgage. The Plaintiff contends that the Defendant has no caveatable interest pursuant to section 106 of the Land Transfer Act. Moreover, the Plaintiff alleges that the caveat filed has not complied with the requirement stipulated under section 107 of the Act.

Defendant's case,

4. The Defendant vehemently opposed this Summons. He is one of the shareholders in the Mortgagor Company and admitted that the Mortgagor mortgaged this property in favour of the Plaintiff under the Mortgage No 600557. He further admitted that the Company has been defaulted the repayment of the loan advanced by the Plaintiff under this mortgage. Moreover, the Defendant is one of the signatories to this mortgage. His objections to this Summons are founded on following main grounds that;
 - i. The Defendant is a 25% shareholder in Tropichealth Incorporated (Fiji) Limited,
 - ii. The Business and assets of Waimanu Road Medical Center, the property of the Defendant was acquired by Tropichealth Incorporated (Fiji) Limited,
 - iii. The Defendant and Dr.Malani a fellow shareholder had made advances to Tropichealth Incorporated (Fiji) Limited in the sum of \$ 503,165 as at the 31st of December 2007,

iv. The Defendant had paid the Plaintiff a sum of \$ 23,000 as part of the Plaintiff's mortgage over Tropichealth Incorporated (Fiji) Limited.

5. The Plaintiff forcefully contended that the Defendant's interest as a shareholder of the company and other grounds of objections do not create a caveatable interest in the property owned by the Company. Moreover, the Plaintiff's rights as the mortgagee have a priority over any subsequent claim and such priority has clearly protected under section 72 of the Land Transfer Act.

C. THE LAW & ANALYSIS,

6. I now draw my attention to review the laws pertaining to the issue of caveatable interest. Section 106 (a) of the Land Transfer Act states that;

" Any person claiming to be entitled or to be beneficially interested in any land subject to the provision of this Act, or any estate or interest, by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or "

7. The meaning and the scope of application of the section 106 (a) of the Land Transfer Act has comprehensively expounded by the Fiji Court of Appeal in **Cambridge Credit (Fiji) Limited v W.F.G. Limited (Vol 21 FLR 182)**, where it was held that;

" the respondent must however, bring itself within the provision of Section 106 and in order to do this must satisfy the court that the following are fulfilled,

(a) That it is a person claiming to be entitled to or to be beneficially interested in any land estate or interest under the act; and

(b) That is it so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever,.....

Section 138 of the Land Transfer Act 1885 (N.Z) (which was not dissimilar from our section 106) was discussed in Staples & Co v Corby and District Land Registrar (1900) 19 N.Z.L.R.517 where Stout C.J. at page 536 said;

“ Before a person can caveat under this section he must be a person who claims to be entitled to the land, or any estate or interest in the land, or to be “beneficial interested” in the land, or in any estate or interest in the land, and the person in either event must claim “by virtue of any unregistered agreement, or other instrument or transmission” (transmission meaning acquirement by title or estate consequent on death, will, intestacy, bankruptcy, &c) or of any trust expressed or implied, or otherwise howsoever”.

Section 106 of the Fiji Act is designed to protect unregistered instrument in land. For instance an agreement for sale and purchase, an unregistered mortgage, an agreement to give a mortgage, or an option to purchase land is just a few examples of unregistered instruments which are capable of being protected by the lodging of a caveat”.

8. Griffith C.J. in **Municipal District of Concord v Coles (1906) 3 CLR 96 at 107** has discussed the definition for “an interest in any land” , where his lordship held that:

“After a very anxious consideration of the words of the section and the whole Act, we have come to the conclusion that the intention of the legislature in using the word “interest” was that only a person having, or claiming to have some legal or equitable interest in the land partaking of the character of an estate, or of an equitable claim upon the land can be a caveator”.

9. The Judicial observation outlined by Griffith C.J in **Municipal District of Concord v Coles (supra)** has adopted and approved by Justice Jitoko in **Fiji National Providence Fund Board v Vivras Holdings Ltd (2004) FJHC 16, HBC0325D.2002S (3 June 2004)**, where Jitoko J while referring the passage of Griffith C.J, held that under the Torren system, a caveatable interest amount to a proprietary interest in land.

10. Stout C.J. in Staples & Co v Corby and District Land Registrar (1900) 19 N.Z.L.R.517 further elaborated the scope of “ an interest in land” where Stout C.J. held that;
- “the person who can caveat against bringing under the Act is one who has, or claims that he has, an “interest” in the land. “Interest” is not defined, but it seems to be a legal interest, not an equitable one, or an equitable interest capable of being made legal”.*
11. Having considered the section 106 (a) of the Act and the judicial dictums discussed above, I find that the Defendant is required to satisfy;
- i. That he has a claim of entitlement to this property or “estate or interest” in this property subject to the provision of the Land Transfer Act,
 - ii. Beneficially interested in this property or “estate or interest” in this property subject to the provision of the Land Transfer Act,
 - iii. This entitlement or the beneficial interest in the property or “estate or interest in the property is derived by virtue of
 - a. Any unregistered agreement, or
 - b. Other instrument, or
 - c. Transmissions, or
 - d. Of any trust expressed or implied, or
 - e. Otherwise howsoever,
12. Having reviewed the laws and applicable provisions on the issue of caveatable interest, I now proceed to analyses the evidence presented before me with these laws and principles discussed above.
13. The Defendant mainly contended that he has a caveatable interest in lieu with his 25% of shareholding in the Mortgagor Company and the advancement made to the Company by him with his fellow shareholder Dr. Malani in the sum of \$ 503,165 as

shareholder/Director advance. In fact in my view, this contention is misconceived. If the court approved such a contention, it would hazardously unsettle the legal foundation of corporate governance. The fundamental attribute of corporate personality is that the corporation is a legal entity distinct from its members. Lord Macnaghten has accurately articulated the distinct nature of the corporate personality in his widely acclaimed passage in Solomon v Solomon & Co (1897) A.C.22, where his lordship outlined that:

“the company is at law a different person altogether from the subscribers..... and. Though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extend and in the manner provided by the Act”.

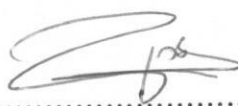
14. Lord Porter in Short and Another v Treasury Commissioners (1948) 1 K.B. 116 further elaborated the distinct nature of the company with its shareholders in respect of properties owned by the company. His lordship found that *“a shareholder has no direct share in the asset of a company, he has such rights as the memorandum and articles give him and nothing more”*.
15. Having considered the reasons set out above, I am satisfied that the Defendant has no caveatable interest under section 106 (a) of the Land Transfer Act in lieu with his 25% of shares in the company.
16. The Defendant claimed that he has contributed to the advancement of the company and made advances to the company as shareholder/director advance. The Defendant has failed to provide any credible evidence to substantiate his claim of advancement though he deposed such in his affidavit. However, he admitted that he has not obtained any charge or lien against this property in respect of such advancement. Wherefore, I find it as an unsecured advancement. In fact his claim as a shareholder/director advancement is a claim in personam against the Company. Fiji Court of Appeal in Ali v Fiji Development Bank (2005) FJCA9; ABU0057.2004S (18

March 2005) held that an interest in personam does not fall within the meaning of caveatable interest.

17. Furthermore, the Defendant has signed this mortgage as one of the directors of the Company and had full knowledge about the operation and the status of the Company, yet he signed this mortgage and accepted the condition of the loan from the Plaintiff with the understanding that this property was unencumbered.
18. I now turn to address the issue of that the Defendant is the previous owner of this property and presently operating his business on the property. There is no registered or unregistered charge, lien or covenant to secure any form of interest of the previous owner in this property. Therefore, this contention does not create any caveatable interest.
19. In view of the reasons set out above, I am satisfied that the Defendant has not established that he has caveatable interest in this property contained and described in certificate of title No 20104 pursuant to section 106(a) of the Land Transfer Act. Wherefore, I hold that the Defendant does not have a caveatable interest to lodge and maintain this caveat No 7666848. I accordingly make following orders that;
- i. The caveat No 7666848 registered against the Certificate of Title No 20104 be removed forthwith,
 - ii. The Registrar of Title is hereby ordered to remove the caveat No 7666848 registered against the Certificate of Title No 20104 forthwith,
 - iii. The Plaintiff is awarded with cost of \$ 2000 assessed summarily,

Dated at Suva this 20th day of June, 2014.




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R.D.R. Thushara Rajasinghe
Master of High Court, Suva