

**IN THE HIGH COURT OF FIJI**

**IN SUVA**

**CIVIL JURISDICTION**

**CASE NUMBER:**

**HBC 166 OF 2008**

**BETWEEN:**

**URMILA DEVI as administratrix in the estate of RAJ KUMAR by  
LA No. 38047.**

**PLAINTIFF**

**AND:**

**FIJI CO-OPERATIVE DAIRY COMPANY LIMITED**

**DEFENDANT**

**Appearances:**

***Mr. S. Kumar for the Plaintiff.***

***Mr. Viren Kapadia for the Defendant.***

**Date/Place of Judgment:**

***Friday 19 September 2014 at Suva.***

**Coram:**

***The Hon. Madam Justice Anjala Wati.***

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## **JUDGMENT**

**Catchwords:**

***Land- sale and purchase agreement- sale evidenced in writing- compliance of s 59 d of IGBA- successor does not have right to deny contract- fraud on part of successor if the successor seeks to deprive the right of the purchaser -applicability of indefeasibility of title in a contractual case- successor estopped from denying contract and enforcing – acquiescence on part of successor of the transactions by the registered proprietors - performance of contract by one party- right of specific performance- delay in bringing claim for rental for occupation of land.***

**Legislation:**

***The Indemnity, Guarantee and Bailment Act (“IGBA”): s. 59 d.***

*The Land Transfer Act Cap. 131.*

*The Limitation Act Cap. 35: s. 7.*

Cases:

*Merrie v. McKay (1897) 16 NZLR 124.*

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***The Cause***

1. The plaintiff is an administratrix in the estate of her husband Raj Kumar. Ram Kumar died intestate on 4 March 2000.
2. The plaintiff claims that all material times she was the registered proprietor of all that piece and parcel of land described as Kolutanibuli & Konavunikavika [part of] in the district of Rewa having an area of 39 acres 2 roods and 4 perches being Lot 5 on Deposited Plan Number 4496 contained in the Certificate of Title Number 18320.
3. The plaintiff says that in or about 1999, the defendant approached the plaintiff's father in law, Ram Harakh, to allow the defendant to build a Chilling Centre on his land for the storage of milk from nearby dairy farmers for onward delivery to its factory.
4. Her father in law agreed and the defendant company then constructed a Chilling Centre.
5. The plaintiff alleges that the defendant's occupation and usage of her land is unlawful and illegal. The defendant is a trespasser on the said land as they do not have any rights on the said land.
6. The plaintiff claims that the defendant is using the land free of charge and thereby getting unjustly enriched.

7. The plaintiff avers that she made several requests to the defendant for rental of the use of the land or for the defendant to purchase the property but the defendant has failed to respond to either of the request.
8. The plaintiff therefore claims that the defendant pays to her rental of the property in the sum of \$1000 per month from the date of occupation until the date of judgment or in the alternative that it buys the property. The plaintiff also claims general damages, interest and costs of the action.

### ***The Defence and Counter-Claim***

9. The defendant says that at all material times the plaintiff's father in law Ram Harakh was the owner of the said property. The defendant is not aware when the property was transferred to the plaintiff and requires that ownership be proved. In any event the plaintiff took the property subject to the existing agreement and should have notified the defendant of the change of ownership.
10. The defendant is engaged in manufacturing and supplying dairy products Fiji wide.
11. The defendant installed a Chilling Centre at Waidawara on Ram Harakh's property. The installation was done with a proper consent from late Ram Harakh. Waidawara Chilling Centre was a good project of the Government of Fiji and Waidawara Dairy Community was to benefit from the said project.
12. It was a term of the agreement that the defendant would continue to employ at the Chilling Centre any of the late Mr. Ram Harakh's close blood relatives. Mr. Ist Deo and Shiu Dayal were employed before and presently the plaintiff's son Lilesh Kumar has been employed there since 8 January 1998.
13. The defendant had also entered into an agreement with late Ram Harakh to purchase the said property at the consideration sum of \$1,000 which has been paid to late Ram

Harakh sometimes in August 1995 but the said property has still not been transferred to the defendant.

14. Based on the agreement between late Mr. Ram Harakh and the defendant, the defendant constructed a driveway at Waidawara Chilling Centre which leads to the plaintiff's residence.
15. The defendant has invested quite a substantial sum to make the Chilling Centre operational.
16. The defendant also provides employment to the members of the Waidawara settlement.
17. The defendant says that its operation on the property is not illegal. It is lawful by virtue of the consent and authority given by the late Mr. Ram Harakh and pursuant to the contract made between them.
18. Based on the contract between late Mr. Ram Harakh and the defendant, the defendant seeks specific performance of the contract in that the piece of land on which the Chilling Centre is situated comprising of some 2023 square meters on CT 18320 and which was bought by the defendant be transferred in its name and that a separate title be issued.

### ***Plaintiff's Response***

19. The plaintiff says that the defendant is aware of the change of ownership from Ram Harakh to Urmila Devi. This is through payment of dairy proceeds.
20. The plaintiff also says that the relatives were employed through normal recruitment process by the defendant company and that no concession or favours were given to the plaintiff's relatives.
21. If there was an agreement between the defendant and her husband, the defendant should have had the property transferred in its name but it did not do so. The defendant is in breach of s. 59 d of the IGBA.

### ***The Agreed Facts***

22. The parties have agreed that on CT 18320, the plaintiff is registered as the administratrix in the estate of Raj Kumar and that the defendant has constructed a Chilling Centre on the part of the land comprised in CT 18320.

### ***Issues***

23. The issues that the parties have agreed should be tried are:
- 1. Whether there was an agreement made by the previous registered proprietor with the defendant to construct a Chilling Centre on the part of the land comprised in CT 18320?***
  - 2. Whether the defendant has any legal right to occupy the said part of the said property comprised in CT 18320?***
  - 3. Whether the defendant's occupation is illegal. If so then whether the plaintiff is entitled to damages or rent for the period of occupation and the amount of relief in monetary terms for its occupation?***
  - 4. Are the parties entitled to any costs of the action?***

### ***The Evidence***

24. I will not recite the entire evidence given in Court as the record consists of the transcribed version of the audio recording.
25. On the given evidence before me I shall proceed to make factual findings. If necessary I shall refer to some evidence.

***The Law and Analysis***

26. The first issue hinges on s. 59 d of the IGBA. The section states that ***“No action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized”***.
27. From the plaintiffs exhibit 10 it is clear that the plaintiff’s father in law, Ram Harakh was the registered proprietor of the subject land until the same was transferred to the plaintiff’s husband on 15 October 1997. The plaintiff’s husband died on 4 March 2000.
28. Raj Kumar being the plaintiff’s husband died intestate. The Letters of Administration was issued in favour of the plaintiff on 12 July 2000.
29. In a meeting held on 4 September 1993 the Waidawara dairy farmers agreed that a Chilling Centre be built in the Waidawara locality. Mr. Ram Harakh voluntarily agreed to give his land to the defendant to construct a Chilling Centre. This was via a letter dated 24 May 1994 which reads as follows:
- “ This is to confirm that I am willing to give up an area of ½ acre of my freehold land property for use by Rewa Dairy Company to construct Chilling Centre.***
- I invite the Directors to visit my farm and select a most suitable site at their convenience”***
30. Subsequently the defendant entered into an agreement with Ram Harakh to purchase the ½ acre land in the sum of \$1,000. The agreement was made with Ram Harakh as he was the owner of the property at the material time.

31. The sale and purchase agreement was signed by Ram Harakh but not the defendant. There is a memorandum from the defendant company which indicates that the agreement was signed on 14 September 1994. The memorandum was signed by the Company Secretary Sereana Qoro. The agreement was signed in triplicate but was not dated and witnessed.
32. Under the agreement, I accept that a sum of \$1,000 being the purchase price was paid to Ram Harakh. The payment voucher shows that Raj Kumar being Ram Harakh's son accepted the payment on his behalf. This is also substantiated by the evidence of Mr. Ram Chand who testified on behalf of the defendant that he was approached by Raj Kumar if he could collect the cheque in the sum \$1,000 as Ram Harakh was sick and could not come to collect the cheque personally. Mr. Ram Chand testified that he had authorized the release of the cheque.
33. I find that Ram Harakh had made an offer and signed the sale and purchase agreement. If he had not so, he and his son Raj Kumar would have protested the building of the Chilling Centre on his land in the first place. Further there is no credible evidence to contradict Ram Harakh's offer to give his land to the defendant, the signed sale and purchase agreement by Ram Harakh and the payment of \$1,000 to Raj Kumar to be paid to Ram Harakh.
34. The Chilling Centre was constructed on the property in 1995 pursuant to the sale and purchase agreement. After the Chilling Centre was constructed, the defendant went in occupation of the property and is operating the Chilling Centre since then until date.
35. The property was transferred to Raj Kumar on 15 October 1997 pursuant to a sale and purchase agreement of 21 July 1997. The transfer was done on "**as is where is**" basis which means that Raj Kumar was to take the land as it was and since there was a Chilling Centre on the same, Raj Kumar was bound by the dealing in the land in that the Chilling Center was sold to the defendant.

36. I find that Ram Harakh and Raj Kumar both knew that the Chilling Centre was sold to the defendant as Raj Kumar had accepted the payment. Raj Kumar knew that he was not the owner of the  $\frac{1}{2}$  acre of land on which was built a Chilling Centre. If Raj Kumar did not know about the Chilling Centre and the sale of the land to the defendant, he would have made the defendant's occupation of the land an issue when he became the owner of the property but he did not do so in his lifetime. He allowed the Chilling Centre to operate because to his knowledge the sale was complete and they had received the purchase price.
37. By her letter dated P6 the plaintiff confirmed receipt of the \$1,000 as well although the plaintiff and her witness denies having knowledge of Ram Harakh's and Raj Kumar's dealing with the defendant. They also deny that Ram Harakh signed the sale and purchase agreement and that the land was ever bought by the defendant. The plaintiff even denies her signature in her letter of P6 where she admits that \$1,000 was given for the land. I must say that the evidence of the plaintiff and her son was geared towards only denying the dealing in the land. Their evidence is incredible in light of the evidence of the defendant and the documentary evidence before me and the circumstances surrounding the erection of the Chilling Centre.
38. I find the evidence of Mr. Ram Chand important, independent and credible. He testified that he was related to Ram Harakh. At the relevant time, he was the chairman of the defendant company. He had personally negotiated the issue of building of a Chilling Centre on the land. He said that at the time the going rate for the land was about \$1,000 per acre and the defendant had agreed to pay double the price which was very generous. The defendant had further agreed that whilst the Chilling Centre was built, its equipment would be used to upgrade the driveway that went down to the milking shed on Ram Harakh's land.
39. According to Mr. Seniloli, the first witness of the defendant, it cost the defendant \$1,500 to upgrade the driveway. I accept the evidence of Mr. Seniloli and Mr. Ram Chand that the driveway was built at the cost of \$1,500. I have no reason to disbelieve their evidence.



40. Mr. Ram Chand confirmed the offer letter, the sale and purchase agreement and the memorandum of the secretary indicating the date on which the agreement was signed by Ram Harakh. I accept his evidence.
41. I find that there is no breach of s. 59 d of the GBIA in that there was an agreement by Ram Harakh to sell his land, the agreement was signed by him and he was paid the full purchase price for the agreement. The plaintiff's husband and plaintiff are bound by the dealings of her father in law who owned the land at the time. She was fully aware of the Chilling Centre and accepted the same without raising any issues until her father in law and her husband died and she became greedy for more money. Her family has had the full benefit of the arrangement and she should honour the arrangement.
42. I find that not only did the defendant buy the piece of land under the sale and purchase agreement and honoured the agreement but it did more than what the written agreement required. It built the driveway and also employed the relatives of Ram Harakh's descendants as Ram Harakh wanted that from the defendant. Ist Deo and Shiu Dayal were close blood relatives of Ram Harakh. They were employed by the defendant and the plaintiff's son has been employed as well since 1998.
43. I find that this claim is an exercise by the plaintiff and her son to extract more money from the defendant. Even Mr. Ram Chand gave evidence that the plaintiff in year 2000 had gone to him for preparation of letters of administration. At that time she enquired from Mr. Ram Chand whether there was possibility of obtaining further monies from the defendant for the Chilling Centre. Mr. Ram Chand had testified that he had advised her that the land had been purchased by the defendant and that she could not claim any more monies for the land. Mr. Ram Chand says that she appeared satisfied with the explanation and never raised the issue with him again. Mr. Ram Chand's evidence explicitly indicates the greed of the plaintiff and her son to get unjustly enriched.
44. I have no reason to disbelieve the evidence of Mr. Ram Chand but the plaintiff and son Lilesh Kumar appeared to have concocted evidence to deny any dealings in the land by the defendant to extract more money for the Chilling Centre. Their demeanour and

deportment indicated to me that they were carefully choosing answers to suit their claim and avoided cross-examinations to an extent where it was obvious that they knew about the Chilling Centre and the dealings but initiated the proceedings on the basis that there was no agreement for the dealing. When the agreement was subsequently discovered they had to maintain their initial claim that they had no knowledge of the dealing in the land. Mr. Lilesh Kumar was certain in denying his father and his grandfather's signatures. He was only 13 when the dealing took place. He could not possibly remember their signatures. He did what his mother had asked him to say in Court.

45. Since there was a proper written agreement for the defendant to buy the Chilling Centre and that the defendant had paid the full consideration, the defendant was and is not in occupation of the land illegally. It had bought the piece of land and paid for the purchase price. It has not been unjustly enriched by occupation of the land. It is another matter that after the Chilling Centre was built and fully operational, both parties overlooked to have the land transferred and a separate title issued in the name of the defendant as agreed.

46. The defendant had performed its part of the bargain under the agreement. It paid the \$1,000, built the driveway, employed the close blood relatives of Ram Harakh and went in occupation of the property. It is only equitable that the transaction be formalized in that the plaintiff transfers the land to the defendant on which the Chilling Centre is built and ensures that a separate title be issued in the name of the defendant.

47. I have answered all the issues arising from the pre-trial minutes but there appears to be some more issues that the parties have raised through their closings submissions. They are:

- ***Whether the plaintiff's claim for rent is statute barred;***
- ***Whether the plaintiff is protected by the provisions of indefeasibility of title under the Land Transfer Act Cap. 131; and***

- *Whether the defence of estoppel applies in favour of any party to the claim.*

48. I think it is prudent to take up the question of the Limitation Act first. I have made findings of fact that there existed a written agreement for the defendant to purchase the land on which the Chilling Centre was built. That agreement is valid under s. 59 d of the IGBA in that the proprietor of the land Mr. Ram Harakh had signed the agreement. There is credible evidence by the defendants' witnesses to that effect which I have accepted. The plaintiff is holding the property as a successor from her husband who had bought the property from Ram Harakh his father on **"as is where is basis"**. The plaintiff is therefore bound by the dealings of her husband. She has no right to question those dealings but even if she has any right, she has lost it by virtue of the Limitation Act in that she should have brought a claim for land rent in on or before 2006 but she brought this claim in 2008 which is well beyond 6 years. S. 7 of the Limitation Act bars a claim for rent after 6 years.

49. In the defendant's case, the statute of limitation does not apply as neither party has breached the agreement but there was an overlook by the parties to give full effect to the same for the benefit of the defendant whilst the defendant had complied with the agreement in full from its side. If the defendant was suing for breach of contract than the limitation period would run from the date of the breach. In this case, there is no evidence to say that there was any breach because the defendant could not find the agreement and there was no such refusal to implement the agreement. The plaintiff had always denied the existence of the agreement and it was only found when the trial began so the relief of specific performance is not caught by the statute of limitation.

50. The next question is whether the plaintiff has an indefeasible title which can only be impeached by showing fraud on her part. I am surprised that the plaintiff has claimed indefeasibility of title in her favour. I find that that the plaintiff is bound by the dealings of her predecessors. She is not the bonafide purchaser of the land but holding the same

pursuant to letters of administration. The registered proprietor had entered into a sale and purchase agreement with the defendant. The defendant is now seeking specific performance of that agreement. Neither the registered proprietor nor his administrators can plead indefeasibility. The Court cannot allow the doctrine of indefeasibility of title to deprive the equitable relief of specific performance. If that were so, the provisions of s. 59 e of the IGBA would be meaningless as no one could rely on a contract for sale to claim an interest but s. 59 d provides that right. The provisions of indefeasibility cannot negate that right.

51. The provisions of the Land Transfer Act as to indefeasibility of title have no reference to contracts entered into by the registered proprietor or his executors and trustees.
52. The next issue is that of estoppel. The plaintiff is the successor in title. She had knowledge of the dealings in the land and also knowledge that the defendant had bought the piece of land. She also had knowledge of the defendant's occupation of the land. What remained was for the defendant to register its interest on the land. She thus is bound by the dealing in the land and is estopped from asserting her rights of indefeasibility of title and if she does so knowing the rights of the defendant, she is committing a fraud: **Merrie v. McKay (1897) 16 NZLR 124.**
53. In **Merrie v. McKay** (supra), the plaintiff went into possession of, and erected buildings on, land under an agreement with the then registered proprietor under the Land Transfer Act for a lease of it for ten years, the lessor and his successors to take the buildings at a valuation at the end of the lease, and the plaintiff an option of purchasing in the case of the lessor selling. The defendant was the last of the three successive registered proprietors of the fee-simple in succession to the proprietor who made the arrangements with the plaintiff, each of whom purchased with the knowledge of the plaintiff's agreement, of his possession, and his expenditure. The plaintiff's agreement was never registered. It was held that it was fraud within the meaning of the Land Transfer Act for the defendant to seek to deprive the plaintiff of his rights under the agreement, and that the defendant must perform the contract entered into by his

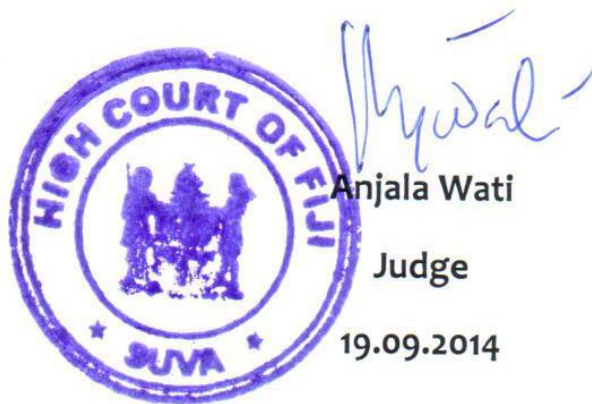
predecessor in title. It was also held that it would have been no answer to an action claiming performance of the agreement

54. The cause of action for specific performance is based on the contract and I find that there is existence of the contract fully performed by the defendant. It now remains for the successor to complete her or part of the bargain which she is bound to as the trustee.
55. I think I must deal with the issue of costs as well. This is a matter which I find was brought to Court wholly out of greed of the successor of the title. The moment she realised that the defendant's could not locate the sale and purchase agreement or any document in writing to evidence the dealing in the land, she brought this claim hoping to get some money and be unjustly enriched. Her claim was bound to fail from the beginning.
56. The defendant has indeed put up a very extensive defence and prepared its case. A lot of paper work in terms of filing submissions and authorities was involved. The trial lasted a week as well. It would be unreasonable to deny the defendants costs of the proceedings. I shall summarily assess the costs.

### ***Final Orders***

57. The plaintiff's claim is dismissed.
58. The defendant's counter-claim is allowed in that the plaintiff is ordered to transfer the 2023 square meters of land on which the chilling Centre is built by the defendant.
59. As agreed the costs of the survey, subdivision and transfer and all other incidental costs be borne by the defendant.
60. If there is refusal by the plaintiff to execute the transfer, the defendant can make an application to the Court to have an officer appointed to execute the transfer on her behalf. Any such application shall be made inter-partes to the court.

61. The defendant shall have costs of this proceeding in the sum of \$5000.



To:

1. *Mr. Sunil Kumar for the Plaintiff.*
2. *Mr. Viren Kapadia for the Defendant.*
3. *File: Suva HBC 166 OF 2008.*