IN THE HIGH COURT OF THE REPUBLIC OF FIJI
AT LAUTOKA

Civil Action No. 105 of 2014L

BETWEEN : **IAN WILLIAM SMITH** of Lot 21, Baravi Road, Newtown Beach, Nadi, Retired Farmer.

PLAINTIFF

A N D : **ROSELINE SHAREEN LATA DUTT** formerly of Lot 21, Baravi Road, Newtown Beach, Nadi, but whose present address is not known to the Plaintiff.

DEFENDANT

Counsel:

Mrs V Patel for plaintiff
No appearance for defendant

Date of Hearing : 2 September 2014
Date of Judgment : 6 November 2014

J U D G M E N T

[1] This is an application filed on 19 August 2014 by plaintiff seeking summary judgment for specific performance (the application). The application is accompanied by an affidavit sworn by the plaintiff. The application seeks the following relief:

1. *An order pursuant to Order 86 of the High Court Rules 1988 for specific performance of the agreement dated 2nd February, 2012 in the Writ in this action.*

2. *An order that the Deputy Registrar, Lautoka High Court do execute all requisite documents on behalf of the Defendant in order to transfer the Defendant's one-undivided half-interest in Certificate of Title No. 18439 in favour of the Plaintiff.*

3. *An order that the Plaintiff pay the balance of the purchase price, namely, the equivalent of NZ$8,282.96 into Court for the credit of the Defendant.*

4. *Such further or other relief as this Honourable Court deems just.*

5. *Costs on a solicitor/client indemnity basis.*

[2] Defendant neither appeared nor filed any objection to the application.

[3] The application is made under Order 86 Rule 1 and Rule 2 of the High Court Rules 1988 (HCR) and under the inherent jurisdiction of the Court. O 86, r.1 of HCR provides:

1.-(1) In any action begun by writ indorsed with a claim –

'(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or

(b) for rescission of such an agreement, or

(c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ.'

Background

[4] The plaintiff is the registered proprietor of one-undivided half share of all that freehold property comprised in Certificate of Title No. 18439 known as "Cawa" (part of) and situated in Nadi having an area of 1 rood 1.5 perch. The defendant is the registered proprietor of one-undivided half share of that property. The Defendant and the plaintiff entered into an agreement dated the 2nd February, 2012 whereby it was agreed that the Defendant would sell and the plaintiff would purchase the Defendant's one-undivided half share of the property for the sum of NZ $25,000.00. The plaintiff, according to him, paid the Defendant a sum of NZ$2,000.00

on the 20 January 2012 and a further sum of NZ$8,000.00 on 8 February 2012 and on 23 February 2012 under the said Sale and Purchase Agreement. The balance sum of NZ$8,282.96 was to be paid to the Defendant at settlement. In October 2012 the plaintiff sent an email to the Defendant informing her that he would have the transfer documents delivered to her by a friend, Len, for execution by her. The Defendant responded that she would sign the documents when she returned to Fiji. The plaintiff filed writ of summons indorsed with a claim against the defendant as she failed to perform the agreement. The defendant did not file acknowledgement of writ within the time prescribed. Then the plaintiff filed the application for summary judgment for specific performance of the agreement.

Determination

[5] The plaintiff applies for summary judgment against the defendant that failed to acknowledge service of the writ. The plaintiff filed writ endorsed with a claim wherein he seeks, inter alia, specific performance of the agreement for sale of the property.

[6] In any action begun by writ indorsed with a claim, any party may apply for judgment for specific performance of an agreement, see O.86, r.1-(1) (a) of HCR. The plaintiff in this case has begun the action against the defendant with writ indorsed with a claim for specific performance. So, he is entitled to make an application for specific performance of the agreement.

[7] The plaintiff and the defendant entered into an agreement in writing dated 2 February 2012 whereby it was agreed that the defendant should sell and the plaintiff should purchase for the sum of NZ$25,000.00 the defendant's one undivided half share of the property comprised in Certificate of Title No.18439.

[8] The writ of summons has been served by way of substituted service by way of advertisement in **'The Fiji Sun'**. The court allowed substituted service on the plaintiff's assertion that, 'the defendant formally resided at Lot 21 Baravi Road, Newtown Beach, Nadi. She then went to New Zealand on a temporary basis and her address for service of any notice under the said Agreement was given as 1/17 Church Street, Otahuhu in New Zealand. She has since left New Zealand. I am not aware of her current address but I am aware that she has an adult daughter and relatives who live in Fiji.'

[9] It is to be noted that the defendant had signed the agreement in New Zealand and had given the address for service of any notice under the agreement as 1/17 Church Street, Otahuhu in New Zealand. The plaintiff did not strive to serve the writ at the defendant's New Zealand's address given for the purpose of service. The plaintiff, at least, should have tried to serve the writ at that address which the plaintiff had failed to do so.

[10] Has the plaintiff fulfilled his obligation under the Sale & Purchase Agreement? When applying for summary judgment for specific performance of an agreement, the plaintiff must satisfy the court that he has fulfilled all the obligations he had under the contract. The Sale & Purchase Agreement entered into between the plaintiff and the defendant contains terms as to how the price and deposit should be paid. Cl.2.1 of that agreement states as follows:

'PRICE & DEPOSIT

2.1 The said sum of Twenty Five Thousand New Zealand Dollars ($NZ25, 000.00) shall be paid by the Purchaser to the Vendor in the following manner.

a) A sum of Two Thousand New Zealand Dollars ($NZ2, 000.00) has been paid on the 20th day of January, 2012 and the Vendor [sic].

b) A further sum of Eight Thousand New Zealand Dollars ($NZ8, 000.00) shall be paid upon execution hereof.

c) *The balance sum of Fifteen Thousand New Zealand Dollars ($NZ15, 000.00) to be paid on such date(s) as agreed between the parties.'*

[11] In the affidavit verifying facts the plaintiff states that, he paid the defendant a sum of NZ$2,000.00 on the 20th January 2012 and a further sum of NZ$8,000.00 on 8th February 2012 and on 23rd February 2012 under the said Sale & Purchase Agreement. He paid a total sum of NZ$16, 717.04 to the defendant and/or on her account in respect of the purchase price on various dates from 20 January 2012 till 17 September 2012. The balance sum of NZ$8,282.96 was to be paid to the defendant at settlement (see paras 6, 7 & 8 of the plaintiff's affidavit verifying facts).

[12] According to Cl. 2.1 of the agreement, a sum of NZ$2,000.00 has been paid on 20 January 2012 and a further sum of NZ$8,000.00 shall be paid upon execution hereof (the Sale & Purchase Agreement). However, the plaintiff had paid this payment in two instalments, NZ$4,000.00 on 8 February 2012 and another NZ$4,000.00 on 23 February 2012 making NZ$8,000.00. It is doubtful when the Sale & Purchase Agreement was entered into between the parties. The plaintiff had signed from Fiji and the defendant from New Zealand. Both of them did not note when they signed the document. Even the plaintiff did not give the actual date of execution of the Sale & Purchase Agreement. He conveniently states that the defendant and him entered into an agreement dated 2 February 2012.

[13] Moreover, the balance payment of NZ$15,000.00, according to Cl. 2.1 was to be paid on such date(s) as agreed between the parties. The plaintiff had made some payments towards the balance purchase money in instalments but it is not clear why he made this payment in instalment. Was there any agreement between the parties to make payments in instalment? The agreement has variation clause under Cl.17. Cl.17 of the agreement stipulates that:

'17.1. This Agreement shall not be changed or modified in any way subsequent to its execution except in writing signed by the parties.'

[14] It appears to me that the agreement is changed or modified by the plaintiff by paying the balance purchase money in instalment as he wishes. Any change or modification of the agreement was possible with mutual agreement in writing signed by the parties in accordance with Cl.17.1. But, nonetheless, there is nothing in the plaintiff affidavit to show that there was mutual agreement in writing signed by the parties to make instalment payment of the balance purchase money. In the absence of any such mutual agreement, payment by instalment would amount to failure to observe the terms of the agreement, because the agreement does not speak of payment of the balance purchase money by instalment.

[15] The crucial point is that of settlement. According to Cl. 3.1 of the Sale & Purchase Agreement, the settlement shall be effected on or before 30th June, 2012 or such other date as may be mutually agreed to in writing between the parties. It may be understood that time was essence of the agreement. The plaintiff produced no document to show that the parties mutually agreed to in writing to defer the settlement date to another date. The settlement was to be effected by 30 June, 2012, but the plaintiff applies for specific performance in July 2014, i.e. two years after the date for settlement. The plaintiff fails to explain why he applies specific performance in 2014. In fact, the plaintiff should have observed and paid the entire purchase money before 30 June 2012, the date for settlement.

[16] Most importantly, the Sale & Purchase Agreement bears in it default clauses. Cl.8 narrates consequence of default by the vendor. That clause states that:

'DEFAULT BY VENDOR

8.1 If the vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor's part herein contained and if such default shall continue for the space of thirty (30) days from the due date then and in any such case the Purchaser without prejudice to any other remedies available to him may at his option exercise all or any of the following remedies namely:-

a) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be refunded to the Purchaser without deduction.
b) May sue for specific performance of this Agreement.
c) *May sue for Special and General Damages.'*

[17] If there is any default by the defendant (vendor) in the performance or observance of any terms of the agreement, the plaintiff (purchaser) had three options under Cl.8.1 to exercise after 30 days of that default. The plaintiff was entitled to sue the defendant for rescission or for specific performance of the agreement or for special or general damages.

[18] The agreement also bears clause on default by purchaser under Cl.9. That clause provides:

'DEFAULT BY PURCHASER

9.1 If the Purchaser shall fail or neglect to observe or comply with any covenant, stipulation or agreement on their part in this agreement contained and to be performed or observed by her (the times for such payment performance or observance fixed by this agreement being strictly of the essence of this contract) and if the Vendor shall give the Purchaser notice in writing specifying the default and requiring the default to be remedied within the period of thirty (30) days after the date of giving of such notice and if the Purchaser fail within such period to remedy the default then and in any such case the Vendor without prejudice to the other remedies of the Vendor hereunder may at the option of the Vendor exercise any of the following remedies namely:

a) may rescind this contract of sale and thereupon all monies thereto fore paid or under the terms of sale applied in reduction of purchaser money shall be forfeited to the Vendor as liquidated damages;

b) may re-enter upon and take possession of the said Land without the necessity of giving any notice or making any formal demand.

c) May enforce this present contract in which case the whole of the purchase monies them unpaid shall become due and once payable;

d) May sue for specific performance of this Agreement.

e) May sue for Special and General Damages.'

[19] If there was any default on the part of the purchaser (plaintiff) in the performance of any stipulation of the agreement, the vendor (defendant) may exercise his options for seeking remedies after 30 days of such default with giving a notice in writing to the purchaser specifying the default and requiring the default to be remedied within the period of thirty (30) days after the date of giving of such notice. Whereas, if there is any default on the part of the vendor in the performance of any stipulation, the purchaser may exercise his options for seeking remedies without giving any notice to the vendor requiring the default to be remedied within 30 day period after the date of giving such notice. This reflects unreasonableness in respect of default clause of the agreement.

[20] Presumably, if the defendant had appeared in court, she would have taken the defence that the plaintiff had failed to comply with the terms of the agreement. Then that would suffice and satisfy that there is an issue or question in dispute which ought to be tried or that there ought, for some other reasons, to be a trial of the action.

[21] In **Renate Schmeing v Bisun Dayal, Anand Kumar Singh & Mohammed Sheriff Koya** [2002] HBC 245/99L Ruling 17 May 2002, Prakash, J thought that:

'It is not necessary for there be a Statement of Claim to make an O.86 application. The affidavit in support sets out the relevant facts that supplement what is stated in the Statement of Claim. Where the defects in affidavit material are technical and do not contradict facts borne out in attachments, the essential matters are not in dispute, and summons complies with the rules, and orders sought are not attached to the minutes, Court grants orders as attached in minutes for return of moneys paid under rescinded sale and purchase agreement.'

[22] In the matter at hand, the plaintiff has filed an affidavit verifying facts on which the cause of action is based, exhibited the sale and purchase agreement and deposes he believes the defendant has no defence to the claim. In my opinion, the affidavit evidence given by the plaintiff contradicts the facts borne out in the attachment namely the sale and

purchase agreement, especially in respect of balance payment of purchase price and date of settlement. As such, the plaintiff case is not a plain and obvious case for summary judgment.

[23] I would therefore, for the reasons set out above, dismiss the plaintiff's application filed under O.86 for summary judgment for specific performance of the sale and purchase agreement. Since the defendant did not appear to defend the application, I would refrain from making order for costs.

Final outcome

[24] The final outcome is that the plaintiff's application filed on 19 August 2014 for summary judgment for specific performance of the sale and purchase agreement is refused and dismissed, but without costs. Order accordingly.

HIGH COURT OF FIJI
LAUTOKA

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M H Mohamed Ajmeer

PUISNE JUDGE

At Lautoka

06 November 2014