

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 177 OF 2012**

**BETWEEN** : **JAI PRASAD** of Flat 42 Nakasi Hart, Nakasi, Fiji, Self Employed  
**PLAINTIFF**

**AND** : **RAJESHWAR PRASAD** C/- Telecom Fiji, Walu Bay, Suva Fiji  
**1<sup>ST</sup> DEFENDANT**

**AND** : **AMOL PRASAD** of Nadi Police Station, Nadi, Fiji  
**2<sup>ND</sup> DEFENDANT**

**Counsel** : **Mr. Samad for the Plaintiff**  
**Mr. R. P. Singh for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Date of Hearing** : **14<sup>th</sup> October, 2014**

**Date of Judgment** : **16<sup>th</sup> March, 2016**

**J U D G M E N T**

**INTRODUCTION**

1. The Plaintiff filed this action seeking an order for a sum of \$9,250 and also for damages for breach of contract. The Plaintiff and the Defendants were beneficiaries of the estate of their late father (The Estate). The claim was based on the written agreement between the parties regarding the distribution of The Estate. The Plaintiff had the right to possess the premises till his interest in it was transferred, upon the payment of fixed sum, within a stipulated time period. This did not happen, and the Plaintiff was ousted from the property and it was rented from 2004 by the 1<sup>st</sup> Defendant who was the Trustee and Administrator of the Estate. According to the agreement between the beneficiaries if it was rented the rental income should have been given to the Plaintiff.

## FACTS

2. The following facts were agreed between the parties at the Pre Trial Conference
  - i. The Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants are beneficiaries of the Estate of his late father Rajendra Prasad of Nasinu.
  - ii. The 1<sup>st</sup> Defendant is duly appointed as the trustee and administrator of The Estate.
  - iii. In the Probate Action HPP 74 of 1994 the parties entered in to a terms of settlement dated 13<sup>th</sup> July, 1995.
  - iv. According to the said settlement the trustee should;
    - a. Distribute the sum of \$21,000 held in fixed deposit account with each party receiving 25%.
    - b. Distribution of sum of \$2,800 equally (25% each)
    - c. Valuation and distribution of the estate property being part of Lot 5 on DP 3055. Certificate of Title No 3213(part of) Crown Grant 605.
    - d. The Plaintiff together with 2<sup>nd</sup> Defendant and Mr. Jayant Prasad to buy out the shares of the 1<sup>st</sup> Defendant in the property.
  - v. On 5<sup>th</sup> September, 1996 the parties entered into further agreement stipulating the sale of their shares of the estate property comprised in Lot 5 on DP 3055, CT No. 3213 to the 2<sup>nd</sup> Defendant for a sum of \$9,250.
  - vi. The Plaintiff reserved the right to occupy the property until the said sum of \$9,250 was fully paid to him by the 2<sup>nd</sup> Defendant.
3. At the hearing the Plaintiff and the 1<sup>st</sup> Defendant gave evidence. The documents marked were relied by both parties and contained in Agreed Bundle of Documents.

## ANALYSIS

4. The parties on 5<sup>th</sup> September, 1996, agreed between them further, to settle the only fixed asset Lot 5 on DP 3055, CT No. 3213 (The Land) and accepted the valuation of the property at \$37,000.

5. Accordingly the Plaintiff along with Jayat Prasad and 1<sup>st</sup> Defendant consented to relinquish their rights to The Land for a sum of \$9,250 being the sum equivalent to 25% of the said valuation. The Land comprised of a wooden house with tin roof.
6. The Document No. 4 of the Agreed Bundle of documents filed contained the said agreement between all the beneficiaries to the estate and states inter alia
  - a. *I, Jai Prasad (the Plaintiff) hereby agree that I accept the valuation of \$37,000 and I agree to sell my share of the property above described for the sum of \$9,250. This sum will be paid to me after 3 years, and shall be paid during the next three years and my share will be only transferred when the full amount is paid and if I do not reside in the said property and the said property is rented, then payments to me shall begin from the day it is rented, otherwise I reserve the right to stay on the property till full payments are made.'*
7. The Plaintiff in his evidence stated that he was locked out of the property, by the 2<sup>nd</sup> Defendant, but this fact was not accepted by the 1<sup>st</sup> Defendant. He said he was unaware of such an incident. But according to him the Plaintiff had voluntarily vacated the premises and it was vacant for some time. This cannot be accepted as true position in the analysis of his evidence. If the parties desired to deviate from the written agreement then they should have amended the conditions and could have arrived at new settlement after renegotiations. There was no such evidence of any renegotiation. The 1<sup>st</sup> Defendant as the trustee and administrator of The Estate should know his obligations and the effects of settlement reached between the parties. He had also admitted sale of a motor vehicle belonging to The Estate without accounting for it. There were two out bound motor boats fixed with renowned Japanese brand of motors and these were also not accounted in the distribution of The Estate. According to the Plaintiff there were valuable furniture and fittings and household items and all these were not accounted in the Estate. These were not denied by the 1<sup>st</sup> Defendant when he gave evidence. The Plaintiff also stated that he was locked out from the premises by the 2<sup>nd</sup> Defendant. The unaccounted items were allegedly distributed between the Defendants.

8. The 2<sup>nd</sup> Defendant did not give evidence at the hearing. So, on the balance of probability I accept the version of the Plaintiff that he was compelled to leave the property by the 2<sup>nd</sup> Defendant's actions. The 2<sup>nd</sup> Defendant was a Police officer and there was no reason for him avoiding the court to refute the evidence given against him.
9. According to the Plaintiff the 2<sup>nd</sup> Defendant had even tried divine interventions in the said premises while he was living in the property and when inquired he had stated that he could do so as he was a Police Officer. It was alleged that witch-craft was also used to frighten the Plaintiff.
10. The Plaintiff also stated that he did not take action about the dispossession of the property by the 2<sup>nd</sup> Defendant since he was working at Nadi at that time. He also said his belongings were inside when he locked him out.
11. The Plaintiff did not give description of things he had in the property when he was locked out by the 2<sup>nd</sup> Defendant. So the court is unable to assess the damage done by the 2<sup>nd</sup> Defendant.
12. The 1<sup>st</sup> Defendant in his evidence stated that the Plaintiff left the property voluntarily as he was not working in the area close to the Property. This cannot be accepted as correct position. If the Plaintiff left the premises voluntarily, there would not have been any property inside. It is unlikely that he would do so as he was not given any payment for furniture belonged to the Estate or two motor boats and also one motor car. All these items were not accounted and distributed among the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. So apart from the cash remained to Estate at the time of death, the only thing the Plaintiff received from The Estate was his interest on the said house and property where he was allowed possession till he was paid \$9,250 for his share. So it is unlikely that he would voluntarily abandon it.

13. The Plaintiff accepted that the agreement dated 5<sup>th</sup> September, 1996 did not state who would buy his share for the sum of \$9,250 but he said it was the 2<sup>nd</sup> Defendant who promised to buy his share. This was an agreed fact (see item 7 of the Pre-Trial Conference minutes)
14. The 2<sup>nd</sup> Defendant in the statement of defence had admitted this fact and had further said that he could not pay the sum of \$9,250 as he could not secure a loan for the said property.
15. There was a time period for the 2<sup>nd</sup> Defendant to purchase the interest of the Plaintiff to the Land from the Plaintiff and till it was fully paid the Plaintiff had the right to occupy the Land. The time period starts from 3 years from the date of agreement and, it would be kept open for 3 more years. So the payment needed to be finalized within 6 years from the 5<sup>th</sup> September, 1996.
16. The Plaintiff was to remain in occupation of the property till the payment of sum agreed between the parties. He has the right to possession of The Land till full settlement for his share.
17. According to the 1<sup>st</sup> Defendant he had renovated the property and had given it on rent to two tenants for \$150 and \$130 *per mensum*. In the statement of defence it was \$120 and \$150 but oral evidence was contrary to that. The Plaintiff stated that there were three flats but in the cross examination stated he had not been to the property for a long time and was not aware of the number of the flats given on rent. So, on the balance of probability I consider that there were two flats given on rent for \$150 and \$130 *per mensum* from 2004.
18. So there was an admission that the Property was rented to third parties from 2004 and rental was not paid to the Plaintiff. This was a breach of the agreement between the

parties entered on 5<sup>th</sup> September, 1996. According to the said agreement the Plaintiff should be paid the rent from the day of renting.

19. The Plaintiff stated that he was promised of payment by the 1<sup>st</sup> Defendant every time he asked about payment of money to his share of 25%. So, there is no application of Limitation Act (Cap35). The Plaintiff was willing to transfer his share for \$9,250 even after the lapse of time period stipulated in the agreement.
20. The Plaintiff claimed \$9,250 for his share. There is maximum 6 year time period for the purchase of his share of 25% and he was given possession of the property till full settlement.
21. There was no provision in the said agreement between the parties to compel the 2<sup>nd</sup> Defendant to purchase the property. By the time this action was filed on 29<sup>th</sup> June, 2012 the time granted for the purchase of the property had already expired as 6 years have lapsed from the inking of the agreement between the beneficiaries to The Estate. There was no provision to deal with position if the time period was not honoured. So the court cannot interpret such a scenario and this is open for the parties to renegotiate if they so desire, but the Plaintiff should be in possession of the premises or if rented the rental income should be given to the Plaintiff. This had not happened and 1<sup>st</sup> Defendant was collecting the rentals in breach of the agreement.
22. So the claim for \$9,250 will fails, but the claim for damages for breach of contract needs to be considered. The breach of contract was pleaded in the statement of claim. The overriding principle in litigation is that it should be conducted fairly, openly without surprises and as far as possible to minimize costs. (See *Astovlans Compania Naviera SA v Linard* [1972 Q.B. 611];[1972] 2 All E.R. 647). The Plaintiff had pleaded the accrual of rental income at the hands of the 1<sup>st</sup> Defendant, which was admitted by the 1<sup>st</sup> Defendant when he gave evidence. The breach of contract was also pleaded. There was no claim for the action being statute barred in terms of Limitation Act (Cap 35) in the statement of

defence. There was no such pleading in the statement of defence. (see O.18 r.7 of High Court Rules of 1988)

23. As stated earlier the Plaintiff had the right to occupy. He denied that he was requested to occupy one flat. I accept the Plaintiff's position as probable in analysis. In the circumstances there was a breach of agreement by the 1<sup>st</sup> Defendant as the Plaintiff was not paid rentals collected by the 1<sup>st</sup> Defendant. By collection of rentals the 1<sup>st</sup> Defendant had breached the contract entered on 5<sup>th</sup> September, 1996.
24. There was no bar to this action though the agreement was entered in 1996 since the Plaintiff was given possession for the property till payment of \$9,250. Till the payment the Plaintiff has the exclusive right to The Property. This is the logical interpretation as any rental of the property is exclusively granted to the Plaintiff. The Plaintiff said that whenever he asked about payment the 1<sup>st</sup> Defendant did not deny his obligation to pay, and promised to pay.
25. The 1<sup>st</sup> Defendant stated that property was deteriorated and he renovated it and he collected rentals for the compensation of the said expenditure. He was unable to state how much he expended on the property and how much was collected from the property. In the evidence he stated he had expended \$10,000 to the property and also said sum was received by his insurance, but failed to provide any documentary proof of that.
26. It is highly unlikely that such expenditure would have incurred in 2004 to a property of the description given by the parties to the action. If such an amount was needed he should be able to give details of such expenditure. Absence of such evidence would indicate that there was no proof of substantial expenditure on the Land. Any expenditure on The Estate should be properly accounted by the 1<sup>st</sup> Defendant as its trustee and administrator, and there was none.

27. In the analysis of evidence if \$10,000 was needed to renovate the premises in 2004 it was highly unlikely that such property would be given on rent for \$150 and \$130 per month. It was a wooden building with tin roof. The area of the building was not presented to court.
28. It should also be noted that 1<sup>st</sup> Defendant would have recovered more than \$10,000 within 3 years time from the rentals collected. According to the evidence of 1<sup>st</sup> Defendant the premises was vacant only for 6 months, before renovation. An occupied premises would deteriorate to the extent of such extensive extent, within 6 months of being unoccupied cannot be accepted, without any substantiating evidence. If the building on the Land had substantial value that would have been included in the valuation, but neither party produced the valuation of the said Land.
29. Due to the Limitation Act the breach of Contract damages cannot be calculated beyond 6 years. Section 4 of the Limitation Act (Cap 35) states as follows;

*'Limitation of actions of contract and tort, and certain other actions*

*4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

*(a) actions founded on simple contract or on tort;*

*(b) actions to enforce a recognizance;*

*(c) actions to enforce an award, where the submission is not by an instrument under seal;*

*(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

*Provided that-*

- (i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the*



*plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and.....'*

30. The damage for breach of contract is generally calculated based on the loss to the claimant due to the breach. In this instance though the Plaintiff was agreeable to transfer his rights to the Land upon the payment of \$9,250 the damage for the breach of the contract was due to the non payment of rental income. (See *Kuddus vs Chief Constable of Leicestershire Constabulary* 2002 2 A.C 122)
31. Accordingly the damages should be  $[12 \times (\$130 + \$150)] \times 6 = \$20,160$ . It is admitted that 1<sup>st</sup> Defendant had collected rentals for more than 6 years. So he should pay the damages to the Plaintiff. The damages for breach of contract are based on unpaid rentals as per the agreement between the beneficiaries.
32. The claim against the 2<sup>nd</sup> Defendant was based on the locking out of the Plaintiff from the premises and taking possession of his items, but the Plaintiff did not state the items that were taken by the 2<sup>nd</sup> Defendant. So the damage against the 2<sup>nd</sup> Defendant was not established.

## CONCLUSION

33. The Plaintiff was one of the beneficiaries of the Estate. The agreement relating to the property in issue was to transfer the Plaintiff's share for a value of \$9,250 after 3 from 5<sup>th</sup> September, 1996 and payment should happen within 3 years thereafter. This did not happen and from 2004 the 1<sup>st</sup> Defendant had rented the property and collected \$280 as rentals for a month. The Plaintiff is entitled to all the rentals received, according to the agreement of 5<sup>th</sup> September, 1996. The Limitation Act (Cap35) Section 4 limits damages for breach of contract to 6 years. The Plaintiff also stated that 2<sup>nd</sup> Defendant locked him out from the premises and he lost his belongings but no details were given to assess any damages. So the claim against the 2<sup>nd</sup> Defendant is not proved on the balance of

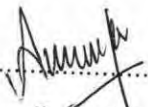
probability. From the analysis of evidence it is proved that 1<sup>st</sup> and 2<sup>nd</sup> Defendants have acted in collusion to deprive the Plaintiff his due from the estate. The dispossession of the Plaintiff also would have been a result of that collusion. The Plaintiff who is a differently able person was deprived of his rentals by the actions of the Defendants. The Plaintiff is granted a sum of \$20,160 as damages against 1<sup>st</sup> Defendants for breach of contract. The cost is summarily assessed at \$3,000.

### **FINAL ORDERS**

- a. The Plaintiff is granted a damage of \$20,160 to be paid by the 1<sup>st</sup> Defendant.
- b. Cost of this action is summarily assessed at \$3,000.

**Dated at Suva this 16<sup>th</sup> day of March 2016**



  
.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**