IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 82 of 2010

BETWEEN	:	**SHAMINA BIBI**	
			Plaintiff
A N D	:	**AMEER ALI**	
			1st Defendant
A N D	:	**RAM SUBHAG**	
			2nd Defendant

COUNSEL : Mr. S. Singh for the Plaintiff.

Mr. R. Naidu for the Defendants.

Date of Hearing : **29th October, 2015**

Date of Judgment : **27th January, 2016**

JUDGMENT

[1] The plaintiff instituted this action by way of writ of summons seeking the following reliefs;

1. An order restraining the 2nd defendant whether by himself or by his servants or agents or otherwise howsoever from transferring the part of the land comprised in CT24690 being lot 1 on Deposited Plan No. 8912 (formerly Lot 13 on DP 2050 known as "Calia" (part of) to the 1st defendant.
2. An order on the 2nd defendant to transfer the said land to the plaintiff.
3. Costs of the action on indemnity basis.

[2] The plaintiff with the leave of the Court later filed another statement of claim with amendments on 14th July 2010 wherein she prayed for the following reliefs;

A. A declaration that the transfer of the said property is null and void.

B. An order on the defendants to execute necessary documents to transfer the said property to the plaintiff.

C. In the alternative, a declaration that the 1st defendant is holding the said property in trust for the plaintiff.

D. Damages, and

E. Costs.

[3] The defendants filed their statement of defence on 03rd August 2010 wherein they prayed for the dismissal of the plaintiff's action.

[4] According to the minutes of the pre-trial conference the following facts are admitted by the parties;

1. The plaintiff is a market vendor residing on the part of the land comprised in CT24690 being lot 1 on Deposited Plan No. 8912 (the said land) and now Certificate of Title No. 39696 on Deposited Plan No. 8912 (the subdivided land).
2. The 1st defendant is the plaintiff's son and the registered proprietor since 31st March 2010 of the land in question.
3. The 2nd defendant was the registered proprietor of all the land comprised in the said land.
4. At all material times and for a time period exceeding 40 years, the plaintiff has resided on the said land with her family.
5. The second defendant commenced subdivision works on the said land in early 2003 and the subdivision works ended in the year 2004.

[5] The case of the plaintiff is that she intended to buy the portion of land on which she and the 1st defendant are living from the 2nd defendant and gave money to the 1st defendant to be given to the 2nd defendant and to have the land in question transferred in her name. To substantiate her position that she gave the money to the 1st defendant, the plaintiff tendered a bank statement (**P3**) where it shows that she had withdrawn $ 4400.00 from the bank.

[6] It is her evidence that her daughter Merul Nisha gave the 1st defendant Aus $ 4000.00 for his wedding and she asked the 1st defendant to pay that money to purchase the land. She testified that if she knew that the 1st defendant was going to have the property transferred in his name she would not have given the money to him and also that she did not consent to the land being transferred in the name of the 1st defendant nor was she aware of it. In cross-examination she said

that $ 4400.00 was not given for the wedding but for the land and when the money was given she asked the 1st defendant to buy the land in her name.

[7] The 1st defendant denied having any understanding with the plaintiff to transfer the property in question in her name and that she gave money to buy this property. He also testified that his mother knew that the property was going to be transferred in his name and the sister gave money for the wedding and not for the property and he still owes it to her. It is his position that when his sister and the brother-in-law came from abroad only the dispute between him and the plaintiff arose.

[8] The 2nd defendant denied having any discussion with the plaintiff on the sale of the land. When the 1st defendant asked for the land because he was living on it the 2nd defendant had promised to sell it to him. According to him he never promised the plaintiff to give this property to her. When he was asked in cross-examination as to why he sold this portion of the property for $ 2500 in 2005 after buying the entire property for $ 12000 in 1999 the 2nd defendant said that he and the 2nd defendant were known to each other since birth and since it was his property he could give for free or for one dollar.

[9] It was submitted by the learned counsel for the plaintiff that on the issue of selling the land below the normal price the 2nd defendant's statement that the land was his and he could sell the land for one dollar or any price is nothing short of being dodgy, evasive and untruthful especially when considered the costs incurred for subdivision and the land had been undervalued. The learned counsel submitted further the 2nd defendant is not a relative or a member of the plaintiff's and the 1st defendant's family and some years ago he gave the plaintiff's family notice vacate the land and it cannot therefore be believed that the real consideration of the transaction was $ 2500. It is the submission of the learned counsel that in the circumstances the plaintiff's evidence should be preferred as against the 2nd defendant's evidence. The mere assumption that the property was sold for a lesser price without any evidence as to the current market value of the property is not sufficient for the Court to disbelieve the 2nd defendant.

[10] The learned counsel for the defendants submitted that the fraud must be specifically pleaded and the plaintiff must give as much information to the defendant in order to make his defence.

[11] In the Supreme Court Practice 1995, Volume 1 Order 18 Rule 12/7 it states:

> Fraud – Fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts (*Davy v Garret (1878) 7 Ch. D 473, p 489; Behn v Bloom (1911) 132 L.T.J. 87; Claudius Ash & Sons Co. Ltd v Invicta Manufacturing Co. Ltd (1912) 29 R.P.C. 465 H.L.)*".
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> General allegations however, strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court to take notice (*Wallingford v Mutual Society (1880) 5 App. Cas. 685, p 697*). The acts alleged to be fraudulent must be set out, and then it must be stated that these acts were done fraudulently, otherwise no evidence in support of them will be received.

[12] In the statement of claim of the plaintiff dated 14th July 2010 she has averred that the 1st defendant on her behalf had discussions with the 2nd defendant and the 1st defendant assured that he would obtain a transfer of the subdivided portion of the land in question in her name. Acting on the said assurance of the 1st defendant and induced thereby, provided the 1st defendant the sum of $ 8400 to arrange the transfer of the land in her name. She has also averred that in breach of the said assurance the 1st defendant fraudulently, acting in collusion with the 2nd defendant obtained a transfer of the said land in his name.

[13] As conceded by the learned counsel for the plaintiff fraud carries a higher degree of proof. The question arises whether the plaintiff has been successful in discharging the burden of proving that the 1st defendant has fraudulently purchased the property in his name and if so, is he holding the property in trust for her?

[14] The particulars provided by the plaintiff in her statement of claim are in my view sufficient for the defendant to understand what her allegation is. She has clearly stated in the statement of claim how the 1st defendant perpetrated the alleged fraud on her.

[15] In the case of **Tota Ram Sharma v Akhil Projects Limited [2010] FJCA 8; ABU0030.2008 (18 February 2010)** it was held;

> The onus of proving fraud rests with the party alleging it. In ***Panama and South Pacific Telegraph Co. v India Rubber, Gutta Percha, and Telegraph Works Co. (1875) 10 Ch. App. 515, at p. 530*** Mellish, L.J. says:

"No doubt the Court is bound to see that a cause of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the Court is to draw a reasonable inferences from their conduct.

[16] In the case of **Nandan v Datt [1984] FJCA 5; Civil Appeal No. 29 of 1982 (21 March 1984)** the Court of appeal made the following observations:

"If the defendant acquired the title, the Prendergast C.J. in ***Merry v McKay (1897) 16 NZLR 124***, intending to carry out the agreement with the plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights, under the agreement. If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered title. Whichever view is accepted, he must be held to hold the land subject to the plaintiff's rights under the agreement, and must perform the contract entered into by the plaintiff's vendor."

[17] Apart from the plaintiff's own testimony the only evidence in support of her position that she gave money to the 1st defendant to purchase the land in her name is the bank statement showing a withdrawal of $ 4400.00 from the bank, which is in my view insufficient for the Court to arrive at the conclusion that she in fact gave money to the 1st defendant in view of the evidence of the defendants. Withdrawing the money from the bank does not necessarily mean that that money reached the 1st defendant. The learned counsel submitted that there is evidence that the 1st defendant is still indebted to his sister for the money she gave him and that supports the plaintiff's contention that $ 8400 was paid to him for the purpose of purchasing the property.

[18] If the 1st defendant purchased the property with the money sent by the sister, then he should be holding the said property in trust for the sister and not for the mother. The plaintiff who came to Court on the basis that the 1st defendant acting in collusion with the 2nd defendant, had got the property transferred in his name must establish that it was with her money he purchased the property and that there was an agreement between her and the 1st defendant to purchase it in her name.

[19] The 2nd defendant is totally an outsider who sold a portion of his land for a consideration. He denied having any understanding or discussions with the

plaintiff about the land. In fact his evidence corroborates the evidence of the 1st defendant. There had been no reason for him to perpetrate a fraud on the plaintiff.

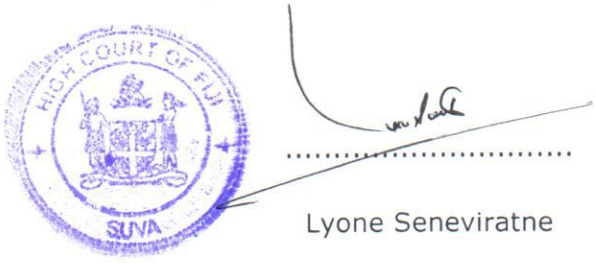
[20] The learned counsel for the plaintiff submitted extensively on the legal principles governing constructive trusts and cited various authorities on the subject. If the plaintiff can establish that it was with her money that the 1st defendant purchased the land in his name she is in law entitled to a declaration that the 1st defendant is holding the property in trust for her and also an order on the 1st defendant to transfer it in her name. Since the plaintiff has failed to prove to the satisfaction of the Court that it was with her money the property in dispute was purchased by the 1st defendant there is no necessity to consider the principle of law governing constructive trusts.

[21] For the reasons stated above I am of the view that the evidence adduced by the plaintiff on the questions of fraud and trust is grossly insufficient for the Court hold with her on those issues.

[22] For these reasons I make the following orders.

ORDERS.

1. The writ of summons of the plaintiff is struck out.
2. Taking all the circumstances into consideration I make no order of costs of this action.



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Lyone Seneviratne

JUDGE

27.01.2016