

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
APPELLATE JURISDICTION

HBA NO. 6 OF 2017

Magistrate Court

Civil Action No. 188/2009

BETWEEN : **RUP NARAYAN VERMA** of Nawai, Nadi, Farmer.
APPELLANT
[Original Plaintiff]

AND : **MAHENDRA PRASAD** of Tunalia, Nadi, Farmer.
RESPONDENT
[Original Defendant]

Counsel : Mr. Kumar N. for the Appellant o/i Babu Singh & Associates.
Respondent absent & Unrepresented.

Date of Judgment : 3rd May, 2018

Judgment by : Hon. Mr. Justice Mohamed Mackie

JUDGMENT

A. Introduction

1. This is a timely appeal by the appellant (original Plaintiff) against the judgment of learned Magistrate (Magistrate) at the Magistrate's Court of Nadi. The Magistrate by his judgment dated 25th January 2017 (judgment indicates the year as 2016) dismissed the Plaintiff's claim and defendant's counter claim.
2. It is against the above dismissal, the plaintiff, having filed and served the Notice of Intention of Appeal dated 31st January 2017, subsequently on 23rd February 2017 filed the Notice and Grounds of Appeal before this Court.

3. Both the above **Notice of Intention to Appeal** and **Notice and Grounds of Appeal** were reportedly served on one Divendra Prasad, who is said to be the Brother of the Defendant and had appeared in the Court below to give evidence on behalf of the defendant, who is said to be living in New Zealand. Since the said Divendra Prasad had reportedly refused to sign the acknowledgment of service in spite of accepting the above services, this Court made it a point to have the above notices served on the defendant by way of Registered post in New Zealand as well and the relevant affidavit of service is filed of record. Defendant or his Brother did not appear in this Court.

B. Grounds of Appeal

- a. *“THAT the Learned Magistrate erred in law and in fact in holding that further evidence of consent pursuant to Section 13 of the State Lands Act was required to be tendered in Court at the hearing of the matter when the parties at paragraph 6 of the Pre-Trial Conference Minutes had agreed that after grant of consent by the Director of Lands the dealing took place between the parties.*
- b. *THAT the Learned Magistrate erred in law and in fact in holding that the consent was an issue at trial, when the parties had agreed otherwise in the Pre-Trial Conference Minutes.*
- c. *THAT the Learned Magistrate erred in law and in fact in holding that there was no evidence that the Crop Lien and the Mortgage were not registered when there was an agreement. In the Pre-Trial Conference Minutes and when the Defendant specifically admitted in paragraph 3 of its statement of defence that the Mortgage was registered and the alleged debt was secured by the said Mortgage.*
- d. *THAT the Learned Magistrate erred in law and in fact in holding that the Mortgage was not valid when the subject Lease expired being inconsistent with Section 8 (1) of the Limitation Act which allows an action for recovery of monies under a registered Mortgage to be recovered after the expiration of 20 years from the date when the right to receive the money accrued.*
- e. *THAT the Learned Magistrate erred in law and in fact in holding that the Appellant could not maintain a claim under the registered Mortgage securing the debt when the subject Lease to the land was terminated when the claim under the registered Mortgage remained valid in law”.*

C. Background

1. The plaintiff filed writ of summons and statement of claim against the defendant in the

Magistrate's Court of Nadi on 13th October 2009 which states, among other things, as follows;

- a. *That on 25th April, 2000 he entered in to a written agreement with the defendant for the defendant to purchase the plaintiff's leasehold land known as Lot 20 on plan No: 16515 Nawaicoba in the extent of 16-A, 00-R, P-16 as contained in Crown Lease No. 4528 and LD Ref 4/10/1054 together with the certificate of Registration of Farm No. 10220 Nawaicoba Sector.*
 - b. *The agreed price was \$ 80,000.00 out of which \$ 10,000.00 was paid as deposit upon the endorsement of the consent of the Director of Lands and the balance \$ 70,000.00 was secured by a Mortgage Bond registered on 16th June 2010 requiring the defendant to settle the balance from the Sugar cane harvest income out of the land in question throughout 8 years period, commencing from 1st June 2001 and ending on 1st day of June, 2009. The arrangement was for the Money to be directly deposited to the Westpac Bank and it was duly deposited commencing from 17th August 2001 till 31st March 2008 totaling to a sum of \$ 38,280.00.*
 - c. *Plaintiff's action was to recover the balance \$ 31,720.00 out of the total arrears of \$70,000.00.*
 - d. *Though, several notices were given to the defendant to settle the balance amount and complete the sale by 1st day of June 2009 as per the agreement, he wrongfully failed to comply with the agreement. Accordingly, plaintiff moved for judgment in a sum of \$ 30,450.36, interest and indemnity cost.*
2. The Defendant by his amended statement of defence dated 14th May 2015, having admitted most of the averments in the SOC, took up a strong position that the agreement between the parties stood frustrated due to an Act of Parliament which resulted the ownership of the Land being reverted back to the Native Land Trust Board by Native Land Trust Amendment Act No. 12 of 2002. Particulars of frustration are as follows.
- a. Crown lease No. 4528 was schedule B land and reverted to Native Land in 2003 upon the expiry of lease,
 - b. Defendant lost all right to any extension of the Crown Lease that was promised by the plaintiff.
 - c. Defendant applied for and was required to purchase the Native Lease for \$ 6,101.40 from the iTaukei Trust Board.
 - d. As a result of the reversion of the said Crown Lease No.4528 to iTaukei Land Trust Board the Defendant is dispossessed of the said land.

- e. The defendant also lost the House-site due to the Plaintiff's action.
- f. Plaintiff failed to disclose

D. Issues before this Court

1. The primary issues to be decided by this court are:
 - a. Whether the learned Magistrate erred in law and fact by holding that further evidence with regard to the consent of the Director of land pursuant to section 13 of the State Land Act was required, when the parties had in fact agreed in the PTC Minutes that the consent had been obtained, as adduced in the Grounds of Appeal 1 and 2.
 - b. The propriety of learned Magistrate's observations on the registration of the purported Mortgage Bond and the decision alleged to have arrived at on it by the Magistrate leading to the dismissal of the action.

E. Discussion;

1. Despite the relevant notices being , reportedly, served on the Defendant –Responded (Defendant) and his Brother namely, Divendra Prasad, who had appeared on behalf of the defendant and given evidence in the Magistrate's Court , none of them took trouble to appear before this Court personally or through a Counsel. Accordingly, when the matter came up on 5th March 2018 to fix a hearing date, Learned Counsel for the Plaintiff moved to dispose the hearing by way of written submission. Though, 28 days initially and thereafter, on application, further 14 days were granted for the Plaintiff's written submissions no submissions were filed. Hence, I decided to proceed with writing of this judgment relying on the materials found in the record.

On the Issue of Consent from the Director of Land (as averred in 1st and 2nd Grounds of Appeal)

2. Undisputedly, the agreement marked P-1 at the trial and the subsequent transfer, which was not marked are instruments dealing with the State Land. Section 13 of the State Lands Act specifically mandates that the consent of the Director of the Land is a pre requisite for any dealing relating to the State Land.
3. The so- called Agreement to buy and sell speaks about the "consent" under three different headings of it, namely, PAYMENT, CONSENT & POSSESSION described as follows.

- a. **PAYMENT**: *An initial deposit of \$10,000.00 to be paid by the purchaser upon grant of consent by lands department.....*
- b. **CONSENT**: *This dealing is subject to consent of Director of lands.*
- c. **POSSESSION**: *The vendor (plaintiff) shall retain the House site presently occupied by him for his life time and in the event of his vacating the said house site, the purchaser shall pay the vendor \$ 5,000.00 in order to buy a House. **The purchaser (defendant) shall have possession of the balance property upon grant of consent.** (emphasis mine)*

4. Both the parties at the Pre-trial conference minutes dated 4th July 2013 have recorded the 6th agreed fact as follows;

*“6. That the plaintiff has duly paid sum of \$ 10,000.00 as deposit for the said purchase **upon the grant of the consent by the Director of Lands**” (emphasis mine)*

5. When the above paragraph C and the Agreed fact No.6 are closely scrutinized, there appears a conflicting position with regard to the consent. It means while the last sentence in paragraph C appears to be clearly suggesting that the consent is yet to be obtained, the agreed fact No. 6 seems to be suggesting that the consent has been already obtained. The purported consent did not see the “Daylight “at the trial in its document form as correctly observed by the learned Magistrate.

6. The said agreement (P-1) was for the sale of the entire land in the extent of A-16, R-00, P-16 and the required consent for same, whether already obtained as per the purported agreed fact No.6 or was to be obtained in future, was for the entire land and not to be obtained in piecemeal. The possession of the part of the land and the House situated on it was never handed over to the Defendant in terms of the Agreement. This shows that no necessity for consent arose for the parties to act in terms of the above paragraph C of the said agreement. This confirms much needed consent was not obtained .

7. The leads me to raise following pivotal questions that demand plausible answers;

- a. Why the so called consent did not come up at the trial in the form of a document, had the plaintiff in fact obtained it?
- b. Could the learned Magistrate be absolved from his onerous duty of making sure that the consent had in fact been duly obtained?

- c. Could the Magistrate have totally relied on the purported Agreed fact No.06 as far as the indispensable consent is concerned?
8. Had the Plaintiff in fact obtained the consent, there could not have been any reason for him to suppress its document form from the Court at the trial. The learned Magistrate could not have completely relied on the purported agreed fact No.6 and disregarded his duty of satisfying himself that the consent was in fact obtained, particularly when the Director of Land or the iTaukei Land Trust Board was not made a party to the case.
9. In my view, the learned Magistrate was correct in arriving at his decision with regard to the consent, which in a sine qua non for the sale of the State Land, and the Plaintiff could not have bypassed this requirement by hiding behind the so called agreed fact No.06.

On the question on the Registration of the Mortgage Bond (as averred in 3rd to 5th Grounds of Appeal)

10. The Plaintiff filed this action for his purported claim purely relying on P-1 Agreement and not on the Mortgage Bond. Although, the execution of this Mortgage Bond was not disputed and marked as P-2 at the trial, the Plaintiff did not even make an alternative claim on it and there was no any serious issue before the learned Magistrate on it. It was only about the failure to register under new lease, the learned Magistrate seems to have made certain comments.
11. This so called Mortgage Bond and crop lien were executed as collateral security to the P-1 Agreement which was for dealing with the State Land. When the P-1 Agreement becomes null and void due to the absence of the consent from the Director of Lands, the subsequent Mortgage and crop lien connected thereto will not have any standing in the eyes of the law and they too become unenforceable.
12. The reason adduced by the learned Magistrate to dismiss the claim on the ground that there was no Consent of the Director of Land to deal with the State Land is well and truly sufficient. This Court need not engage in any further exercise to decide the merits of the grounds of appeal 3 to 5.

Other Considerations

13. Apart from the above, another important aspect that draws the attention of this court is the soundness of the defence advanced by the defendant in his amended statement of defence. It is about the frustration of Agreement by subsequent legislation of the Parliament (Native Land Trust Amendment Act No. 12 of 2002) on the iTaukei Lands that covered the subject matter in this action as well and which finally resulted the

ownership of the Land being reverted back to the iTaukei Land Trust Board on the expiry of Plaintiff's original lease.

14. The amended statement of defence being filed after the PTC, unfortunately it has escaped the attention of both the Counsel in the Magistrate Court either to amend the PTC minutes or to raise an issue on this question of frustration. However, on careful perusal of the pleadings and the rest of the contents in the case record it appears the Plaintiff being very well aware of this impending expiry of his lease or when there were reason for him to be aware of it, he got the defendant to bind himself into this agreement, entered without the consent of the Director of Lands, on which the defendant was not to be benefitted on the long run for the price he agreed to pay.
15. The defendant had a legitimate expectation that he will be able to get the lease in his name at the expiry of plaintiff's lease in the year 2009 and kept on with his cultivation and depositing the proceeds out of it till 31st March 2008 where he paid total sum of \$ 38, 280 .00, which is over than 50% of the balance purchase price of \$70,000.00. It is only after realizing that he will not get the lease for the Land in Question as he was made to believe by the Plaintiff, the defendant stopped the cultivation and payment.
16. Unfortunately, neither the Pre-Trial conference Minutes were amended nor an issue on the question of frustration was raised after the amended statement of defence was filed. However, since the question of frustration was a part of the pleadings, this fact also seems to have influenced the learned Magistrate when he decided to disallow the Plaintiff's claim, which I don't see as a deviation from his duty what the justice demands at the end of the day.
17. However, I observe that the learned Magistrate having correctly arrived at his conclusions as above, in paragraph 13 of his judgment, has made an observation to the effect that, if his assessment of evidence is not firmly grounded, this action would still fail as his Court does not have jurisdiction to adjudicate on this matter as the appropriate forum would be the High Court under section 2 of the Land Transfer Act. I see this observation was unnecessary and made in the absence of an application by the defence before him to that effect.
18. With all due respect, I would like to put on record that once the jurisdiction is assumed with no valid objection on it, raised at the earliest opportunity, it is not open for the Magistrate to make such an observation or decision, particularly after deciding on the matter in the way it should be. Therefore, this court is of the view that paragraphs 13 and 14 of the impugned judgment should stand expunged.

F. Conclusion:

19. For the reasons adumbrated above, I decide that the grounds of appeal advanced on behalf of the Plaintiff are with no merits and this Court should not lay its hand on the well-considered findings of the learned Magistrate. Strong grounds have to be shown before this Court interferes with such a decision. Accordingly, it is my conclusion that the appeal should fail and the impugned judgment should be affirmed subject to expunction of the paragraphs 13 and 14 of the impugned judgment of the learned Magistrate.

G. Final Result:

- A. Appeal is dismissed.
- B. Magistrate's judgment affirmed subject to expunction of paragraphs 13 and 14 of the impugned judgment.
- C. There shall not be any costs.
- D. The original record is to be transmitted back to the Magistrate's Court of Nadi forthwith together with a copy of this judgment.



At Lautoka
3rd May, 2018

.....
A.M.Mohammed Mackie

Judge