

IN THE HIGH COURT AT SUVA
CIVIL JURISDICTION

Civil Action No. 161 of 2018

BETWEEN

VIJAY KAPOOR of 23 Kisdon Crescent, Prospect, NSW 2148, Australia,
Warehouse Manager.

FIRST PLAINTIFF

AND

HARI PRASAD of lot 1 Chanik Place, Caubati, Nasinu, Fiji,
Retired Accounts Clerk.

SECOND DEFENDANT

AND

VINESH PRASAD OG Lot 10 Tamavua, Suva, Fiji, Estimator.

FIRST DEFENDANT

AND

THE REGISTRAR OF TITLES of Civil Tower, Suva.

SECOND DEFENDANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF FIJI

THIRD DEFENDANT

Counsel : Ms S. Narayan with Mr N. Lal for the Plaintiffs.
Ms S. Saumatua for the 1st Defendant.
Ms P. Singh with Ms M. SAli for the 2nd & 3rd Defendants.

Date of Hearing : 07th August, 2018

Date of Ruling : 29th August, 2018

RULING

(On the application for Injunction)

- [1] The plaintiffs instituted these proceedings alleging that the 2nd defendant had fraudulently transferred undivided half share of the property which is the subject matter of these proceeding onto himself.
- [2] Particulars of fraud as alleged by the plaintiffs in their statement of claim are as follows:
1. Knowing that the second plaintiff was old and weak and did not have a control on his memory of things he did, caused him to execute transfer instrument in his favour.

2. Deliberately misinforming the second plaintiff that the transfer of Sashi's half share of the property was yet to be registered in favour of the second plaintiff when the said transaction was already registered on 08th October, 1998.
3. Depriving the second plaintiff of his own property without making any financial contributions towards the purchase and towards any improvement on the same and despite having knowledge that the expenses on the property were only incurred by the plaintiffs and Sashi.

[3] The second plaintiff is the father of Sashi Kapur, the first plaintiff, Shailendra Prasad, first defendant and Vineeta Dev.

[4] The plaintiffs has prayed inter alia, for a declaration that the said transfer be deemed null and void and of no legal effect.

[5] On 30th May, 2018 the plaintiffs filed ex-parte summons which was converted into an inter-parte summons by the court, seeking the following orders:

1. That the first defendant either through himself, his servants and/or agents be forthwith restrained from taking possession, selling, transferring, assigning, disposing and or creating any encumbrance over the property comprised in Certificate of Title No. 22868 being Lot 1 on Deposited Plan No. 5642 constituting an area of 798m² situated at Lot 1 Chanik Place, Caubati, Fiji until this matter is completely disposed of.
2. That the first defendant either through himself, his servants and/or agents be forthwith restrained from interfering with second plaintiff, his servants and/or agents or restraining them from entering the said property and meeting the second plaintiff and his wife or looking after them from day to day basis until the further order of this court.
3. That the second plaintiff be allowed to reside in Lot 1 comprised in Certificate of Title No. 22868 being Lot 1 on Deposited Plan No. 5642 until further order of this court.
4. That the 1st defendant provide a full inventory and accounts of all the funds collected as rental income from and expenditure incurred

toward flats 2 and 3 comprised in Certificate of Title No. 22868 being Lot 1 on since September 2016 to-date within 14 days.

5. That the 1st defendant shall deposit all future monthly rental incomes derived from flats 2 and 3 to the second plaintiff's following bank account for his personal use and benefit until further order of this court;

Account Name : Hari Prasad

Account No. : 852046

Bank Name : ANZ Bank

Branch : Centrepoint

Swift Code : BFJFX

BSB Code : 010890

6. That costs of this action be paid by the defendants.

[6] Injunction is an equitable remedy granted at the discretion of the court. When exercising the discretion the courts in many jurisdictions including Fiji follow the guidelines set down by Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] 2 W.L.R. 316, [1975] A.C. 396. They are:

- (i) Whether there is a serious question to be tried at the hearing of the substantive matter;
- (ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and
- (iii) In whose favour the balance of convenience lie if the injunction is granted or refused.

In his judgment Lord Diplock also made the following observations:

I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

- [7] The first issue to be determined is whether there is a serious question to be tried at the hearing of the substantive matter. Before that I will briefly deal with the objection raised by the learned counsel for the 1st defendant that the 1st plaintiff has no *locus standi* to bring this action. The submission of the learned counsel for the plaintiffs is that the 1st plaintiff brought this action with the 2nd defendant who is his father to secure his future interests in the property. The 2nd plaintiff on 14th December, 2017 has made a last will naming his wife, the 1st plaintiff and the 1st defendant and other children as heirs and successors to his estate. As submitted by the learned counsel for the 1st defendant the 1st plaintiff becomes entitled to a share of his father's estate only upon the demise of the testator who is the 2nd plaintiff in this matter. Although it was submitted by the learned counsel that the 2nd defendant has come to court in representative capacity to look after the interests of his father and the other brothers and sisters, there is nothing on record to show that he has been appointed legally to represent them in court. On the other hand the 2nd defendant who alleges that his signature was fraudulently obtained for the transfer can look after the interest in the property which is the subject matter of these proceedings. In my view the 1st plaintiff has no *locus standi* to initiate these proceedings. The court will therefore, only consider the application for injunction of the 2nd plaintiff.
- [8] It is common ground that the 2nd plaintiff was the owner of the property which is the subject matter of this action. It is alleged that the 2nd plaintiff's signature was obtained fraudulently to the transfer document by the 1st defendant knowing very well that he did not have the mental capacity to understand the results of his acts. To support this contention the plaintiffs tendered two medical reports. The report dated 09th February, 2016 has been issued by a doctor in New South Wales. In that report there is nothing to say that the 2nd plaintiff was suffering from dementia or any other mental disease. However, from the medicine prescribed by the doctor it appears that he was suffering from Parkinson. The second report is dated 18th February, 2018 nearly two years after the transfer which is sought to be challenged by the plaintiffs was done and in that report the doctor has said that it is most likely that the 2nd plaintiff is having a mental

impairment called Dementia. It is to be noted that in the report dated 18th February, 2018 it is stated that the patient was first seen by the doctor on 27th March, 2018 which affects the reliability of the report.

[9] In deciding whether there is a serious question to be tried at the hearing of the substantive matter the court is not expected to go to the extent of deciding the substantive issues between the parties.

[10] In **Hubbard & Another v Vosper & Another** [1972] 2 Q.B. 84 Lord Denning made the following observations:

In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

[11] In any matter there may be many questions to be tried at the hearing but for a party who expects the court to exercise its discretionary power in his favour must establish that there is a prospect that he will be successful in his claim.

[12] It is not a fact disputed by the 2nd plaintiff that he signed the transfer document. The main issue to be adjudicated upon at the hearing of the substantive matter is whether the signing of the transfer document was a voluntary act on the part of the plaintiff.

[13] In none of the reports the doctors have said that the illnesses the 2nd plaintiff was suffering from affected his capacity to understand the consequences of his acts. As per the 2nd report the 2nd defendant has been examined for the first time in March 2018 and the transfer that is sought to be challenged in these proceedings has been done in December 2017. These are the only materials that were produced before the court expecting the court to hold that there is a serious question to be tried at the substantive hearing which in my view is grossly insufficient.

- [14] It is also important to note that the 2nd plaintiff who was in fact the owner of a half share of the property in question did not file a single affidavit. All affidavits filed in support of the summons were affirmed to by the 1st plaintiff who does not have any right over the property. There is nothing on record to say that the 2nd plaintiff was not in a proper mental condition to affirm an affidavit. Even in the affidavits filed by the 1st plaintiff it does not say that the 2nd defendant was not in a proper mental condition to affirm an affidavit. The 2nd plaintiff has executed the last will only two weeks prior to the execution of the transfer document in favour of the 1st defendant which is conceded by the plaintiffs. Therefore, it cannot be said that he was not in a proper mental condition to affirm an affidavit. It is in the exclusive knowledge of the 2nd plaintiff the circumstances under which this transfer document was executed.
- [15] One cannot forget that the 1st defendant was the owner of a half share of the property at the time the transfer of the other half share was executed, which fact has not been challenged by the 2nd plaintiff. The 1st defendant has stated in his affidavit in opposition that he has already made arrangements to renovate the building and obtained quotations. He also says that he is looking after his father the 2nd plaintiff and the mother. There is also nothing on record that the 1st defendant is making arrangements to dispose of this property.
- [16] This application was filed by the plaintiff on the basis that they feared that the 1st defendant would disposed of the property pending the action. In other words the interim injunction prayed for by the plaintiffs is a *quia timet* injunction. For the court to exercise its discretionary power in favour of the 2nd plaintiff there must be some evidence that the 1st defendant is making arrangements to dispose of the property. In the affidavit in support filed by the 1st plaintiff the main allegation is that the 1st defendant does not look after the parents and he harasses them. There is nothing in the affidavits which suggests that the 1st defendant was making arrangements to dispose this property.
- [17] The 2nd plaintiff also seeks an order that he be allowed to remain in the premises until further orders of the court. For the 2nd plaintiff to make an application for this nature he must have some valid grounds. There is no evidence whatsoever that the 1st defendant at least indicated that he would evict the parents form the property.

- [18] The 2nd plaintiff seeks another order restraining the 1st defendant from entering into the premises and meeting the 2nd plaintiff. If he does not want to meet his son that is a matter for him to decide. However, the 1st defendant who is the owner of the property (at least half of the property) cannot be restrained from entering upon his own property and on the other hand even if the 2nd plaintiff is successful in obtaining a judgment it will not be made nugatory for the reason that the 1st defendant is permitted to enter upon the property.
- [19] The 2nd plaintiff has not explained the reason for seeking an order directing the 1st defendant to deposit the income of the property to his account. It is the 2nd plaintiff who transferred the first half share of the property to the 1st defendant. If the court accepts the argument that he is not entitled to the balance half share of the property, still he is entitled to his share of the income. I therefore, do not see any rational in the argument that the 1st defendant must give the entire income of the property to the 2nd plaintiff.
- [20] Whether the 1st defendant must account for what he spent on the maintenance of the property arises only after the 2nd plaintiff secures a judgment in his favour.
- [21] For the reasons aforementioned the court makes the following orders:
1. The summons filed by the plaintiffs on 30th May, 2018 is struck out.
 2. Costs of the application will be in the cause.




Lyone Seneviratne

JUDGE

29th August, 2018