

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 238 of 2017

BETWEEN : **SHARWAN LATA CHANDRA** of Lot 16, Kishor Kumar Road, Laucala Beach Estate, Suva Machinist as the Administratrix of the Estate of Vijay Chandra, Deceased.

PLAINTIFF

AND : **MUKESH CHANDRA** of Lot 34 Mangu Maharaj, Kinoya Suva, Driver as the Soul Executor and Trustee in the ESTATE OF RAM CHANDRA Deceased.

1st DEFENDANT

AND : **SUDESHNA KUMARI** of lot 34 Mangu Maharaj Road, Kinoya, Suva, Housewife.

2nd DEFENDANT

AND : **MUKESH CHANDRA** of lot 34 Mangu Maharaj Road, Kinoya Suva, Driver.

3rd DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. A. Liverpool with Ms. V. Kirti for the Plaintiff
: Mr. K. R Prasad for the Defendants

Date of Hearing : 20 June 2019

Date of Judgment : 26 November 2019

ORIGINATING SUMMONS: application for sale and distribution of land – Order 31 of the High Court Rules – cause or matter relating to property – dispute between co-owners of lease – claim of income from property – whether expedient to order sale of property – consent of lessor

Cases referred to:

- (a) Pagenstecher v Estate Management Services Ltd [2014] FJHC 180; Civil Action 123.2010 (20 March 2014)
 - (b) Vimal Construction and Joinery Works Ltd v Vinod Patel and Company Ltd [2008] FJCA 98; ABU0093.2006S (15 April 2008)
 - (c) Sunil Dutt and another v Public Trustee Corporation Ltd and another Civil Action No. HBC 41 of 214 (22 July 2019)
 - (d) Hem Raj v Ravinesh Dinesh Prasad Civil Action No. HBC 269 of 2015
 - (e) Bibi v Raza [1993] FJHC 13; HBC109J.89 (15 February 1993)
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JUDGMENT

1. The Plaintiff has moved this Court by an originating summons for the sale of a leased land shared equally by the parties and for the rightful distribution of the sale proceeds. The Plaintiff and the Defendants are closely connected. The Plaintiff's deceased husband, Vijay Chandra, is the son of the 2nd Defendant, Sudeshna Kumari and her deceased husband, Ram Chandra. Vijay Chandra is the brother of the 3rd Defendant, Mukesh Chandra, also described as the 1st Defendant, being the executor and trustee in the estate of his father, Ram Chandra.
2. Vijay Chandra, Ram Chandra, Sudeshna Kumari and Mukesh Chandra were joint lessees of a property bearing Lot 34, Mangru Maharaj Road, Kinoya. The long term lease, granted by the Housing Authority, was for a period of 83 years 2 months and 10 days commencing from July 1983. Upon Vijay Chandra's death, on 19 December 2015, his share devolved on his widow, the Plaintiff. After Ram Chandra's death, the 3rd Defendant, Mukesh Chandra became the sole executor and beneficiary to that estate. There is no controversy as to the ownership rights of the parties.

3. Friction between the Plaintiff and the other Defendants began prior to Vijay Chandra's death. This, claimed the Plaintiff, prompted the Plaintiff and her husband to move out of the premises; their moving out to another premises followed an order by the Magistrate Court in September 2017, related to domestic violence; prior to moving out, Vijay Chandra, together with the other Defendants, built a three bedroom flat in which the Plaintiff's family resided; part of this flat is rented out by the 1st Defendant; Vijay Chandra also built an extension to the flat, from which he ran a dairy business; this business is now run by the 1st Defendant. These matters have been averred by the Plaintiff in her affidavit in support of the originating summons filed on 15 August 2017, which was amended on 18 October 2018 and again on 8 January 2019. Her complaint is that the Defendants have denied her the benefit of income derived from the subject property.
4. The Defendants responded by denying the Plaintiff's claim, and objected to the sale of the land; they contended the Plaintiff was entitled to $\frac{1}{4}$ share as a beneficiary to the estate of Vijay Chandra, her husband, and the Plaintiff's ownership right has been registered; the Plaintiff is not entitled to a share of the income as no income was derived from the land; the property was not rented out as claimed by the Plaintiff; income from the dairy business cannot be considered as being derived from the subject property; and, in any event, the dairy business was registered in the name of Ram Chandra, and the Plaintiff is not a beneficiary to Ram Chandra's estate. Counsel for the Defendant submitted that the Plaintiff's share did not constitute a moiety in terms of the law. A moiety, counsel submitted, was a half share, which the Plaintiff did not possess, and, therefore, was not entitled to demand a sale of the land.
5. The respective affidavits evince material differences in some of the facts averred by the parties. The Plaintiff's position is that the property derives income through renting and the running of dairy business. The Defendants deny that the premises have been sublet. Though not directly denying that a dairy business is run from the property, the Defendants dispute the Plaintiff's right to a share of income from that business; the income from the business, they contended, was not derived from the property. What is not in dispute is the

Plaintiff's ownership right to an undivided ¼ share of the land rights. The Plaintiff's grievance is that she is unable to benefit from such ownership; that she is unable to reside in such premises due to a breakdown in the relationship between the parties, that she is living on rent and that she has no monetary benefit from the property. Hence, the application to Court for sale and distribution of the sale proceeds. There is no denial by the Defendants that the Plaintiff is not in occupation of the premises. However, they deny that the Plaintiff has a right to a share of the property's income.

6. It is evident from the contents of the affidavits that the parties are at an impasse; it seems probable that the dispute related to the property has been exacerbated by bad blood between the family members. The Defendants admit the ownership rights of the Plaintiff but are not prepared to recognize any right to income arising from the property, a situation which leaves the Plaintiff, a widow, with few options to exercise in regard to the property.
7. In these circumstances, it is necessary to examine whether this Court has the power in terms of Order 31 of the High Court Rules to order the sale of the land or interests therein and distribute the sale proceeds. Order 31 states that where in *any cause or matter relating to any land* it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct. Land is defined to include any right or interest in land. Order 31 (2) of the High Court Rules empowers the court to give necessary directions to carry out such sale.
8. Counsel for the Plaintiff referred to the case Pagenstecher v Estate Management Services Ltd¹, where mention was made to the Supreme Court Practice of the UK (1988), which dealt with the scope of Order 31, which was applicable in the UK. In that case, the High Court struck off the action on the basis that the Court did not have the power to sell off properties that were *not the subject matter of the*

¹ [2014] FJHC 180; Civil Action 123.2010 (20 March 2014)

action; the properties in that action belonged to a third party. Therefore, that decision is not helpful to the matter before Court.

9. In a number of cases – which were not brought to the attention of Court –relief has been granted to litigants under Order 31 of the High Court Rules in appropriate circumstances. The Court of Appeal in Vimal Construction and Joinery Works Ltd v Vinod Patel and Company Ltd², affirmed an order by the High Court for the sale of properties of a director of the appellant under Order 31³ of the High Court Rules in proceedings for the winding up of a company. It was contended in that case that winding up proceedings was not a cause relating to “land” and, therefore, the court did not have jurisdiction in the matter. However, the Court of Appeal, held, *inter alia*, that the summons sought for the sale of land and, therefore, it was a cause relating to land. In Sunil Dutt and another v Public Trustee Corporation Ltd and another⁴, the Court held it was expedient to order the sale of the co-owned property and distribution of the net sale proceeds among the plaintiffs and the estate of a deceased. The High Court stated that Order 31 allowed the Court to take control of the sale of property, if that is necessary and expedient to do so, and that in such an action, a plaintiff was required to prove on a balance of probabilities that such a sale was necessary. In Hem Raj v Ravinesh Dinesh Prasad⁵, the plaintiff alleged that the defendant unjustly enriched himself from rental income received from property co-owned by the parties. The High Court was of the view that it was expedient to order the sale of the property as the only remedy available to the plaintiff was to obtain an order for the sale of the property and for division of the proceeds of sale. In Bibi v Raza⁶, the High Court dealt with an originating summons relating to orders sought in terms of the Married Women’s Property Act. The summons was later amended to include a prayer under Section 119 of the Property Law Act. The plaintiff claimed that the property was registered in the name of both, the plaintiff and the defendant. The court was of the view that the best and least complicated manner in which to finally settle the issue

² [2008] FJCA 98; ABU0093.2006S (15 April 2008)

³ High Court Rules

⁴ Civil Action No. [2019] FJHC 725; HBC 41 of 214 (22 July 2019)

⁵ Civil Action No. [2019] FJHC; HBC 269 of 2015 (16 July 2019)

⁶ [1993] FJHC 13; HBC109J.89 (15 February 1993)

was to direct a sale of the matrimonial home for the best price that could be obtained. These were cases where the matters related to land, and the court, in each of those cases, considered it expedient that the subject land should be sold.

10. The main relief claimed by the Plaintiff is for the sale of the land and for the sale proceeds to be distributed among the parties, and for a declaration that the Plaintiff is entitled to a share of the property. In her Originating Summons, the Plaintiff relies on Order 31 of the High Court Rules to procure an order for the sale of the land and for distribution of the proceeds of sale. The Plaintiff has, in her supporting affidavit, agreed to buy out the Defendant's share. In the alternative, she has proposed that the Defendants buy out the interest of her husband's estate in the property. Any relief granted by this Court will necessarily be subject to the rights of the lessor of the property, Housing Authority, which has not been made a party to these proceedings.

11. The Court's power to direct a sale of a land or any right or interest in such land in terms of Order 31 arises in a cause or matter relating to any land and where it appears necessary or expedient to order such a sale. In this case, the dispute relates to the land as do the reliefs. The meaning of the verb "relate",⁷ is to "*make or show a connection between*". The Black's Law Dictionary,⁸ describes the adjective as, "*Connected in some way; having relationship to or with something else*". "Cause" is interpreted to include, any action, suit or other original proceeding between a plaintiff and defendant; "matter" includes every proceeding in court not in a cause⁹. It is the opinion of this Court that this cause is related to land, and the Court is vested with the jurisdiction to make appropriate orders in terms of Order 31 of the High Court Rules. The Court takes cognizance of the absence of any relief seeking a partition of the property. This was raised by counsel for the Defendant during oral submissions. The Plaintiff has not explained why it did not seek this course. However, it is the view of this Court that the power to order the sale of any land is unaffected by the absence of relief seeking a partition of the land. Order 31 vests the Court with sufficient authority and flexibility to make such orders as are necessary to mete out justice

⁷ Concise Oxford English Dictionary, 12th Edition

⁸ 10th Edition

⁹ Order 1 Rule 2, High Court Rules

if a co-owner of land is unable to benefit from such land. A contrary reading of the provision is likely to negate the purpose for which it has been enacted by the legislature.

12. In view of the nature of the dispute, and there being no likelihood of a resolution of the affair, an order for the sale of the interest in the land and for the proportionate distribution of the sale proceeds appears to be the most pragmatic and just solution on offer. Order 31 of the High Court Rules allows the Court to make such orders as are necessary to achieve that end. However, the declaration sought by the Plaintiff that she is entitled to a share of the income derived from the property will not be granted; this is a matter that is in dispute, and cannot be adjudicated without evidence being led.

Orders

- A. Lease rights to Housing Authority Sub Lease 144380 situated at Lot 34, Mangu Maharaj Road, Kinoya to be sold subject to the written approval of the Housing Authority, to be obtained by the Plaintiff. The parties shall adhere to the following guidelines:
 - a. Upon the written approval of the Housing Authority, the Plaintiff will obtain an independent valuation from a valuer acceptable to both parties to determine the sale price. The parties will share the cost of the valuation. The Plaintiff may purchase the entirety of the lease rights of the Defendants or the Defendants may purchase the lease rights of the Plaintiff based upon the valuation;
 - b. If there is no agreement for the sale of the lease among the parties, the lease rights to Lot 34, Mangu Maharaj Road, Kinoya shall be sold to any person after advertising in two local newspapers. The sale shall be to the highest offer subject to the written approval of the Housing Authority;
 - c. The proceeds from the sale of the Plaintiff's share shall be remitted to the Plaintiff, and the proceeds from the sale of the Defendants'

share shall be remitted to the Defendants in equal proportion. The proceeds of the sale of the interests to the land is to be deposited in an interest bearing account and after the deduction of expenses related to the sale, it shall be distributed among the parties in accordance with their ownership;

- B. A party may apply to Court for orders to give effect to the sale, if necessary.
- C. The relief seeking declaration that the Plaintiff is entitled to a share of income from the property is declined.
- D. There is no order as to costs.

Delivered at Suva this 26th day of **November, 2019**



Justice M. Javed Mansoor
Judge of the High Court