

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

CIVIL ACTION NO.: HBC 310 of 2018

BETWEEN : **NAVIN KUMAR** **PLAINTIFF**

AND : **BAL KRISHNA** **FIRST DEFENDANT**

AND : **DEPARTMENT OF LANDS** **SECOND DEFENDANT**

AND : **ATTORNEY-GENERAL'S OFFICE** **THIRD DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr. Young [Chand & Young Lawyers]

FIRST DEFENDANT : Mr. Dayal [Bale Law]

SECOND & THIRD DEFENDANT : Ms. Ali [Attorney-General's Chamber]

JUDGMENT OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 17 April 2019

JUDGMENT

[Leave to Lodge Second Caveat]

1. The plaintiff is seeking orders to be granted for leave to file and lodge a second caveat against the state lease no. 855785 being Lot 1 on DP No. 9219.

He further seeks restraining order against the defendants restraining them from selling, transferring, assigning or in any manner disposing off the property.

2. The application is opposed by the first defendant.

3. According to the plaintiff, he is the purchaser of state lease no. 855785 being Lot 1 on DP No. 9219 by virtue of a sale and purchase agreement signed on or about 20 May 2014.

This sale and purchase agreement was signed by the respondent on or about the 20 May 2014.

Consideration sum for the sale was \$150,000. A deposit of \$6,555 was to be paid to the Department of Land.

Settlement was to take effect in 90 days from the date of the grant to transfer from the Director of Lands.

Despite numerous correspondences via mail and email the office of the Director of Lands failed to respond to the same.

On 18 May 2018, the Plaintiff had placed a caveat (no. 861857) on the property.

The basis of the application was made on the interest created from the sale and purchase agreement between him and Bal Krishna.

Bal Krishna had made an application for removal of caveat and subsequently the Registrar of Titles wrote to the plaintiff on 10 September 2018.

Said caveat was cancelled after 21 days from date of the Notice.

The plaintiff claims to have received the notice of removal on 27 September 2018.

Solicitors for the plaintiff were instructed that consent for sale of the property was given to the Bal Krishna and another purchaser.

If extension of caveat or second caveat is not lodged the plaintiff will lose his interest in the property.

4. According to the first defendant, he is the registered proprietor of all that parcels of land comprised in CT No. XI/056 (Part of) State Lease No. 855785 being Lot 1 on DP NO. 9219 and situated at Narere Subdivision (part of) formerly Bal R299A.

He admits to entering into a sale and purchase agreement with the plaintiff on 20 May 2014.

Sale price of the property was \$150,000 and a deposit of \$6,555 was paid by the Plaintiff towards the principal price.

The date of settlement was within 90 days from date of consent given by the Director of Lands or such other date mutually agreed in writing between the parties.

There was no consent given by the Director of Lands. The 90 days lapsed on 20 August 2014 with no settlements by the Plaintiff.

5. Pursuant to **section 106** of the **Land Transfer Act** a person has right to caveat a land provided he fulfills two requirements:

- i. *It is a person claiming to be entitled to or to be beneficially interested in any land estate or interest under the Act; and*
- ii. *It is so claiming by virtue of any unregistered agreement or other instruments or transmission or any trust expressed or implies or otherwise howsoever”.*

[See **Cambridge Credit Fiji Limited v W.F.G Limited 21 FLR 184**]

The onus is on the caveator to satisfy the court that caveat should be extended.

6. **Section 112** of the **Land Transfer Act** reads:

“When any caveat has been removed under the provision of Section 109 or 110, it shall not be lawful for the Registrar to receive any second caveat affecting the same land, estate, or interest by the same person, or in the same rights and for the same causes, except by order of the court”.

7. As per the State Lease No. 855785 the lease was registered on 14 December 2017 to Bal Krishna. Said Lease is a protected under the provisions of the State Lands Act.
8. Navin Kumar is claiming interest as a purchaser by virtue of a sale and purchase agreement dated 20 May 2014.
9. The Defendant’s counsel submitted that the said sale and purchase agreement was entered into without the consent of the Director of Lands and thus is in breach of section 13 of the Crown Lands Act and cannot be enforced.

10. **Section 13** of the **Crown Lands Act** reads:

(1) Whenever in any lease under this Act there has been inserted the following clause:-

“This lease is a protected lease under the provisions of the Crown Lands Act”

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to

mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

- (2) *On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.*
- (3) *Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.*
- (4) *Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent. (Inserted by 21 of 1959, s. 2).*
- (5) *For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.*

11. Jesuratnam J. in **Kumari v. Rewa Development Limited** [1989] 35 FLR 36 whilst discussing section 13 of the Crown Lands Act and the requirement for consent held that:

A mere agreement to mortgage which the instant "mortgage" was on 23.11.82 is not illegal or unlawful. There are a number of authorities which considered the analogous provision of section 12 of the Native Land Trust Act according to which prior agreements to lease or sublease before the necessary consent of the NLTB is obtained are not unlawful or void.

The Privy Council said in the classic case of Chalmers v. Pardoe [1963] 3 All ER 552 at p. 557:-

"It is true that in Harnam Singh and Backshish v. Bawa Singh (1958-59) FLR 311 the Court of Appeal said that it would be an absurdity to say

that a mere agreement to deal with land would contravene section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent."

The Fiji Court of Appeal said in Phalad and Sukh Rai (FCA Reps. 78/471):-

"The cases already cited show that the courts have held that the mere making of a contract is not necessarily prohibited by section 12".

In those cases it was laid down that what were prohibited were the acts done in pursuance of the agreements prior to consent. It should also be remembered that section 12 of the Native Land Trust Act refers to "dealing" in land which can occur in a multitude of situations. There can be "dealing" in land in a thousand and one ways. Agreement coupled with some acts can cover the situation.

12. The parties are said to have entered into a sale and purchase agreement. Date of settlement was to be within 90 days from the date of grant of the consent to transfer from the Director of Lands.

It is alleged the first defendant has failed to apply for consent from the Director of Lands.

There is no evidence to show that nothing else was done due to which the dealing between the parties can be said to in contravention of section 13 of the Crown Lands Act.

13. Hence I do not find that the sale and purchase agreement so entered between the parties is illegal and unenforceable.
14. Upon perusing the pleading – statement of defence of the Second and Third Defendants, I note that prior to 14 December 2017, Bal Krishna held an Approval Notice of Lease over the property.

There is no record of any application lodged by the first defendant for consent of the Director of Lands to transfer to the plaintiff.

The plaintiff had only lodged for consent of the Second Defendant to lodge a caveat.

15. In the affidavit in support filed by plaintiff on 14 March 2019 in support of an application to file submission out of time, the deponent informed that the first caveat was removed on 23 October 2018.
16. In the case of **NBF Asset Management Bank v. Nasau Limited, a Fiji Court of Appeal Civil Appeal No. ABU 0067 of 2006S (delivered on 25 June 2007)** the Court of Appeal discussed the two distinct prohibitions incorporated in Section 112:

"One is that the same person is not to lodge another caveat against the same land; the other that no other person is to lodge a further or second caveat in respect of that land if that person relied upon the same right and same cause as the person who lodges the first caveat that has been removed"

The Court of Appeal further went on to state that:

"The prohibition in Section 112 against a second caveat is not absolute, but is subject to an express exception in Section 112 permitting it "by order of the court". This confers a judicial discretion which, although as was said in Muellner v. Montagnat (1986) 2 NZCP2 520 it is unfettered, ought to be carefully considered before being exercised in favour of allowing the caveat to remain"

17. One of the orders sought in the substantive claim is for specific performance.
18. I am satisfied that Plaintiff is entitled to lodge a second caveat to ensure his rights under the sale and purchase agreement is protected until finalisation of the substantive matter and hence I will grant an order accordingly.
19. Cost to be in cause.




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Vandhana Lal [Ms]
Acting Master
At Suva.