

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 246 of 2019

IN THE MATIER OF AN APPLICATION by
ZEENAT SAINAAZ ALI of 5021 140 Avenue
Edmonton, Alberta, Canada, T5A 5G3, Housewife, as
Administratrix of the Estate of **Riasat Ali** of Bulileka
Settlement, Labasa, Fiji Bailiff, Deceased, Intestate for an
Order for Discharge of Mortgage of Mortgage No. 848832
registered on 10 August 2017 over State Lease No. 17796
and other orders.

BETWEEN: **ZEENAT SAINAAZ ALI** of 5021 140 Avenue Edmonton, Alberta,
Canada, T5A 5G3, Housewife as **Administratrix** of the **Estate of Riasat**
Ali of Bulileka Settlement, Labasa, Fiji Bailiff, Deceased, Intestate

PLAINTIFF

AND: **AZAD HUSSAIN** of last known address of Valebasoga, Labasa, Manager,
current address and occupation unknown

FIRST DEFENDANT

AND: **THE DIRECTOR OF LANDS** of iTaukei Trust Complex, Ground Floor
& Level 1, West Wing, Navosa Road, Nasese, Suva

SECOND DEFENDANT

AND: **THE REGISTRAR OF TITLES** of Ground Floor of Civic Towers,
Victoria Parade, Suva

THIRD DEFENDANT

Counsel : Plaintiff: Mr. V.Prasad
First Defendant: Mr. V. Kumar
Second and Third Defendants: Ms. G. Naigulevu

Date of Hearing : 19.9.2019

Date of Judgment : 30.9.2019

JUDGEMENT

INTRODUCTION

1. Plaintiff filed this action by way of originating summons seeking redemption of mortgage No 848832 and for an order for delivery of mortgage No 84882 registered on 10.8.2017 over State Lease No 17796 and together with original duplicate of mortgage No 848832 and original duplicate of State Lease No 17796 in exchange of sum of \$ 20,000 being the full and final amount stated in the mortgage No 848832. First Defendant was the mortgagee and other two Defendants were nominal parties, who were named due to their official status and they did not file affidavits in opposition. According to the mortgagee, he was promised of sale of the land by deceased mortgagor. He also stated that the reason for mortgage was to obtain money to pay for arrears of lease rentals as it was a State land. He state that Sale and Purchase agreement was made in this regard between first Defendant and the deceased mortgagor. First Defendant stated that he was an equitable owner and this matter cannot be dealt by way of originating summons. Irrespective of first Defendant's possession of the land and purported Sale and Purchase Agreement, right of redemption can be exercised and first Defendant cannot refuse to discharge mortgage No 848832.

FACTS

2. Plaintiff is the Administratrix of Late Riasat Ali who was the lessee of State Lease No 17796.
3. Late Riasat Ali was the lessee of State Lease No 17796 annexed as Z 2 to the affidavit in support. It is a protected lease and subjected to provisions contained in Stat Lands Act 1945.
4. The said State Lease No 17796 was mortgaged to fist Defendant by late Riasat Ali for a sum of not more than 20,000 and it was payable 'upon demand'. The said mortgage was executed on 24.4.2010, but it was registered only on 10.8.2017.
5. Director of Lands had consented to said mortgage for a consideration not more than \$ 20,000 on 24.2.2012.
6. It is not denied that consideration of the mortgage No 848832 was not more than \$20,000, which was the condition on which the consent of the Director of Lands was given.
7. First Defendant in the affidavit in opposition stated that the deceased signed a sale and purchase agreement to sell the land described in State Lease No 17796 which was marked as AH 3 and Plaintiff was denying the signature of the said document.

8. Upon the execution of sale and purchase agreement first Defendant had entered in to possession of the land described in the said State Lease No 17796.

ANALYSIS

9. Plaintiff filed this action by way of originating summons seeking to redeem the mortgage No 848832 on behalf of the estate of Late Riasat Ali. There was no notice to redeem or notice of sale of the Property, by mortgage.
10. The subject matter of mortgage No 848832 is a State Lease No 17796 and at the time of death late Riasat Ali he was the registered lessee of the said lease which was granted in terms of State Lands Act, 1945 and more specifically Section 13(1)of said Act which states as follow;

“Protected leases

13.-(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.”

11. It is admitted that late Riasat Ali, had mortgaged State Lease No 17796 to first Defendant, and second Defendant had consented to the said mortgage subject to the condition that the consideration or the maximum principle payable on the said mortgage was \$ 20,000.
12. The mortgagor is deceased and the Property was part of Estate of Late Riasat Ali as he remained lessor in terms of registration of State Lease No 17796.
13. Pursuant to section 72 (1) of Property Law Act 1971, the mortgagor is entitled to right of redemption any time before actual sale of the property mortgaged.

14. It is admitted that there was no sale of the property as there was no consent for such dealing by second Defendant hence any dealing that was not consented by second Defendant is null and void in terms of Section 13 (1) of State Lands Act, 1945.
15. The purported Sale and Purchase Agreement between first Defendant and late Riasat Ali, was not consented by second Defendant.
16. In the text Hinde McMorland & Sim Land Law in New Zealand¹ stated:

“A mortgagee cannot, as part of the mortgage contract, also obtain as grantee an option to purchase the mortgaged property². Such an option would prevent the mortgagor from getting the property back and would therefore be a clog on the equity of redemption. Similarly, where the transfer of a mortgage is arranged between the mortgagor and the transferee, the transferee cannot, as part of the arrangement, stipulate for an option to purchase the mortgaged property.³ But a mortgagor and a mortgagee may, by a separate and independent transaction

subsequent to the mortgage, make a valid agreement giving the mortgagee the option of purchasing the mortgaged property, and thus having the effect of depriving the mortgagor of the right to redeem.⁴ An option granted before the mortgage was entered into and which was not part of the mortgage transaction would be enforceable.”⁵

17. It is admitted that first Defendant had obtained possession of land pursuant to purported Sale and Purchase Agreement. By subsequent agreement mortgagor is not prevented from

¹ Chapter 15 Land as Security: Mortgages and Other Charges , 15.057 Options to purchase the mortgaged property

² Samuel v Jarrah Timber and Wood Paving Corporation Ltd [1904] AC 323 ; Harper v Joblin [1916] NZLR 895 (CA); Bannerman, Brydone, Foister & Co v Murray [1972] NZLR 411 (CA); Re Supreme Court Registrar to Alexander Dawson Inc [1976] 1 NZLR 615 ; Jones v Morgan [2001] EWCA Civ 995 . The principle in these cases was criticised by Glanville Williams (1944) 60 LQR 190. Cf Westfield Holdings Ltd v Australian Capital Television Pty Ltd (1992) 32 NSWLR 194 ; Epic Feast Ltd v Mawson KLM Holdings Pty Ltd (1998) 71 SASR 161 at 173 per Debelle J; Jones v Morgan [2001] EWCA Civ 995 at [86] per Lord Phillips MR; and Lift Capital Partners Pty Ltd v Merrill Lynch International (2009) 73 NSWLR 404 . Cf Sun North Investments Pty Ltd v Dale [2013] QSC 44.

³ Lewis v Frank Love Ltd [1961] 1 WLR 261 ; [1961] 1 All ER 446

⁴ Reeve v Lisle [1902] AC 461 ; Canterbury Finance Ltd v Sagar Trust Ltd (High Court, Christchurch M 414/97, 7 August 1997, Master Venning); and see Re Supreme Court Registrar to Alexander Dawson Inc [1976] 1 NZLR 615 at 627 per McMullin J. Cf Epic Feast Ltd v Mawson KLM Holdings Pty Ltd (1998) 71 SASR 161 at 173 per Debelle J, Jones v Morgan [2001] EWCA Civ 995 , where a majority of the English Court of Appeal held that an option granted to the mortgagee three years after the mortgage transaction was part of a variation of the mortgage, rather than independent of the mortgage, and was therefore unenforceable; Warnborough Ltd v Garmite Ltd [2003] EWCA Civ 1544 at [76]; and Wily v Endeavour Health Care Services Ltd (No 5) [2003] NSWSC 616 , (2003) 11 BPR 21,081 . The mortgagee may effectively acquire the mortgagor’s equity of redemption in other ways subsequent to the mortgage by a separate and independent transaction: Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd [1983] 1 WLR 87 ; [1983] 1 All ER 944 (the argument that the transactions in this case were in reality a mortgage was not taken in the Court of Appeal: [1985] 1 WLR 173, [1985] 1 All ER 303 (CA)).

⁵ Bay of Islands Electric Power Board v Buckland (Supreme Court, Whangarei A 48/1976, 10 July 1978); Fisher and Lightwood, at [47.8], n 7. Cf London and Globe Finance Corporation Ltd v Montgomery (1902) 18 TLR 661.

sale of the property, but in this action the Sale and Purchase Agreement had granted long term possession of the land comprised in State Lease No 17796 (see clause 5 of Annexed 'AH3' to affidavit in opposition). This is an 'alienation' and or 'dealing' that is precluded without the consent of second Defendant. Hence purported Sale and Purchase Agreement was a null and void document.

18. So there is no need to consider purported Sale and Purchase Agreement between first Defendant and late Riasat Ali for the exercise of right of redemption which is statutorily guaranteed in Section 72(1) of Property Law Act, 1971.
19. The contention of first Defendant that the purported Sale and Purchase Agreement was disputed and even the signature of deceased was disputed, hence this action needs to be converted as an action begun by writ of summons cannot be accepted. Defendant had not counterclaimed against the Plaintiff in this action, and this action is limited to redemption of the mortgage, so allegations of improvements by first Defendant are outside the scope of this action.
20. This originating summons is only seeks to discharge the mortgage No 848832 through payment of consideration stated therein.
21. Any agreement to allow transfer of property which is disputed is not a reason to convert this action as to an action begun by writ since the relief sought in this action is statutorily guaranteed right in terms of Section 71(1) of Property Law Act, 1971 which states;

“Repayment of mortgages

72.-(1) A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all moneys due and owing under the mortgage at the time of payment.

(2) A mortgagor is entitled to redeem the mortgaged property although the time for redemption appointed in the mortgage has not arrived; but in that case he shall pay to the mortgagee, in addition to any other moneys then due and owing under the mortgage, interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage.

(3) A mortgagor seeking to redeem after the expiry of the term of the mortgage, or of any further term for which it has been renewed or extended, shall give to the mortgagee three clear months' notice in writing of his intention to redeem, or shall pay to the mortgagee three months interest in lieu thereof;

Provided that this subsection shall not apply in any case where the mortgagee has entered into possession of the mortgaged property or any part thereof, or has taken any steps to realize his security.

(4) For the purposes of this section, the expression "moneys due and owing under a mortgage" includes all expenses reasonably incurred by the mortgagee-

(a) for the protection and preservation of the mortgaged property or otherwise in accordance with the provisions of the mortgage; and

(b) with a view to the realization of his security, and in either case includes interest on the sums so expended at the rate expressed in the mortgage."

22. Mortgage No. 848832 was registered on 09.8.2017 though it was dated 24.4.2010. This is annexed to the affidavit in support annexed, marked as 'Z12'. It expressly recognized the statutory provision as follow;

"THIRDLY the Mortgagor shall be at liberty to settle the balance of the Mortgage debt at any time whereupon the Mortgagee shall forthwith discharge the Mortgage"
23. The condition upon consent of second Defendant was granted was that consideration should not exceed 20,000. There is no interest stated in the said mortgage No 848832, but first Defendant had entered in to possession.
24. So, Plaintiff as administratrix is entitled to seek the discharge of the mortgage upon payment of sum of \$20,000.
25. There is no dispute that deceased and first Defendant entered in to mortgage and what was consented by first Defendant was also a mortgage. There is no time period stated for the repayment of the consideration and this can be understood as the mortgagee was in possession of the property.
26. The fact that there was no time period stated in the mortgage cannot prevent it from redeeming. (See *Fairclough v Swan Brewery Co Ltd* [1912] AC 565). Mortgage is only a security for the loan amount and nothing more.
27. Right of redemption is an absolute right and this is recognized in Court of Appeal decision of *Mohammed v Rafiq* [2005] FJCA 78; ABU0036.2004S (decided on 25 November 2005).

CONCLUSION

28. Originating summons seeks to redeem the mortgage No 848832. This mortgage was consented by second Defendant subject to maximum principle sum of \$20,000. There was no interest stated in the mortgage, but mortgagee was in possession of the mortgaged land. So maximum sum recoverable under mortgage is \$20,000 and mortgagor and heirs of the mortgagor are entitled to redemption of mortgage No 848832 upon payment of \$20,000. Right of redemption is not extinguished in terms of the mortgage No 848832

read with section 72(1) Property Act, 1971 and Section 13(1) of State Lands Act, 1945. The Purported Sale and Purchase Agreement that granted a long term possession without seeking consent of second Defendant is null and void in terms of Section 13(1) of State Lands Act, 1945. For avoidance of doubt this is not an action to evict mortgagee, but to discharge mortgage No 848832. The cost of this action is summarily assessed at \$ 1,500 to be paid within 21 days.

FINAL ORDERS

- a. Upon payment of \$20,000, first Defendant is ordered to deliver to Plaintiff's solicitors a duly executed discharge of Mortgage No 848832 without delay. First Defendant is also directed to hand over original duplicate of Mortgage No 848832 and also original duplicate of State Lease No 17796, upon said payment.
- b. If the first Defendant failed to perform, within 21 days from today in respect of actions stated above, Chief Registrar or his nominee, is directed to execute a discharge of mortgage No 848832 upon payment of \$20,000 to High Court in favour of first Defendant, of this action.
- c. If the first Defendant failed to deliver original duplicate of mortgage No 848832 a provisional mortgage of mortgage No 848832 and provisional State Lease No 17796 is to be issued without delay by third Defendant, for the performance of orders stated above by Chief Registrar or his nominee. Second Defendant is directed to corporate and grant necessary consent and approval for execution of above orders.
- d. The cost of this action is summarily assessed at \$1,500 to be paid within 21 days by first Defendant to the Plaintiff.

Dated at Suva this 30th day of September, 2019.



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Justice Depthi Amaratunga
High Court, Suva