

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 161 OF 2018

BETWEEN : **NIHAL WANIGASEKERA** of 21 Rubicon Crescent, Kuraby 4112,
Brisbane, Australia.

PLAINTIFF

AND : **ANEESH SHARMA AND ASHEEKA DEVI** both of Teidamu,
Lautoka, occupation unknown.

DEFENDANTS

Appearances : Ms J. Naidu for the plaintiff
The defendants appears in person
Date of Trial : 31 October 2019
Date of Judgment : 26 February 2020

J U D G M E N T

Introduction

[01] The plaintiff brings this action against the defendants claiming the following relief:

- a. Judgment against the defendant in the sum of \$195,000.00.
- b. Alternatively a declaration that the defendants hold the subject properties namely the land and the vehicle JL 158 on constructive trust for the plaintiff.
- c. An order that the defendants do transfer the subject land under TLTB Agreement for lease 4/7/39616 and the vehicle JL 158 to the plaintiff forthwith.
- d. Permanent injunction against the defendants to restrain from transferring/alternating and/or damaging the subject properties.
- e. General damages.
- f. Pre and post-trial interest.
- g. Costs on solicitor/client indemnity basis.

[02] The basis of the claim appears to be breach of the verbal agreement between the parties and unjust enrichment.

[03] At the trial, the parties gave evidence and only the defendants called witnesses in support of their case.

[04] Both parties have filed their written submission, and the court has been immensely assisted by the same.

The facts

[05] The following are the facts as claimed by the plaintiff in his statement of claim:

1. Nihal Wanigasekera, the plaintiff is a resident of Australia.
2. Aneesh Sharma and Asheeka Devi, the defendants are residents of Fiji and lives at Teidamu, Lautoka.
3. The plaintiff has known the defendants for a long time as, Ms Asheeka Devi is a relative of the plaintiff's wife and whenever the plaintiff comes to Fiji they do visit the defendants.
4. The plaintiff and defendants befriended each other and the plaintiff had close relation with the defendants. The plaintiff also spent a lot of time with the defendants and their family during his regular trips to Fiji.
5. It is alleged that sometime in June 2016, when the plaintiff visited the defendants they showed him the TLTB Agreement for Lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province of Ba containing an area of 1098 square meters under Aneesh's name and requested the plaintiff if he could lend them money to build their house which they would pay the plaintiff back upon Mr Aneesh Sharma's 2 insurance been matured in 2018. The plaintiff agreed to lend the money to the defendants on the basis it would be repaid to him. It was agreed between both the parties that the plaintiff would provide the fund to the defendants to enable them build the house and the defendants would repay the money once the insurance matured.

6. The plaintiff gave money to the defendants in the following manner:
 - a) In September 2016, when the plaintiff visited Fiji he loaned the defendants first \$20,000.00.
 - b) In January 2017, plaintiff gave further \$45,000.00.
 - c) In May 2017, another \$50,000.00 was given to the defendants for building their house.
 - d) In October 2017, the plaintiff visited Fiji again and he gave \$50,000.00 to the defendants upon their request.
7. The plaintiff had loaned a sum of \$165,000.00 to the defendants and out of kindness the plaintiff had also bought household material worth of \$12,000.00 which he gifted it to the defendants to finish the house. He gave the money to the defendants on trust and with the belief that they will repay him by January 2018.
8. It is alleged that to date the defendants have refused to repay the plaintiff any money despite request and demand by the plaintiff.
9. Sometimes in January 2018, when the plaintiff asked the defendants to return the money without any interest, they made declaration that they owe money to the plaintiff.
10. The plaintiff visited Fiji sometimes in March 2018 and decided to purchase a vehicle for him but because he did not have enough time to look for a suitable vehicle, the plaintiff left \$30,000.00 with the defendants for safe keeping until his return to purchase a vehicle under his name. Thereafter, upon enquiry, the defendants had told the plaintiff they have already purchased vehicle number JL 158 under Asheeka Devi's name which was without the plaintiff's knowledge.
11. The defendant's enrichment is at the expense of the plaintiff thus it is unjust since he continues to retain the benefit of the house with the land and does not return the money they borrowed from the plaintiff.

[06] The facts as stated in the joint statement of defence by the defendants in person are:

1. We have known each other for a brief period of approximately 2 years.
2. The plaintiff never showed an intention that he was giving us a loan rather he always reiterated that it was all a genuine charitable intention. There is no valid agreement of such a substantial amount being loaned.
3. The insurance policy in question is due to mature in the year 2033.
4. The plaintiff repeatedly forced us to receive cash on his behalf from unknown persons.
5. The plaintiff acquired the Declaration connivingly and with deception by stating that he needed the same for taxation issues in Australia. He did not mention to us that he would be utilizing the same for court purpose.
6. Additionally, we pray to this honourable court to also consider that we under oath mentioned we shall repay ONLY repay the monies borrowed, without interest, in instalment upon availability.
7. The plaintiff instructed us to purchase the motor vehicle to transport the children to and from school.
8. The plaintiff never showed an intention that the monies were given as a loan rather reiterated verbally that he was genuinely helping us out of the poverty and hardship.
9. The plaintiff acts deceitfully and had an intention to get legally married to the second defendant which she denied. Upon denial of the proposal by the second defendant, the plaintiff then asked us to provide a Statutory Declaration and on 13 January 2018, we provided the same to the plaintiff.
10. The plaintiff forced us into receiving cash and accessories.

The evidence

Plaintiff's evidence

[07] At the trial, only the plaintiff, Nihal Wanigasekera gave evidence in support of his claim and exhibited five documents marked 'PEx1' to 'PEx5'.

[08] The plaintiff's evidence was that:

- a) *He has known the defendants for long time. He had very close relationship with them, visited them and spent time with them.*
- b) *In June 2016, when he was in Fiji, showed him the TLTB agreement for lease which was leased to the 1st named defendant and asked him whether he could lend some money so that they could build the house. He agreed and said ok and asked: will you pay the money back? They said: in 2 years' time when the insurance matured in January they will pay the money back.*
- c) *He said it was a verbal arrangement. He gave about AUD\$ 150,000.00 He also said when he came with his family, he was allowed to bring \$10,000.00 each time so he gave the money through his friends. Aneesh Sharma collected the money. He had sent some money through exchange, too, and he did not know who collected it but he thought it's Asheeka Devi.*
- d) *He also stated he had intention to buy a car in Fiji and had asked the defendants to look for a car for him, the defendants told him they had bought a car for and when he came back to Fiji he found the vehicle was bought under Asheeka's name. He gave \$30,000.00 to the defendants to buy a car for him.*
- e) *He said he had bought gadgets, fixtures and other materials for the house which was gift for the defendants and which he is not claiming back.*
- f) *He said when he asked the defendants to return his money on numerous occasions they executed a Statutory Declaration that they had taken money from the plaintiff.*

[09] Under cross-examination, the plaintiff said (he was cross examined by the defendants in person):

- a) *He denied that the close relationship him and Asheeka was having an affair and he was sleeping with Asheeka.*

- b) *He said he didn't give the money because of an affair with Asheeka but just lent the money to them to build the house.*
- c) *He denied having sexual relationship with Asheeka.*
- d) *He said the Statutory Declaration was given after 2 years, in 2016. He never asked them to write anything. It was done by them and was sent to him.*
- e) *He also said he had known Asheeka for over 10 years and Aneesh for nearly 4 or 5 years.*
- f) *He gave the money to Asheeka not Aneesh.*
- g) *He admitted that when he sent the money stated "gift" as reason for sending the money.*

Defendants' evidence

[10] Both defendants, Aneesh Sharma (DW1) and Asheeka Devi (DW2) gave evidence. In addition, they called one Abneet Sharma as their witness (DW3).

[11] Sharma's evidence was that:

- a) *The moneys were not given to him. He knew about the money when it was informed by his wife that the moneys were given to help us. There was no arrangement or talks that the monies were to be repaid or refunded.*
- b) *The plaintiff came in 2016, did not mention anything about the documents (Statutory Declaration) or about the building of the house.*
- c) *He never informed the plaintiff about the insurance policy and the date of maturity of the policy. There were no talks about this.*
- d) *He said he (Wanigasekera) was used to communicate with Asheeka through messenger.*
- e) *In 2017, he came to our house to visit us, had a quarrel and went away from the house to sleep on the road with his vehicle FZ 307.*
- f) *Nihal was used to come and spend time with Asheeka. He said: 'whenever my wife used to stay in the kitchen he (Nihal) used to stay in the kitchen, if she used to come to the front section of the house he used to be there as well. At that moment, I did not know they had a relationship. I only came to know about this when my wife took oath and informed the court that Mr Wanigsekera was having an affair with her.'*

g) *In March 2018, the plaintiff came to Fiji and stayed at our place peacefully. Thereafter, his wife came and started a quarrel. Next day Wanigasekera's wife and her sisters came to the villege and started spreading rumours that Asheeka is having an affair with Wanigasekera and that's why he built the house.*

h) *He said he did not have enough money in the insurance for him to take that amount of loan. Mr Wanigasekera knew of our conditions of how poor we were.*

[12] Under cross examination he admitted that he is the owner of the property, TLTB agreement for lease reference no. 4/7/39616 and when he bought it there was nothing on it. He said 'yes' when suggested that the money was sent by Nihal from his agent from different people. He said he received the money as a help, it was a gift that's why we took it as a gift. He asked the document for tax purposes.

[13] Asheeka Devi's evidence was that:

- a) *He made me a friend on Facebook in 2016, in that year my first child passed away and as a mother she was distressed of losing her child.*
- b) *She said about 2016 he told her that he's been admiring her from 2014 and he pestered her to have a relationship with him. He showed her greed of money and her if she could have relationship with him, have sexual intercourse and not to inform his wife. **'I had a relationship with him because of the greed of money.'***
- c) *He told her not to rent, he is going to build a house for her, and she can go and stay in that house.*
- d) *She said: 'Before taking the money, I had never told Mr Wanigasekera that I will be returning the money and that these monies were given to us as gift.*
- e) *When aunty (plaintiff's wife) came to know about our relationship, she forced the plaintiff if the money or the land can be transferred to her (aunty). Later, Mr Wanigasekera called her and pressured her if she could make a statutory declaration and that he wants that documents to be given to his accountant for tax purposes. She then drafted the statutory declaration and gave it to the plaintiff.*

f) *On February 26, he sent her some money through one of his friends to buy herself a birthday gift. To persuade her, she said, he offered gold, clothes, money for her not to inform anybody about our relationship. The plaintiff and she went around visiting places in the same vehicle, the vehicle he's claiming.*

g) *She said he gave money because he was having sexual relationship with her and she is domestic worker.*

- [14] Under cross examination Asheeka stated that: monies given to her, and he has also utilized her for his personal lust. The monies were given as gift not as a loan to build the house. He is asking return of the money after the relationship had ended. He sent \$30,000.00 as a birthday gift. He gave her so much money because he was having sexual relationship with her. The dealings were done between her and Nihal and not with her husband, Aneesh. We had sexual relationship and that's why he was dealing with me.
- [15] In her re-examination she said these monies were given as gift and the statutory declaration was done only for Mr Nihal's tax purposes.
- [16] DW 3, Abneet Sharma who is a priest said in evidence that: his ex-wife is residing with Mr Nihal at the moment. He throws money on women and after using them he is gone. His wife was involved with Mr Nihal. He used to send money to her and when he came to know about this he broke up the family.
- [17] Under cross examination, DW3 said that he was unaware of the exchange of monies between Nihal and his aunty (Asheeka) but he came to know about it through his wife.

The issue

- [18] The principal issue at the trial was whether the exchange of monies between the plaintiff and Asheeka Devi, the second named defendant over a period of time was a loan or gift.

Discussion

- [19] The plaintiff claims the return of \$195,000.00, the monies he sent or gave to Asheeka Devi over a period of time. The basis of the claim is that the money was given to her as a loan to build a house. The pleaded causes of action were that breach of agreement/misrepresentation/fraud and unjust enrichment. In order to substantiate his claim of loan, he relied on the statutory declaration given by the defendants.
- [20] Devi denied receiving the monies from the plaintiff as a loan. She maintained that the monies were given by the plaintiff to her as a gift as he was having an affair with her.
- [21] The first named defendant, Aneesh Sharma has nothing to do with the exchange of money between the plaintiff and Devi, his wife, except for receiving some money sent by the plaintiff on behalf of Devi.

Statutory Declaration

- [22] On 13 January 2018, the defendants had executed a statutory declaration before a JP. It reads:

"We Mr Aneesh Kumar Sharma and Mrs Asheeka Devi of Teidamu, Lautoka solemnly and sincerely declare that we borrowed one hundred sixty five thousand dollars (\$165,000.00) from Mr Nihal Wanigasekera of 21 Rubicon Crescent, Kuraby 4112 Brisbane Australia to build our house at the Teidamu, Lautoka.

The money we have borrowed will be paid back to him in installment on availability without any interest ..."

- [23] Under cross examination, the plaintiff admitted that the remittance advice indicates the transaction as 'gift' but he maintained that he cannot send money otherwise than gift.

- [24] The plaintiff was sending money to Devi from September 2016 till October 2017. He gave monies to Devi through his friend or agent in Fiji and sometime via money transfer directly to Devi.
- [25] In 2016, the plaintiff and Devi became Facebook friend. Thereafter, he was used to visit Fiji and stay with Devi at her house. According to the plaintiff, he befriended with Devi. He met the plaintiff as an underprivileged girl. She did not have any property at that time.
- [26] It is notable that at the time when the plaintiff started to send money to Devi there was no agreement or arrangement that she would return the money back to the plaintiff. Devi appears to have received the money from the plaintiff without any obligation to return it. She did not know the plaintiff was giving the money as loan to build a house. Even the plaintiff did not tell her that he was giving the money as a loan.
- [27] Devi said in evidence that the plaintiff was pressuring them to execute a statutory declaration for tax purposes in Australia; and that she did comply with his request and execute the document jointly with her husband, DW1.
- [28] Devi's evidence was coherent, consistent and straightforward. I had the opportunity to observe her demeanour while giving evidence, and I noticed that she was unshaken and answered the cross-examination questions without any hesitation or pause. Despite the risk of destroying or damaging the wide relationship between her and her husband (Aneesh) if she discloses her sexual ties with the plaintiff, she said the plaintiff was used to stay at her house and sleep with (meaning have sex) her whenever he visits Fiji. I, therefore, find her as a truthful witness, and I accept her evidence.
- [29] The plaintiff did not look at Ms Devi's capacity to repay the sizable money he was giving to her. He did not ask her to execute a statutory declaration or any agreement to repay at the time when he gave money to her. He was giving money to Devi over a period of one year starting from 2016. During this period there was no talk of the loan to build the house and the statutory declaration.

[30] The idea of statutory declaration was an afterthought one. It appears that the plaintiff came out with this idea when his wife got to know about his sexual ties with Devi. Devi had just done what the plaintiff was telling her to do. It has been executed by the defendants without any independent legal advice. I accept the defendants' evidence that it was executed for the plaintiff's tax purposes at his request. I would, therefore, disregard the statutory declaration signed by the defendants.

Loan or gift

- [31] The plaintiff claims the monies given to Devi as a loan. In his amended statement of claim he says that he agreed to lend the money to the defendants on the basis it would be repaid to him, and that it was agreed between both parties that the plaintiff would provide the fund to the defendants to enable them build the house and the defendants would repay the money once the insurance matures.
- [32] It was the plaintiff's evidence that the defendants asked him if he could lend some money to build a house and he agreed when they said they would repay in 2 years when the insurance matures.
- [33] Devi had no insurance policy. However, her husband Aneesh (DW1) had 2 insurance policies.
- [34] DW1 said in evidence that he did not have enough money in the insurance for him to take that amount of loan. Mr Wanigasekera knew of his (DW1's) family conditions.
- [35] Was there any promise or arrangement by the defendants that they would repay the monies they receive from the plaintiff? The monies were given to Devi without any security or promise to return it. Devi simply received the monies without any obligation to repay it because she had an affair with the plaintiff. A large amount of money had been exchanged between the plaintiff and Devi, without any promise on the part of Devi.
- [36] On the evidence, I find that the defendants did not request the plaintiff to lend money to build a house. At the time when Devi received the money, she did not

give any promise that she will return it in about 2 years' time when the insurance matures. I reject the plaintiff's evidence that he lent the money to the defendants upon their promise that they would repay it when the insurance matures.

[37] There is no evidence that the defendants misled, or misrepresented the plaintiff or unduly influenced the plaintiff into giving the monies to them.

[38] Gift, in law, a present or thing bestowed gratuitously. The term generally restricted to mean gratuitous transfers *inter vivos* (among living) of real or personal property.

[39] One cannot really give somebody a gift for no reason because you do have a reason for giving the gift. You are bringing attention to yourself by giving a gift, so the reason is to get attention.

[40] In this case, the plaintiff had hidden agenda for giving gift. The hidden agenda was to have an affair with Devi. He got Devi's attention to himself by giving monies.

[41] The donor (the plaintiff) and the donee (Devi) had full capacity to give and receive gift. I should emphasise that there was no evidence whatsoever demonstrating that Devi unduly influence the plaintiff into giving monies. Given the fact that the plaintiff had sexual ties with Devi, he was giving monies to Devi without any obligation to return it so that she had accepted the money as gift.

Conclusion

[42] On the evidence, and for the reasons I have set out above, I find that the monies given by the plaintiff to Devi was gift and it was not given as a loan. I would, therefore, dismiss the claim. I would not make an order for costs as the defendants had appeared and defended the claim in person.

Counterclaim

[43] The defendants counterclaimed a sum of \$11,700.00 for humiliation and unreasonable duress and for other expenses, such as documentation, fees and transportation. They also counterclaimed damages for undue duress and

depression. However, the defendants had failed to lead sufficient evidence in respect of their counterclaim. As such, I would dismiss their counterclaim as well without costs.

The result

1. Plaintiff's claim dismissed.
2. Defendants' counterclaim also dismissed.
3. No order as to costs.

M.H. Mohamed Ajmeer
..... 26/2/20

M.H. Mohamed Ajmeer

JUDGE

At Lautoka

26 February 2020

Solicitors

Jyoti Legal, Barristers & Solicitors for the plaintiff

