

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

Civil Action No. 35 of 2012

BETWEEN: **RAMAN PRATAP SINGH** of 5 Karan Singh Road, Samabula,
Suva, Barrister and Solicitor.

PLAINTIFF

AND: **MAHENDRA PRASAD** of Lot 6 JP Maharaj Place, Nakasi.

DEFENDANT

Before: **Hon. Chief Justice Kamal Kumar**

Counsels: **Mr A. Singh for the Plaintiff**
Mr I. Samad for the Defendant

Date of Judgment: 7 December 2021

JUDGMENT

Introduction

1. On 10 February 2012, Plaintiff caused Writ to be issued with Statement of Claim claiming for vacant possession, damages, interest and costs arising out of Sale and Purchase Agreement dated 29 June 1992.
2. On 10 May 2012, Plaintiff filed Application to enter Judgment against Defendant and on 6 June 2012, being returnable date of Application it was

struck out and Defendant was directed to file Statement of Defence within fourteen (14) days.

3. On 15 June 2012, Defendant filed Statement of Defence.
4. On 15 October 2012, Plaintiff filed Reply to Statement of Defence.
5. On 4 February 2013, Plaintiff filed Summons for Directions and on 27 February 2013, being the returnable date of the Summons, Order in terms of the Summons was made.
6. On 14 June 2013 and 20 January 2015, Plaintiff and Defendant filed their Affidavit Verifying List of Documents (“**AVLD**”) respectively.
7. On 20 January 2014, Plaintiff filed Minutes of Pre-Trial Conference (**PTC**).
8. On 20 February 2014, Plaintiff filed Copy Pleadings and Order 34 Summons.
9. This matter was listed for trial on 24 and 25 November 2014.
10. On 20 November 2014, Plaintiff filed Agreed Bundle of Documents.
11. On 21 November 2014, Plaintiff filed Application to file Supplementary AVLD and on 25 November 2014, Plaintiff was granted Leave to file Supplementary AVLD which was filed on the same day.

Documentary Evidence

12. By consent parties agreed to tender documents listed in Agreed Bundle of Documents dated 20 November 2014, and in Plaintiff’s Bundle of Documents dated 25 November 2014, marked as **Exhibits P1 to P5** and **P6 to P11** respectively.

Issues for Determination

13. Issues for determination forming part of Part B of Pre-Trial Conference are as follows:-

1. Did the Plaintiff breach the Sales and Purchase Agreement by not fully paying the balance sum of \$12,000.00 and interest in installments as per clause 1(b) of the said agreement?
2. What amount if any is due and owing by the Defendant?
3. Did the Plaintiff give a notice to the Defendant in respect of the default amount?
4. Is the Plaintiff entitled to vacant possession of the said property?

Plaintiff's Case

14. Plaintiff during examination in chief gave evidence that:-

- (i) He was the registered proprietor of property comprised in Certificate of Title No. 25447 ("**the Property**") and on 29 June 1992, he entered into Sale and Purchase Agreement with the Defendant in respect to the Property (Exhibit **P1**).
- (ii) Sale price was \$13,000.00 which was to be paid as follows:-
 - (a) \$1,000.00 deposit paid on date of Agreement.
 - (b) Balance of \$12,000.00 by monthly installment of \$260.00 with interest payable on sale price due at the rate of 11% per annum on reducing balance.
- (iii) Defendant did not pay \$260.00 regularly and as a result he sent few notices to **Defendant**.
- (iv) On 11 April 2011, he wrote to Home Finance Co. Ltd (Exhibit P2) and on 8 August 2011, he served eviction notice on Defendant with attached Statement of Account (Exhibit P3).
- (v) He exercised his right as Vendor pursuant to clause 9(b) of the Agreement whereby he rescinded the Agreement and forfeited the monies paid to him.
- (vi) Payments shown in Statement of Account (Exhibit P1) were paid in his firm's Trust Account.

- (vii) Payment of \$1,000.00 shown in second row of Statement of Account is deposit of \$1,000.00 paid as per Agreement.
- (viii) Interest of \$106.05 on fifth row (1st page) of Statement of Account is one month's interest on \$11,600.00 being paid on reducing balance.
- (ix) Figures shown on second column of Statement of Account is credit towards purchase price and receipts were issued for such credits.
- (x) He is exercising his rights under clause 9(b) of the Agreement and seeking Vacant possession.

15. During cross-examination Plaintiff:-

- (i) Stated that since payment of balance purchase price was to commence from 30 August 1992, default could have started in early 1993.
- (ii) Agreed that he is not related to Defendant and Sale was commercial transaction.
- (iii) Stated that he sold property to Defendant out of sympathy.
- (iv) Stated that default was in 1993 and he did not take action until 2011, for following reasons:-
 - (a) Because he was not losing much as interest payable by Defendant would have offset any increase in price of property.
 - (b) Was hoping that one day Defendant would pay amount and get land transferred into their name.
- (v) Did not agree that Statement of Account is improper and inconsistent and stated that it is in conformity with the Agreement.
- (vi) In reference to Exhibit P10 he stated that at the beginning payments were made to Raman Singh & Co. Trust Account and after 10 January 2005, payments were made to Kohli & Singh Trust Account.
- (vii) Stated that Defendant kept on paying and was not advised of total amount paid and what was owing and he would have given final figure if Defendant was ready to settle.
- (viii) Stated that by notice dated 8 August 2011, Defendant was given fourteen (14) days to pay balance purchase price.

- (ix) Stated that receipts were given for all payments made in office and he is not aware about payment of \$5,000.00 about which his wife did not tell him anything.
- (x) Agreed that he allowed Defendant to build house, install water and electricity and stated the Defendant was given possession on date Agreement was signed.
- (xi) Stated that they wrote letter to Home Finance & Co. Ltd dated 11 April 2011 (Exhibit P7) at someone's request and he could not recall as to whether it was Defendant or an Agent.
- (xii) Denied that interest accrued due to his failure and stated that Defendant could have got account or get accounts person to calculate for him.
- (xiii) Stated that last payment was made on 4 September 2006, and after that payment stopped.
- (xiv) Denied that Defendant came and asked for accounts but were denied.
- (xv) Stated that Statement of Account was prepared by an Accounting graduate from USP.
- (xvi) When it was put to him that Defendant was led to believe that he had paid off balance price, and if property was transferred to him this would not have eventuated he stated that from September 2006, there was no contact from Defendant, his wife or his Agent and there was no request for settlement with no response to letters written by him.

16. During re-examination Plaintiff:-

- (i) Stated that he did not receive any notice to transfer property to Defendant.
- (ii) Stated that currently Defendant and his immediate family occupy the Property.
- (iii) Stated that even if \$5,000.00 was paid in November 1995, it would not have cleared the account.
- (iv) Stated that he did not waive his right for payment of balance price.

Defendant's Case

17. Defendant's wife Raj Mati of J.P. Maharaj Road, Nakasi, Domestic Duties ("DW") gave evidence for the Defendant.
18. DW during examination in chief gave evidence that:-
 - (i) She is sixty-seven (67) years old, residing at J.P. Maharaj Road, Nakasi and Defendant is her husband.
 - (ii) They started living on the Property in 1992 and they came to live on the Property after they saw the owner and agreed to buy the Property.
 - (iii) She knows Plaintiff and that the day Agreement was made she went with Defendant to see the Plaintiff.
 - (iv) Agreement was signed by her husband (Defendant) which was to pay for the land and after that land would be theirs.
 - (v) She cannot tell more about the Agreement as she is uneducated.
 - (vi) Amount to be cleared by them was \$13,000.00.
 - (vii) The Agreement shown to her is the Agreement and she can say so because of the amount \$1,000.00 written on it.
 - (viii) She is educated upto class 4 and that she can read some part of the Agreement and not all.
 - (ix) When asked whose signature is on the last page of the Agreement she stated that she did not see anyone signing.
 - (x) She cannot tell anything else about the Agreement.
 - (xi) When they met Plaintiff, he advised them that when Title is ready he will give it to them.
 - (xii) Annexure P10 are copies of receipts for payment in the sum of \$200.00, \$260.00 and \$300.00 and total amount paid was \$17,449.00.
 - (xiii) Last document in Annexure P10 is about \$5,000.00 paid to Mrs Raman Singh at their office.
 - (xiv) Mrs Singh said to her that there was no receipt book and asked her to collect receipt on Monday.

- (xv) \$5,000.00 paid was from her husband's provident fund.
- (xvi) When shown Exhibit P6 and asked what is that she stated it is notice which notice she read and then took time to answer.**
- (xvii) Nothing was attached to the notice and she cannot understand what is attached to the notice.
- (xviii) In reference to the last page of attachment, she stated that she could not see properly and had difficulty in reading the figures.
- (xix) When it was put to her that Plaintiff is claiming \$42,157.84 she stated that they paid all.
- (xx) Payments were done by her, her son or husband (Defendant) and she never saw Plaintiff when making payment.
- (xxi) She did not ask about the balance left to be paid.
- (xxii) First time they received Notice was in 2011.
- (xxiii) Defendant is present in Court and he is not giving evidence because he cannot hear properly.
- (xxiv) Defendant (Husband) asked for account when he did payment and they did not tell him.
- (xxv) There was no mention of any Title and they said this month and she was with Defendant when it was conveyed to him.

19. During cross-examination DW:-

- (i) Stated that she accompanied her husband (Defendant) to pay \$5,000.00 but no one was there and they went again on another day but no one was there as they changed their office.
- (ii) Stated they went to new office but was chased away by Mr Singh.
- (iii) They stated that they did not do anything about this and after that Summons was served on them.
- (iv) When it was put to her that she did not give \$5,000.00 to Mrs Singh's she stated she gave it in Mrs Singh's hand and she said it was on a Friday.

- (v) When it was put to her that receipt is fictitious she stated that she did not give receipt but gave on a piece of paper.
- (vi) Stated that she had original receipt when it was copied but does not know where it is now.
- (vii) Agreed that last document in Annexure P10 (\$5,000) does not have a signature and is dated 5 November 1995, and stated that she said will make receipt on Monday.
- (viii) When it was put to her that she is not being honest with the Court she stated that she is telling the truth.
- (ix) When it was put to her, 5 November 1995, is a Sunday and not Friday she stated that she paid money on Friday.
- (x) When asked why document is dated 5 November 1995, when it falls on a Sunday she stated she does not know but paid on Friday.
- (xi) When asked if she was familiar with terms of the Agreement she was with Defendant on the day Agreement was made.
- (xii) When it was put to her that she does not recognise husband's signature she stated that it was not signed in front of her and they went to the office.
- (xiii) Stated that she did not see her husband sign and cannot identify the signature.
- (xiv) Agreed that the Property was sold for \$13,000.00. \$1,000.00 deposit was paid and balance \$12,000.00 was to be paid by monthly installment of \$260.00.
- (xv) Stated that they were told about the term that required 11% interest to be paid.
- (xvi) Agreed that whatever payment they made is re-captured in Exhibit P6 (Statement of Account).
- (xvii) When asked if she agreed that interest shown in the Statement of Account is what Account is charged in terms of the Agreement she stated they were not told interest would be that much.

- (xviii) When it was put to her that she stated that interest would be 11% on reducing balance she stated that it would not be that much.
- (xix) Agreed when it was put to her that she is now disputing the Agreement that they relying on.
- (xx) Agreed received Notice (Exhibit P6).
- (xxi) Stated that no one explained notice to her and she does not know what the notice says.
- (xxii) Did not answer when it was put to her that she knew that Agreement will be rescinded if default is not remedied.
- (xxiii) Stated that she did not know that in terms of the Agreement, Vendor rescinded the Agreement.
- (xxiv) Agreed that she is not challenging cancellation of the Agreement.
- (xxv) Agreed that in view of the fact the Agreement has been cancelled she cannot stay on the Property.
- (xxvi) Stated that she agrees to give vacant possession if monies paid by her and expenses incurred be paid to her.
- (xxvii) Stated that if they would have known the balance, they would have paid it and since the Property was under mortgage Mr Singh said to keep paying it.
- (xxviii) When it was put to her that she never asked for settlement or for Vendor to transfer Title to them she stated that she did but he did not agree.
- (xxix) When asked if her Bank was ready to lend her money she stated Bank would pay balance and they would pay Bank.
- (xxx) Stated that Bank did not write to Vendor and someone in BSP Bank was handling it.
- (xxxi) Agreed that she was not taking the loan but someone else was.

20. During re-examination DW:-

- (i) Stated that no notice was served in 1993 or 1994 and first notice was given in 2011.

- (ii) Stated that they were never told when they went to make payment that they were in default.

Statute Barred

21. Defendant has raised issues that Plaintiff's claim is statute barred and Res Judicata.
22. Defendant submits that pursuant to s4(1) and s8(5) of Limitation Act 1971, Plaintiff's claim is statute barred.
23. Defendant has also pleaded that in his Statement of Defence.
24. Agreement subject to this action is unique in terms of payment of purchase price of the land.
25. This Court upon analysis of the evidence and demeanour of witness has no hesitation in believing Mr Raman Singh's evidence that he agreed to sell the Property (vacant land) to the Defendant's out of sympathy.
26. In summary the purchase price of \$13,000.00 as provided in clause 1 of the Agreement was to be paid as follows:-
- (i) \$1,000.00 was paid on date Agreement was signed.
- (ii) Balance \$12,000.00 plus interest on this or the balance owing was to be paid at 11% per annum by monthly installment of \$260.00 commencing from 30 August 1992.
27. If Defendant paid the balance purchase price and interest at the rate of \$260.00 per month then he would have paid balance purchase price and interest by 30 November 1997.
28. This estimate date is arrived as follows:-

$$\begin{array}{rcl} \$260 \times 46 \text{ months} & = & \$12,000.00 \text{ (balance purchase price)} \\ \$100 \text{ (Interest)} \times 46 \text{ months} & = & \underline{4,600.00} \\ & & \underline{\$16,600.00} \end{array}$$

$$\$16,600.00 \div 260 = 64 \text{ months}$$

29. If that was the case and which should have been the case if Defendant kept the payment obligation then the settlement for sale of the Property should have taken place on or about 30 November 1997.
30. Table below shows the payment that Defendant was to make every year and actual payments made by him.

Year	Payment Due (\$260/month)	Payment made by Defendant
1992	1,300	\$ 800.00
1993	3,120	2,400.00
1994	3,200	1,000.00
1995	3,200	1,100.00
1996	3,200	400.00
1997	3,200	100.00
1998	3,200	Nil
1999	3,200	400.00
2000	3,200	200.00
2001	3,200	Nil
2002	3,200	160.00
2003	3,200	Nil
2004	3,200	2,070.00
2005	3,200	1,760.00
2006	3,200	<u>1,450.00</u>
		\$11,840.00

31. It is evidently clear from the Table that Defendant was very relaxed in meeting his payment obligation under the Agreement.
32. It is to be noted that:-
- (i) For first three years five months Defendant paid \$5,300.00 instead of \$10,900.00 (excluding interest).

- (ii) After 1995 and up until 2002, Defendant paid minimum amount and for two years did not pay anything.
 - (iii) Defendant then out of the blue started payment of a larger sum from 2003 (11 years after date of Agreement) and did so upto 2006.
33. By looking at the Table it is apparent that Defendant's complaint that Plaintiff instituted this proceedings after 19 years squarely fits the idiom "The pot calling the kettle black".
 34. Time was not the essence as for settlement of the transaction to the Agreement.
 35. If Defendant wanted to settle by paying the balance price and interest payable then he should have given notice to complete to the Plaintiff that he is ready and willing to settle at a particular time and place.
 36. It is apparent that Plaintiff did not take any action after Defendant defaulted for reason known to the Plaintiff.
 37. One reason that came out in Plaintiff's evidence was that interest payable took charge of any loss he would have suffered by Defendant's delay in paying balance purchase price and interest.
 38. This Court finds that parties by their conduct kept the Agreement active and alive until 9 August 2011, when Plaintiff gave fourteen (14) days notice to rescind the Agreement which rescission according to DW's evidence was acceptable to the Defendant.
 39. Failure by the Defendant to comply with the Notice brought contract to an end and Plaintiff after six months instituted this proceedings.
 40. It must be also noted that last payment made by Defendant was on 4 September 2006, which brings the Writ within six year limitation period.
 41. In view of what is stated at paragraphs 39 and 40 of this Judgment this Court holds that Plaintiff filed this within the limitation period and as such this action is not statute barred.

Res Judicata

42. Defendant's submission on this aspect totally unmeritorious for the following reasons:-
- (i) Plaintiff instituted Civil Action No. 291 of 2010 pursuant to s169 of Land Transfer Act 1971 which is summary proceeding.
 - (ii) Court only looked at Affidavit evidence and dismissed that action for the reason that there were some issues raised which needed to be tested by the Court in a Writ action or Originating Summons action under High Court Rules.

Court's Analysis of Evidence and Finding

43. During the Pre-Trial Conference parties agreed to following facts:-
- (i) Plaintiff was the registered proprietor of the Property.
 - (ii) By Agreement dated 29 June 1992, Plaintiff agreed to sell and Defendant agreed to purchase the Property for consideration sum of \$13,000.00.
 - (iii) \$1,000.00 deposit was paid by the Defendant on date of Agreement.
 - (iv) Notice dated 2 September 2010, was issued by Plaintiff on Defendant requiring Defendant to pay default sum amounting to \$39,748.70.
44. Before moving any further this Court wishes to address the issue that Defendant by his wife tried to portray an image that Plaintiff being a Solicitor tried to take advantage.
45. This Court finds evidence of DW not that credible for the reason that she was very selective in answering questions in that she would agree to what she thought was to her advantage and would not agree or say she is not aware or did not understand matter which did not suit her.
46. She did so to the extent that she refused to say the signature on the Agreement was Defendant's or not.

47. How could she say so when Defendant for whom she was giving evidence agreed through his Solicitors that Agreement was entered into by him and Plaintiff?
48. DW was giving evidence that they did not know interest would be that much which was stated in the Statement of Account.
49. As stated at paragraph 28 of this Judgment if Defendant had kept to his obligation to pay \$260.00 per month from 20 August 1992, total interest payable would be much less and I would be surprised if it would exceed \$4,000.00.
50. In other words interest became “that much” only because of Defendant’s default.
51. This Court also finds that the interest charged on the balance price was justified in that Vendor (Plaintiff) instead of getting lump sum payment gave Purchaser (Defendant) 5 to 7 years to pay the balance purchase price.
52. This Court has no hesitation in finding that Defendant breached his obligation under the Agreement.

Has Defendant paid the full purchase price?

53. There is no dispute that total amount owed by the Defendant towards the purchaser, price is \$12,840 (excluding interest) which said sum is made up as follows:-

Deposit	\$ 1,000.00
Installment	<u>11,840.00</u>
	<u>\$12,840.00</u>

54. Defendant by his witness claims that they paid \$5,000.00 to Mrs Raman Singh towards the purchase price.
55. Plaintiff denies that such payment being made.

56. DW's evidence is that she made this payment on Friday and was told by Mrs Raman Singh to collect receipt on Monday and Mrs Singh gave a note confirming receipt of \$5,000.00 (last page of Exhibit P1).
57. This Court takes note of the following:-
- (i) There is no signature of Mrs Raman Pratap Singh.
 - (ii) 5 November 1995 fell on a Sunday and not Friday.
 - (iii) Original of this note was not produced in Court and according to DW it was lost when copies were made.
58. The above facts/evidence came out during DW's cross-examination.
59. It is also noted that after DW in cross-examination stated that when they went to ask for the receipt they were chased out of the office. However, Defendant whether by himself, his wife (DW) or son continued making payments and obtaining receipt after 5 November 1995.
60. In view of what is noted at paragraph 57 to 59 of this Judgment, assessing the demeanour of witness and absence of any tangible evidence to prove that \$5,000.00 was paid by Defendant as alleged, this Court has no option but to reject Defendant's assertion that \$5,000.00 was paid to Mrs Raman Singh on 5 November 1995, or on a Friday.

Whether Plaintiff is entitled to vacant possession?

61. Plaintiff is the registered proprietor of the Property.
62. Plaintiff as Vendor has rescinded the Agreement in exercise of rights given to him under Clause 9(b) of the Agreement and Defendant has accepted the rescission on the condition that Plaintiff pay them the monies paid by Defendant towards purchase price and expenses.
63. This Court takes note of the following:-

- (i) Plaintiff being a senior legal practitioner should have kept the Defendant informed of the default being made by Defendant.
- (ii) Plaintiff should have exercised his right not long after end of 1997 when balance purchase price and interest should have been fully paid.
- (iii) It is due to both Plaintiff and Defendant's relaxed attitude interest came out to be quite substantial.
- (iv) If Defendant kept up to his obligation then interest payable by him would have been approximately \$4,600.00.
- (v) There is no counter-claim filed by the Defendant.
- (vi) Plaintiff had an upper hand and the balance of power in this situation which he used to his advantage to the detriment of Defendant.

64. On the basis of what is stated at paragraph 63 (i), (ii) and (vi) of this Judgment Plaintiff should refund some money to the Defendant.

65. Since, the Agreement has been rescinded by Plaintiff and accepted by Defendant, Defendant has no right over the Property either beneficially or otherwise.

Costs

66. Court takes into consideration that trial lasted for one day and both parties filed Submissions and assisted the Court during the proceedings.

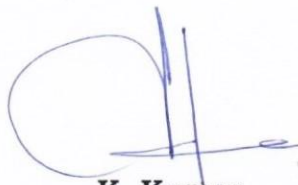
Orders

67. This Court orders that:-

- (i) Defendant do deliver immediate vacant possession of the Property known as Lot 6 on Deposited Plan No. 6249 in the District of Naitasiri containing nine hundred and seventy-eight square meters and situated at Lot 6 JP Maharaj Place, Nakasi (**the Property**) to the Plaintiff.

- (ii) Plaintiff refund a sum of \$7,000.00 to the Defendant within sixty (60) days from date of this Judgment.
- (iii) Defendant dismantle and remove all improvements (including building) carried out on the property at his own expense and cost within sixty (60) days from date of this Judgment failing which all improvements on the property (including building) carried out on the property shall vest in the Plaintiff and Defendant is not to interfere with such improvements.
- (iv) Defendant do pay all electricity and water charges due and payable in respect to the Property upto the date Defendant delivers vacant possession of the Property.
- (v) Except for disconnecting Water Authority of Fiji Account and Electricity Account in Defendant's name, Defendant is not to interfere with or damage any works done for supply of water and electricity to the Property.
- (vi) Each Party bear their own costs in this proceeding.




K. Kumar
Chief Justice

At Suva
7 December 2021

Solicitors:

KOHLI & SINGH for the Plaintiff

SAMAD LAW for the Defendant