

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 398 of 2019

IN THE MATTER of the Property Law Act [Cap 130],
Section 119

A N D

IN THE MATTER of an application for sale and
transfer of the property comprised in Crown Lease No.
1981

BETWEEN: **ANUP KUMAR** of 26 Pegasus Avenue, Hinchinbrook, New
South Wales 2168, Australia, Self Employed

PLAINTIFF

A N D: **ASHOK KUMAR** of 15 Tanoa Street, Flagstaff, Suva,
Businessman

DEFENDANT

Counsel : Plaintiff: Mr. V. Singh
: Defendant: Mr. G. O'Driscall
Date of Hearing : 7.12.2020
Date of Judgment : 28.01.2021

JUDGMENT

INTRODUCTION

1. Plaintiff filed this action by way of originating summons seeking sale of property described in Crown Lease 1981(the Property). Plaintiff and Defendants are having, equal half share interest in the Property. Defendant is residing on the property and object to sale of property. Both parties were granted opportunity to explore possibility of partitioning by directions of the court, but it was not successful. Plaintiff had obtained consent of the Director of Lands for legal proceedings in respect of the Property. Plaintiff had instituted this action in terms of Section 119(2) of Property Law Act 1971for sale of property. A party to joint tenancy as well as tenancy in common, can seek sale of property without resorting to

partition in terms of Section 119(2) of Property Law Act 1971.¹ There is a discretion given to the court to order sale of property. It is to be exercised in favour of sale if parties cannot amicably partition, and hardship to party seeking sale is more in comparison to other parties who are enjoying the property. One party cannot be allowed to enjoy entire property to the exclusion of other party and also object to sale, this would clearly be inequitable. When a party is a tenant in common to a land that party is having an 'interest' in the land and can seek sale of land and distribution of proceeds in terms of Section 119(2) of Property Law Act 1971. The sale is ordered for the benefit of all the parties and court needs to balance the convenience of parties 'interested'. When the interests in the property is equal, one party cannot deprive the benefits of other party through a sale without sufficient and cogent reasons. In this case sale of property benefits all the parties and refusal will favour Defendant. Plaintiff had shown that he is not enjoying fruits of property and also efforts of amicable settlement failed. The court can exercise its discretion to impose conditions to have a fair sale in order to obtain true value for property.

FACTS AND ANALYSIS

1. Relevant facts of this action are not disputed. Plaintiff has made an application pursuant to Section 119 (2) of Property Law Act 1971 for order for sale of the Property.
2. Parties to this action are holding equal shares as tenants in common to the Property.
3. Defendant is residing in the Property and only reason given in the affidavit in opposition for the sale was that.
4. Apart from above, Defendant takes a legal objection to this application on the basis that Plaintiff cannot seek sale of property in terms of Section 119(2) of Property Law Act 1971.
5. Section 119 of the Property Law Act 1971 states:

ART XIII - PARTITION OF LAND AND DIVISION OF CHATTELS

In action for partition court may direct land to be sold

119.-(1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among

¹ *Thomas v Estate of Eliza Miller* [1996] FJLawRp 15; [1996] 42 FLR 268 (12 December 1996)(Per Pathik J)

the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.

(2) The court **may**, if it **thinks fit**, on the request of **any party interested**, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of **any other circumstance**, a **sale of the land would be for the benefit of the parties interested**.

(3) The court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.

(4) On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.

(5) Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations:

Provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.

(6) On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters.(emphasis added)

6. A party having an interest in the Property can seek sale of the Property in terms of Section 119(2) of Property Law Act 1971.
7. In Thomas v The Estate of Eliza Miller & Tess Goulding [1996] 42 FLR 268 Pathik J discussed , the issue of ordering sale of property in terms of Section 119(2) of Property Law Act 1971 as follows;

“I agree with Mr. Gago's submission that in s. 119(1), (2) and (3) provision is made for three separate kinds of action which can be maintained in relation to any property. I reject the defendants' contention that land can only be sold on a court order if there is "an action for partition and not otherwise", and therefore that an application under s. 119(2) must be based on an "action for partition".

In England under the old law the Court had no power to decree sale instead of partition until the Partition Act, 1868 when the court was given power to order a sale. The views of the holders of the greater share prevailed, unless the minority could prove to the Court that their view was the most beneficial. Rules were laid down for the guidance of the Court which are similar to the provisions under our section 119(1), (2) & (3). In all these cases the Court had a discretion.

Where a large estate had to be divided among a few people, the expense was not heavy; but many cases have occurred where a small estate has been given (generally by Will), as in the case before me, to a very large number of persons, some of whom cannot be found, and in these cases the expenses were out of all proportion to the value of the estate. This produced numerous inconveniences and absurdities such as for example a house which was partitioned by actually building a wall up the middle (Turner v Morgan [1803] EngR 490; (1803) 8 Ves 143, Lord Eldon LC). This led to the passing of the Partition Act 1868 (31 & 32 Vict. C. 40) and the Partition Act 1876 under which the Court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition. But since the Law of Property Act, 1925 the necessity for sale by the Court no longer exists in England, since, whenever several persons share land beneficially, it is now vested in trustees on trust for sale. Hence the Partition Acts no longer enable the Court to order a sale in a partition action but an action for partition can apparently still be brought, if occasion arises.”

8. So, I reject the contention of Defendant that Plaintiff first needs to seek partition of land in terms of Section 119(1) of Property Law Act 1971 before seeking sale of the Property in terms of Section 119(2) of Property Law Act 1971. I agree with the position taken by Pathik J in Thomas (supra)

9. Defendant had relied on decision of Seneviratna J's decision in Devi v Sharma [2018] FJHC 201; HBC214.2016 (14 March 2018), but ratio of that case only reiterate legislative provisions contained in Section 119(2) of Property Law Act 1971. The fact that discretion was not exercised by the court in that case for sale cannot be blindly applied to this case.
10. There is a discretion given to court to order a sale if it thinks fit to do so, for the benefit of the parties. Discretion cannot be used arbitrary manner to allow or reject sale and force parties to partition of the Property.
11. As tenants in common both parties to this action have equal interests in the land. Defendant is possessing the Property to the exclusion of Plaintiff. He is also objecting to the sale of property on the basis that he and his family are possessing it.
12. Objection of one or more tenants in common is not an obstacle for the court to order sale of the Property in terms of section 119(2) of Property Law Act 1971 if in the circumstances of the case it would benefit parties. For this court needs to consider relative inconveniences against benefits to the parties from such a sale.
13. It is apparent from the affidavits that Parties cannot resolve dispute regarding their interests in the Property.
14. If sale is not allowed Defendant will further enjoy entire property to the exclusion of Plaintiff all the benefits derived from property including possession of entire property and other flats on that.
15. In contrary, from a proper sale both parties will get an opportunity to enjoy their respective interests in a meaningful manner.
16. It is common in a situation such as this, the party who is enjoying more than his share will face some inconvenience, but this need not to be an obstacle to the greater benefit to all the parties having an interest.
17. In Thomas (supra) it was held,

"...The application here is under s. 119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be "for the benefit of the parties interested" for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that "the sale

would be for the benefit of the parties concerned". In the definition of "land" is included "all estate and interests in land" (section 2 of the Act).

In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the evidence. On the affidavit evidence the Plaintiff has proved and satisfied the Court that s. 119(2) is available to her...

On the evidence I find that the defendants have not advanced any good reason why an order for sale of the flat should not be made.

The most practical solution to the problem which has plagued the parties for some time is to sell the property to the Plaintiff after valuation on terms and conditions hereafter appearing.

The Plaintiff I consider is entitled to the order she is seeking..."

18. Through a sale of the property both parties will benefit, as opposed to all benefits derived to Defendants. They would receive their entitlements from the sale and be able to utilize them according to their wishes, including acquire their own properties
19. In Atu v Atu [1983] 29 FLR 100 the Court considered a similar application and discussed that:

"...Section 119(1) of the Property Law Act provides as follows:

"Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly."

Subject to one issue Mr. Knight raised which I will consider later, unless the Court sees good reason to the contrary, it is mandatory to direct sale of the property since the plaintiff's interest in the property is not less than one moiety.

A 'moiety means a half and the issue raised by Mr. Knight is that section 119 is not available to the plaintiff because he is a joint tenant and not a tenant in common entitled to a moiety or upwards of the property.

It is not necessary to enter upon a description of joint tenancies and tenancies in common because partition of land by the Court is available to persons having concurrent interests whether jointly or in common in a property.

Halsbury Laws of England Volume 21 first edition at p. 810 when describing the legal term "partition" says:

"The legal term 'partition' is applied to the division of lands, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

In a note regarding co-owners, the author says:

"The co-owners may be joint tenants, tenants in common or co-partners."

The plaintiff is entitled to an order for sale of the property unless the Court considers there are good reasons to the contrary.

20. In *Sen v Sen* Civil Action No. HBC27 of 2019 (24.5. 2019) Justice Brito Mutunayagam. In granting the orders sought for sale of the property the Learned Judge noted that no good reason had been given by the Defendants why the property should not be sold.

CONCLUSION

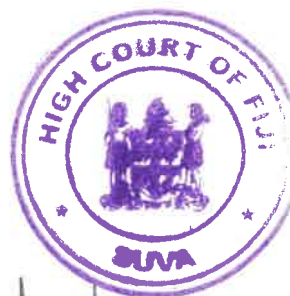
A party having an interest have a statutory right to seek an order for sale in terms of Section 119(2) of Property Law Act 1971, without resorting to partition. The court has a broad discretion to grant order for sale of the Property for the benefit of the parties notwithstanding objections raised by Defendant. The court needs to consider circumstances of the case. In this case if sale is not ordered inconvenience to Plaintiff is greater. At the moment benefits derived from property are enjoyed by Defendant to the exclusion of Plaintiff. It is rare in such an instance common tenant would agree to a sale as it would decrease the benefits that he enjoys. A parson who is enjoying entire property, is not a person who enjoy benefits proportionate to his interest. This itself cannot be the reason to allow inequitable request. It is not for the benefit of both parties, to refuse the sale. Objections of the Defendant for sale is overruled and sale of the property is allowed under following conditions. Considering the circumstances of the case no costs awarded.


FINAL ORDERS

- a. Plaintiff's application seeking sale of Crown Lease 1981(the Property) is allowed subject to consent of Director of Lands at the time of sale.
- b. Solicitors of Both parties to agree to an independent valuer and cost of valuation to be deducted from sale or shared equally by parties. The value of such valuation is the minimum price, for sale.

- c. The property to be advertised at least three consecutive weekends on two local newspapers and highest bidder to be selected by independent part agreeable to both solicitors.
- d. Parties are at liberty to appoint an independent real estate agent for the sale of the property in order to obtain highest value for the Property.
- e. If the Defendant does not co-operate with the transfer of the property Chief Registrar or his nominee is appointed to sign execution of any document needed for transfer of the property.
- f. All cost of transfer of property including tax be shared by the parties equally.
- g. After above deductions (i.e. cost of sale) proceeds of sale be shared equally between the parties to this action.
- h. Liberty to parties to apply generally.
- i. No cost is awarded.

Dated at Suva this 28th day of January, 2021.




.....
Justice Deepthi Amaratunga
High Court, Suva