

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

Civil Action No. HBC 15 of 2019

**BETWEEN:**     **AJAY KUMAR** of Sakoca, Khalsa Road, Nasinu, Economic Planning  
Officer.

**PLAINTIFF**

**AND**             **SHALINI SHIBESHNI PRASAD** of Lot 29 Ramji Shmaji Road, Dilkusha,  
Nausori, Accounts Officer.

**DEFENDANT**

**Counsel**             **: Plaintiff**    **: Ms Lutu I.**  
                              **: Defendant: Mr Nand A.**

**Date of Hearing**    **: 30.11.2020**

**Date of Judgment** **: 01.02.2021**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff and Defendants were betrothed, and jointly made an application for purchase of Itaukei Lease No 31015 (the Property) also for a loan to build a house on that to live once they get married. There is no dispute that all the payments for said Property and subsequent expenses to build a house on that, was done by Plaintiff. Due to religious issues finally they were not married. Defendant is now married to third party, hence does not wish her name being appeared in the joint mortgage and also in the title as joint tenant. Prior to this action, Defendant had requested removal of her name from title though her solicitors, but was not done due to some administrative issues with the financier. Defendant is seeking sale of the property and half share of proceeds. Plaintiff is objecting to sale of the property and seeks an injunction to prevent Defendant from exercising her rights as joint tenant on the title in terms of Section 119(2) of Property Law Act 1971. Defendant's evidence stated her involvement in the purchase of land and no contribution for the structure on it. She had gone to see the land and had consented her name being given as joint applicant to qualify for the said acquisition of mortgage. Request for sale, cannot be allowed due to resultant trust being created for the interest in the Property held by Defendant. It was admitted that she was also paid \$10,000 by Plaintiff, though the purpose of this payment was in dispute and cannot be a claims for specific performance in terms of Section 59 of Indemnity Bailment and

Guarantee Act 1881. Plaintiff did not state any assurance was given by Defendant to enforce to transfer her interest in the property to Plaintiff. The Plaintiff's claim for transfer of Defendant's interest, is not pleaded through included in a prayer. Section 168 of Land Transfer Act 1971 cannot be resorted to seek transfer of a land without a claim for that in pleading. Plaintiff is granted a declaration that Defendant and or her assignees etc hold her interest in the Property in trust to Plaintiff. Plaintiff and Defendant are joint tenants on the title in the absence of specific mention as to their interest in terms of Section 59 of Property Law Act 1971. Defendant's interest in the property is half of undivided share in terms of Section 34 (1) of Land Transfer Act 1971. Defendant, had not sought for transfer of her interests in the property, her only claim was for sale in terms of Section 119 (2) of Property Law Act 1971 which is denied. Plaintiff is granted a permanent injunction restraining Defendant from taking any step under Section 119 of Property Law Act 1971 seeking sale of the Property since she holds it in trust for the benefit of Plaintiff.

## **FACTS**

2. The Plaintiff and the Defendant who met through a popular social media platform on or around 2013 had started a relationship with the blessings of their families. They genuinely intended to get married and had taken steps to acquire the Property in issue.
3. They had jointly applied for an Itaukei Lease No. 31015 to be transferred to the Plaintiff and the Defendant as joint tenants, through a loan /mortgage in the name of both parties.
4. Parties were in anticipation of the marriage hence, agreed to purchase a land together before the wedding to live separately after marriage. For that they also jointly applied for a loan to build a house on the property
5. Upon enquiry by the Plaintiff at the Housing Authority to take out a loan, Housing Authority advised the Plaintiff that he was not eligible to take out a loan as sole applicant hence, Defendant was made a joint applicant and loan was granted.
6. There is no dispute that all payments for the land and building on that were made by Plaintiff despite both parties names being appeared on title to the Property and all the documentations relating to finances relating to it.
7. There is dispute as to the exact time of their differences of religious opinion cropping up and finally deciding not to go through marriage.
8. According to Plaintiff it was in early 2016 and Defendant stated it was late 2017.
9. Defendant informed that she wanted to move on and that she wanted her name removed from the title of the Property and also from mortgage.

10. Upon enquiry at Housing Authority by the Plaintiff, the he was informed that at that point in time they could not process his request.
11. Evidence of Housing Authority at hearing was that another name can be substituted if requested by both parties and if necessary requirements of new name are fulfilled.
12. The Plaintiff claims that because of the verbal agreement, to hold the Property in trust for him, he deposited \$10,000 into the Defendant's bank account as consideration for holding the property in trust for the Plaintiff. This was not admitted in statement of defence and oral evidence.
13. According to Plaintiff payment was for wedding, which was never eventuated.
14. Defendant gave evidence and denied she had any assurance relating to her interest in the Property to Plaintiff though she admitted payment of \$10,000 on 3.6.2016. She said she desired to move her life with her marriage, hence wanted to sell the property and claim half share of proceeds.

## ANALYSIS

15. The Plaintiff in his Statement of Claim has prayed for the following reliefs:
  - a. An injunction restraining the Defendant from taking any further steps under section 119 of the Property Law Act to force a sale of the property comprised in iTaukei Lease No. 31015 Tacirua East Subdivision — Stage 3A (part of) Lot 25 on SO 6619 ("the subject property").*
  - b. A declaration that the Defendant holds one undivided half share in the subject property in trust for the Plaintiff.*
  - c. An order that the Defendant takes all steps usual and necessary to transfer that one undivided half share in the subject property to the Plaintiff.*
  - d. Damages.*
  - e. Costs.*
  - f. Such further and/or other relief as the Honourable Court deems just and necessary."*
16. The Defendant filed her Statement of Defence and Counter-Claim and prays for the following reliefs:
  - a. Plaintiff's claim against the Defendant be dismissed.*
  - b. An order that the subject property be sold.*
  - c. The parties to appoint a reputable valuer to carryout valuations of the property unless the Plaintiff undertakes to purchase the share of the Defendant and undertaking being taken given to direct valuation of the shares of the Defendant.*
  - d. The subject property to be sold at the best price obtained by any of the parties and*

- first priority be given to either parties to purchase the property.*
- e. The Defendant's solicitors to attend to the transfer of the said property on behalf of the Plaintiff.*
  - f. Proceeds received from the sale of the said property to be used to discharge the Housing Authority Mortgage, any arrears of land rental with iTaukei Land Trust Board, city rates/town rates if any and utility bills and costs associated with the sale of the said property including the legal fees of transfer after which proceeds are to be shared equally.*
  - g. The Defendant/Plaintiff to the Transfer of the subject property and all other incidental documents pertaining to the sale of the said property as being the owners of the registered iTaukei lease No. 31015.*
  - h. An order for all necessary and proper consequential directions on the sale of the property.*
  - i. In the event the Defendant/Plaintiff fails to execute the Transfer, the Deputy Registrar, High Court of Fiji to execute the Transfer of Itaukei Lease No. 31015 of Lot 25 on SO 6619 and all other incidental documents for and on behalf of the Defendant/Plaintiff as being the owners of the registered iTaukei Lease No. 31015.*
  - j. Costs of this action to be paid by the Plaintiff."*

17. Plaintiff's claims are in summary as follows
  - a. Permanent injunction preventing Defendant from proceeding with sale of property.
  - b. Declaration that Defendant hold half undivided share in trust for the benefit of Plaintiff.
  - c. An order to Defendant to transfer her undivided half share in the property to Plaintiff.
18. It should be noted though Plaintiff had sought damages in his statement of claim there are no particulars of a claim for damages pleaded.
19. Plaintiff in paragraph 16 of statement of claim had sought return of sum of \$10,000 but this was not sought in prayers.
20. Though Plaintiff had sought an order of the court to transfer Defendant's share in the prayers of statement of claim this had not been pleaded in the statement of claim.
21. The Defendant seeks dismissal of all the claims of Plaintiff and she had counter claimed for a sale of undivided half share of the Property. She desired to transfer her interest in the Property for a consideration to Plaintiff or other party. That is the best commercial price.
22. Both Plaintiff and Defendant had pleaded that Defendant is having an undivided half share of property. This is in terms of Section 34(1) of Land Transfer Act 1971 which states;

‘34.-(1) Subject to the provisions of any law for the time being in force relating to trusts and to the provisions of Part XV, unless the contrary intention is expressed in the instrument of title, where two or more persons are registered as proprietors of any estate or interest in land subject to the provisions of this Act, they shall be deemed to be entitled to the same as tenants in common, and on the death of any one of such proprietors there shall be no right of survivorship in the other or others and the share of such deceased proprietor shall pass to his personal representative.’

23. Most of evidence in this action are admitted. Both parties agree that they in anticipation of their marriage made a joint application to Housing Authority in order to obtain a land and build a house. For purchase of land and building a home finance was granted to both Plaintiff and Defendant upon joint requests, but all payments were done by Plaintiff.
24. It is an admitted fact that Plaintiff alone would not qualify for finance from Housing Authority.
25. According to the evidence the relationship between parties broke due to religious differences and this was early 2016.
26. Plaintiff and Defendant had jointly made an application for variation of mortgage to increase the amount secured to \$150,000 from initial \$86,622.90 and both parties had signed this variation of mortgage on 23.6.2016.
27. Plaintiff did not explain as to how Defendant consented to increase the debt substantially if the relationship of them had broken early 2016 which means before this variation of mortgage on 23.6.2016.
28. It is also be noted that payment of \$10,000 to Defendant was on 3.6.2016. If parties had already decided not to marry by 3.6.2016 and Defendant was also paid \$10,000 in order to hold the Property in trust , the relationship between the parties are irrevocably broken prior to 3.6.2016. If so no reasonable person would sign to enhance debt obligation jointly with Plaintiff to the tune of \$150,000, unless there were other reasons to do so.
29. Defendant specifically stated that she does not want this joint debt to remain after relationship fell. So Plaintiff’s position is not correct that \$10,000 was granted to hold the Property in trust for him.
30. Defendant’s position was payment of \$10,000 was for the future wedding and when this payment was made parties had good relationship. According to her relationship broke in 2017. Again it was not explained why this money was not returned and or asked by Plaintiff at the time they decided to part each other? Why did Defendant decided to keep that \$10,000 with her after 2018 when she already got married to a third party and if she did not want to have any obligations to Plaintiff?

31. So, in my mind both parties are not revealing true nature of payment of \$10,000 to court for reasons best known to them. Only observation I can make in this payment is Defendant had consented to her debt obligation to increase on 23.6.2016 and she was paid \$10,000 on 6.6.2016. In the absence of any evidence to connect the two close incidents of payment of \$10,000 and Defendant agreeing to variation of mortgage to enhance debt obligation, I can only conclude the true reason for transfer of that \$10,000 is not before this court.
32. The Plaintiff further gave in evidence that, he received a letter from the Defendant's solicitors, on 03.11.17, demanding the Plaintiff to have the Defendant's name removed from the subject property or else they will proceed to legal actions. The Plaintiff said in evidence that he emailed the Defendant's lawyers and informed them that they will take time to process the application and he was awaiting disbursement to be fully paid out in order to request removal of the Defendant's name. This was not to the satisfaction of Defendant who wanted immediate removal of her name from her joint debt obligation.
33. Defendant in her evidence admitted that her financial contribution for the Property was limited contributing less than \$100 in money.
34. She said that she was deprived of applying a loan from Housing Authority again due to this joint application. She is not a first time buyer and it has implications. It was not stated whether loans from Housing Authority are more favorable for public compared with other financiers. It is not clear the impact from this to her prospects of obtaining a loan to build a house in future.
35. Plaintiff had paid all payments for the loan/mortgage of the Property. Defendant had allowed her name to be used to loan as joint applicant and subsequently agreed to consent to enhancement of mortgage amount to \$150,000 on or around 23.6.2016. It is admitted fact that there was no relationship between the parties when the house on the Property was built. Defendant's name appears as a joint tenant on the title of iTaukei Lease No 31015. In the circumstances a resulting trust had created in favour of Plaintiff for the Defendant's interest. Hence Defendant's undivided half interest in the Property is held in trust for the Plaintiff. So her request to sale of property and end her joint tenancy cannot be acceded in terms of wide discretion granted to court in terms of Section 119(2) of Property Law Act 1971.
36. There is no claim pleaded to seek transfer of Defendant's interest in the property. So the request for transfer of Defendant's registered interest cannot be made in terms of Section 168 of Land Transfer Act 1971 which reads;

"168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in

the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court."

37. The recognition of resulting trust in law of equity is not as same as ordering transfer of Defendant's rights in the Property to Plaintiff in terms of Section 168 of Land Transfer Act 1971. One cannot resort to Section 168 without proper claim based on such a request.
38. It is worth to consider remedies available for Plaintiff in equity for the registered interest of the Property of Defendant. The text **Hinde McMorland & Sim Land Law in New Zealand** dealt with equitable remedies as follow;

“4.025 Equitable remedies

The principal remedies given by the Court of Chancery were specific performance and injunction<sup>1</sup>. In its strict sense, the former, as already noted, is simply an order directing a person to carry out an obligation which that person has undertaken.<sup>2</sup> The latter is an order to a person to refrain from doing some act in the future or to put right something which that person has already done.

If a person's legal right is infringed he or she is entitled as of right to a legal remedy such as an order for the recovery of land or an award of damages. By contrast a person seeking an equitable remedy had, in theory, no right to anything at all. Although equitable remedies are now given or refused according to well-established principles, they are technically discretionary in that they may be refused if, for example, the plaintiff has acted unconscionably, or if damages would be an adequate remedy, or if the claim is a trivial one.”

39. Further, at 4.019 Hinde McMorland & Sim Land Law in New Zealand (supra ) dealt the issue of specific performance under enforceable contracts as follows

“4.019 Equitable interests arising from enforceable contracts

Many equitable interests in land arise from enforceable contracts affecting that land. Such equitable interests are of great importance in land law and it is therefore appropriate to single them out for special comment.

**The minimum essential requirements for the existence of an equitable interest in land arising from an enforceable contract affecting that land are:**

(1)The existence of a contract entered into for valuable consideration; **and**

(2)The availability of the equitable remedy of specific performance.

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<sup>1</sup> For a general account of equitable remedies, see Megarry and Wade (7th ed), at [5-014]–[5-016]. The leading modern treatise is Spry *Equitable Remedies* 8th ed, 2010. See also Young, Croft and Smith, Part 3.

<sup>2</sup> But note that the term “specific performance” may be used in an extended sense: see [4.019].

In this case not only there is evidence of any contract between the parties to transfer property to Plaintiff for a consideration but also no evidence of consideration being paid and or agreed between parties.”

40. According to Plaintiff \$10,000 was not paid for transfer of Defendant’s registered interest in the Property, but to hold it in trust for the benefit of Plaintiff. So Plaintiff cannot seek transfer of Defendant’s registered interest to him. So the request for transfer not granted.

## CONCLUSION


41. Plaintiff has proved he had provided money for acquisition of the property and also build a house from his money. Defendant admitted that she did not contribute for payment of said mortgage. Though they did not marry parties genuinely desired to do so at that time and each party had acted accordingly. There is a resultant trust created for undivided half share of Property registered in Defendant’s name. Defendant’s request for sale of the Property in terms of Section 119(2) of Property Law Act 1971 is refused and Defendant is restrained from taking further actions for sale of the Property. Considering circumstances no cost is awarded.

## FINAL ORDERS

- a. Plaintiff is granted a permanent injunction preventing Defendant from taking any further step under Section 119 of Property Law Act **for sale** of iTaukei Lease No 31015 Tacirua Estate Subdivision- Stage 3 A Part of Lot 25 on SO 6619.
- b. Defendant hold her undivided half share of in above mentioned property, in trust for the benefit of Plaintiff.
- c. No costs.

Dated at Suva this 2<sup>nd</sup> day of February, 2021.



  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**