

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 225 of 2020

**BETWEEN:** BABITA DEVI of Lot 30, Tovata Road, 8 Miles, Nasinu, Accountant as  
the Administratrix of the Estate of Bramanand aka Brama Nand aka  
Barma Nand (Deceased)

**PLAINTIFF**

**AND:** SHIU SHANKAR & SURUJ MATI formally both of Makoi, Nasinu,  
Carpenter and Domestic Duties respectively but current address and  
occupation not known.

**DEFENDANTS**

**BEFORE:** Hon. Mr. Justice Vishwa Datt Sharma

**COUNSEL:** Mr. Nand S. for the Plaintiff  
Defendants Absent and unrepresented

**Date of Decision:** 26<sup>th</sup> October, 2023 @ 9.30am

DECISION

*(Specific performance of the Sale Note, Consent Order and Declaration)*

## INTRODUCTION

1. The Plaintiff's Originating Summons coupled with the Affidavit in Support is seeking for the following Orders:
  - (i) An Order that the Plaintiff is entitled to specific performances of the Sale Note dated 30<sup>th</sup> September 1988 for the transfer of Lease No. 241416, Lot 31 on DP 5655 located at Tovata Road, Nasinu unto her as the Administratrix of the Estate of Bramanand aka Bram Nand aka Barma Nand, and or alternatively;
  - (ii) A Declaration that the Property comprised in Lease No. 241416, Lot 31 on DP 5655 is held by the Defendants in trust for the Plaintiff.
  - (iii) An Order that the Defendants execute the Application for consent to transfer and all other required documents to transfer assign and set over the property and improvements situated at Tovata Road, Nasinu, being Lease No.: 241416 to the Plaintiff within 10 days of the making of the Order of this Court.
  - (iv) An Order that in the event the Defendants fail to execute the necessary documents, then the Deputy Registrar of the High Court at Suva do and or execute all the documents in place of the Defendants to effect the transfer of Lease No: 241416 to the Plaintiff.
  - (v) An Order that the Originating Summons and Affidavit in Support herein be served on the Defendants by way of substituted service by advertisement in the newspaper.
  - (vi) The costs of this application be paid by the Defendants.
  - (vii) Such further and other relief as Honourable seems just.
2. The Plaintiff is unaware of the Defendant's address of abode and was granted an order by this Court on 01<sup>st</sup> September 2020 to serve the originating Summons and the Affidavit on the Defendant's by way of substituted service by advertisement, service was effected in the Fiji Sun on Wednesday September 09, 2020.
3. The Defendants have neither filed any Affidavit in Opposition nor appeared in Court in the proceedings.

### **Background Facts [Summarised]**

4. The Defendants executed a Sale Note dated 30<sup>th</sup> September 1988 to sell the property Lease No: 241416, Lot 31 on DP 5655 to the Plaintiff's parents for a consideration sum of \$4,000.

5. The property was mortgaged by the Vendors [Shiu Shankar & Suruj Mati] to the Housing Authority and that upon discharge of the Mortgage, the Vendors and the Purchaser shall jointly make an application to the Housing Authority for its Consent for the transfer of the said property and simultaneously execute a transfer of the said property.
6. Housing Authority discharged its mortgage on 14<sup>th</sup> March 1996.
7. The Plaintiff's parents requested the Defendants to execute the application for consent to transfer and transfer of property but the Defendant's evaded and neglected to do so.
8. The Plaintiff has obtained consent to the Sale Note from Housing Authority but Housing Authority requires consent to transfer. This can only happen when the Defendants have executed the application form together with transfer documents.
9. The Plaintiff's contention is that she has a legal and equitable right over the property and the Defendant's do not have any defence to this action.
10. Full purchase price was paid to the Defendants.

#### Determination

11. Initially, in 2016, Vide Civil Case No. HBC 311 of 2016, the Plaintiff had sought for an order for 'Specific Performance' of the Sale Note' made between the deceased Barma Nand and the Defendants on 30<sup>th</sup> September 1988 of Lease No. 241416, Lot 3 on DP 5655 located at Tovata Road, Makoi and Damages for breach of contract.
12. The Court delivered its judgment on 28<sup>th</sup> May 2019 making a finding that 'the Plaintiff has not provided evidence of the discharge of Mortgage nor a written consent of the Housing Authority for the transfer and therefore, the Plaintiff cannot obtain the relief sought without satisfying these two (2) conditions.
13. The Plaintiff now confirms that the two (2) conditions hereinabove have been met as per annexure 'B-9' within the Plaintiff's Affidavit in Support.
14. However, the Housing Authority sub-lease no: 241416 annexed as 'A-2' within the Plaintiff's affidavit extracted on 24<sup>th</sup> July 2020 still confirms that the Lease is Mortgaged to the Housing Authority. There are no discharge of mortgage form attached to the letter of 14<sup>th</sup> March 1996. Housing Authority's letter written to Messrs Nand Law on 25<sup>th</sup> June 2019 advising that '*upon grant of an order from the High Court, consent to Transfer to be applied to the Housing Authority being the Lessor/Landlord.*'
15. Further, I have very clearly examined the 'Sale Note' [Annexure B3] and Housing Authority Sub-Lease No. 241416.

16. Housing Authority Sub-Lease No. 241416 shows and it is evident that the Lease is issued in the name of both Defendant's Shiu Shankar and Suruj Mati and mortgaged to the Housing Authority on 08<sup>th</sup> September 1986.
17. The 'Sale Note' in the subject matter identifying the parties entering into the sale note on top confirms that the Vendors are the Defendants namely Shiu Shankar and Suruj Mati. However, the 'Sale Note' is only signed and executed by Shiu Shankar [one of the Defendants] and Purchaser Barma Nand and neither signed and/or executed by the other Defendant, Suruj Mati.
18. I find therefore that the 'Sale Note' herein is invalid *Ab-initio* and therefore the contents therein cannot be given any effect whatsoever.
19. Accordingly, I for the aforesaid rational, have no alternative but proceed to dismiss the Plaintiff's Originating Summons seeking for Orders herein.

#### Costs

20. The Plaintiff filed the proceedings and furnished Court with written submissions.
21. That matter is now dismissed and therefore the Plaintiff is not entitled to any costs rather bear its own costs at the discretion of this Court.

#### Orders

- i. The Plaintiff's Originating Summons is hereby dismissed.
- ii. The Plaintiff to bear its own costs at the Discretion of this Court.

Dated At Suva this 26<sup>th</sup> Day of October, 2023.



  
VISHWA DATT SHARMA  
JUDGE

cc: *Messrs Nands Law, Suva.*  
*Shiu Shankar and Suruj Mati, Nasinu.*