

**SHIU CHARAN v RUP WATI and SHIU VIDYA CHARAN  
(HBC0372 of 2006L)**

HIGH COURT — CIVIL JURISDICTION

5 WICKRAMASINGHE J

13 April 2012

10 **Contract — consideration — whether transfer of properties was valid — fraudulent misrepresentation — lack of consideration — fraud — Indemnity, Guarantee and Bailment Act s 59 — Land Transfer Act s 40.**

The plaintiff sought declarations that the transfer of two properties to the defendants be revoked on the grounds of misrepresentation and failure to provide consideration.

15 **Held —**

(1) The transfer of the property lacks consideration and is therefore invalid. In the circumstances, the nominal sum of \$5000 requested by the plaintiff for the transfer is acceptable in the eyes of the law. The plaintiff agreed to accept the consideration in the future, but the defendant failed to pay the consideration. It appears that the defendants intended to defeat the payment by never honouring the payment. Non-payment of the consideration by the defendants is dishonest, clearly imputes fraud and renders the contract invalid.

Declarations that transfer of property invalid. Orders made.

*D.S. Naidu* instructed by *Pillai, Naidu & Associates* for the plaintiff.

*D. Gordon* instructed by *Messrs Gordon & Co* for the Defendants

**Wickramasinghe J.**

**INTRODUCTION**

30 [1] By writ, the plaintiff is seeking declarations *inter alia* that the two properties, which he transferred to the defendants, his eldest son and daughter-in-law, be revoked on the grounds of misrepresentation and failure to provide consideration.

35 **BACKGROUND**

[2] The plaintiff had his matrimonial home in Vuniyasi, Nadi where he lived with his wife, three sons and a daughter. The eldest son continued to live in the same house after his marriage. The plaintiff's wife had passed away in 1978 and the defendants had assisted the plaintiff in taking care of the other family members. The first defendant took charge of the household chores and the extended family lived in the matrimonial home until 2004.

[3] Subsequently, the plaintiff moved to Simla, Lautoka to look after some sickly elderly relative named Daya Wati, who eventually died testate, leaving the property in dispute to the plaintiff. The period is unclear but the probate says that Daya Wati, died on 28 July 2003. The plaintiff continued to live in Lautoka. The property consisted of two dwellings. The plaintiff occupied one, and the other was given on rent. The defendants and the plaintiff's youngest son Ajithya and his family continued to live in the matrimonial home. The probate was issued on 12 February 2004 and the transfer by death was executed on 4 May 2004.

50 [4] Somewhere in 2004, the defendants moved to live with the plaintiff due to a dispute with the youngest son, Ajithya.

[5] On 15 August 2004, the plaintiff transferred the inherited properties, CT 15496 Lot 30 to the first defendant, the daughter-in-law (PW4) and CT 13915 Lot 29 to the second defendant, the eldest son (PW3). Both transfers manifest the consideration to be \$5000.00 each.

5 [6] The plaintiff, who was 74 years old then, alleges that the transfers of the properties were subject to the defendants caring for him until his death, collecting the rent or its equal and payment of \$5000.00 each for the two properties as consideration.

10 [7] The defendants say the properties were transferred out of natural love and affection and denied a family agreement as alleged by the plaintiff and further said that the \$5000.00 relates to a payment of tax for the transfer and not consideration.

### 15 ADMITTED FACTS

[8] The parties admitted at the PTC or at the trial that: the plaintiff acquired the two lands by probate; the second defendant is the eldest son and the first defendant is the daughter-in-law; the two properties were transferred to the first and the second defendants: the plaintiff and the defendants resided in Lot 29  
20 which was transferred to the first defendant (PW3); Lot 30, was transferred in the name of the first defendant, which was rented out (PW4); the consideration of \$5000.00 stated in the transfer documents was not paid to the plaintiff; the defendants moved to live with the plaintiff at the request of the plaintiff; the plaintiff continued to receive the rent from Lot 30 until he left Lautoka and went  
25 back to his matrimonial home at Vuniyasi, Nadi on 11 October 2005.

### HEARING

[9] At the hearing, the plaintiff and the youngest son Ajithya gave evidence in support of the plaintiff's case and both the defendants gave evidence in support  
30 of the defence. The parties also filed an agreed bundle of documents consisting of 10 documents.

### EVIDENCE

[10] The plaintiff says, his eldest son, the second defendant wanted the two  
35 properties and he agreed to transfer them to him provided he paid \$5000.00 each for the property and made an oral family arrangement to care for his general needs of food, medicine, clothing etc until his death. He also said that the defendants had lived with him at the matrimonial home since their marriage and assisted him in taking care of his family after his wife's death. The plaintiff had  
40 always trusted the defendants and so did not execute a written agreement relating to the oral family arrangement. In his words, the second defendant was 'smart', he got the plaintiff to write the property in both their names and when the property was transferred, they chased him from the house.

[11] The second witness for the plaintiff, PW2 Ajithya Charan the youngest son  
45 of the plaintiff in his evidence said that the father had lived with him since 11 October 2005. He denied fighting with the defendants and said he was unaware when they moved out of Vuniyasi, Nadi. At Vuniyasi the house also had two dwellings, with the defendants living in one dwelling and Ajithya and his family living in the other dwelling. The plaintiff had lived with him and the cooking had  
50 been done in separate kitchens. Ajithya also stated in his evidence that he learnt for the first time about the transfer of the properties at \$5000.00 each only when

his father returned to Vuniyasi in 2005 to live with him. The father then informed him about the family arrangement including that the second defendant had to pay for the funeral expenses.

5 [12] The defendants denied any family arrangement as a prerequisite to the transfer. It is their position that the second defendant's sibling, Ajithya Charan was constantly fighting with them and when they complained to the plaintiff, he had requested them to move to Lautoka to live with him. The first defendant denied chasing the plaintiff off and stated that the plaintiff simply left on his own volition to live with his youngest son. She also admitted that the plaintiff 10 collected the rent until he left Lautoka in 2005 and would have collected the rent if he continued to live with them. She further stated that there was no agreement to pay \$5000.00 for the transfer of the land. Relating to the transfer of the property it was her stand that two weeks prior to the transfer, the plaintiff had informed her of it, but she did not go the solicitor's office nor signed any 15 documents. Her understanding of the \$5000.00 was that it was a tax payment.

[13] DW 2, the second defendant said in his oral testimony that he moved to live with his father due to a dispute with his brother Ajithya. He confirmed that the plaintiff never charged any rent from him. He said the plaintiff had told him 20 that he is 'old, 80 years better give it to him before he passed away'. He confirmed that there was no sale and purchase agreement for the transfer. He firmly stood ground that he had no oral promises with his father relating to the alleged family arrangement and never agreed to pay \$5000.00 each for the two properties. The second defendant said when the father went to the solicitor to transfer the land, he drove his father to the solicitors but stayed outside. He 25 maintained that he was unaware of the payment of \$5000.00 and believed it was only a payment of tax. He also said that he paid the legal fees to the solicitors for the transfer.

[14] At the trial both counsel submitted as an agreed document marked ABOD 30 10 an affidavit sworn by solicitor Roopesh Singh dated 16 April 2006. Paragraph 2 of the affidavit deposed that Messrs Patel & Sharma acted as common solicitors for both parties for the execution of the transfer. He said he received instructions from both the plaintiff and the defendants relating to the preparation of the transfer documents. He said that the parties instructed the firm to prepare the 35 transfer documents on a nominal consideration of \$5000.00, which will not be demanded at the time the transfer is lodged for registration. At paragraph 5, he deposed that when the plaintiff instructed the law firm that he wished to convey the two properties to each of the defendants, a chief conveyancing clerk from Messrs Patel & Sharma had advised the plaintiff to make a will bequeathing the 40 properties to the defendants. The plaintiff had then insisted that the properties be transferred for the consideration of \$5000.00 each. Since the sale was between the father, son and the daughter-in-law, on their instructions a sale and purchase agreement had not been executed. Neither had the parties wanted to pay additional legal fees for the agreement nor had the plaintiff instructed about a 45 family arrangement to the law firm.

[15] Both transfer documents envisaged that the transaction was exempted from stamp duty. It is also noteworthy that the plaintiff was not cross-examined on a payment of tax nor was it taken up in the statement of defence.

#### **LEGAL MATRIX**

50 [16] The writ is founded on fraudulent misrepresentation and lack of consideration. For convenience let me consider the two issues separately.

**Fraudulent misrepresentation**

[17] It is unclear as to how the defendants came to live with the plaintiff in 2004 in Lautoka. The defendants say they moved to live with the plaintiff due to a dispute with the brother. The second defendant had called the plaintiff and had informed about the quarrel and in turn, the plaintiff requested them to move in with him. On the other hand, the plaintiff in evidence admitted the quarrels between the siblings, but in paragraph 5 of the statement of claim he professed that due to old age and being a widower, he requested the defendants to move in with him. He then says the defendants agreed to live with him subject to the conditions stated in paragraph 7 of the statement of claim. At the PTC, the defendants admitted that they went to live with the plaintiff at his request. (agreed fact No 5).

[18] The plaintiff at the hearing did not give evidence that the defendants demanded the conditions set out in paragraph 7 of the statement of claim before coming to live with him in Lautoka. Neither was he cross-examined on those lines. I would therefore disregard this pleading.

[19] The defendants were unaware of the reasons for the transfer of the properties or the requirement to pay consideration. The plaintiff was 74 years old in 2004, when the defendants went to live with him. I am unable to conclude that the plaintiff intended to transfer the properties to the defendants and planned to move back to his matrimonial home. Until 11 October 2005, the plaintiff lived in the same premises with the defendants. I have no doubt that the plaintiff expected the defendants to look after him in his old age and perhaps the defendants had also had a strong moral obligation to do so. The plaintiff states that the first defendant had demanded the rent, which had created a dispute and resulted in him being chased away from the house. I am inclined to accept the plaintiff that he was in fact chased away by his son and his daughter-in-law.

[20] However, I do not have evidence, except the uncorroborated testimony of the plaintiff of the existence of the family arrangement. The plaintiff said that the second defendant informed him not to divulge information about the transfer to Ajithya, his youngest son. Even if he made a representation relating to the family arrangement, in my mind it would only amount to a breach of contract as contended by Mr Gordon who appeared for the defendants. I therefore conclude that there is no actionable representation by the defendants albeit the existence of a strong moral obligation that they had to look after the elderly father. However, breach of moral obligations does not give rise to an actionable cause of action.

**Consideration**

[21] Paragraph 10 of the statement of defence, sets out that the properties were transferred on the basis of natural love and affection and as gifts, devoid of any monetary consideration. At the hearing, both defendants were heard to say that they were of the view that the payment of \$5000.00 each related to some tax. Both transfers were exempted from tax. The defendants seems to hide behind the non requirement of placing their signatures in an attempt to prove that they were unaware of what was happening except for the fact that they were receiving the properties as gifts. I disbelieve the defendants on this point. The plaintiff was adamant about insisting on the payment of consideration at the hearing and even before the law firm, and I am not prepared to accept that the plaintiff never discussed consideration with the defendants. I am satisfied that the defendants were well aware of the payment but simply decided not to pay the plaintiff.

[22] The transfer documents PW3 and PW 4 in the agreed bundle of documents read as follows:

5 *In consideration of some of \$5000.00 to be paid to the transferor by..... herein after called transferee do hereby transfer to the transferee all the right title and interest of the transferor of the said title.*

[23] Both parties by consent submitted the affidavit of Rupesh Singh who gave evidence surrounding the circumstances of the transfer. He said the documents were prepared on the instructions of both parties and the plaintiff insisted that the  
10 property should be transferred on the nominal consideration of \$5000.00. I am convinced that the plaintiff was certain that he wanted to transfer the property not as a gift but upon a consideration of \$10,000.00. I disbelieve the assertion in the statement of defence that the transfer was for natural love and affection. The plaintiff had only agreed to accept the consideration on a future date but was  
15 waiting for it to be paid. The defendants admit that the \$5000.00 stated in PW3 and PW4 were not paid to the plaintiff. I have ample evidence before me to conclude that the transfer lacks consideration.

[24] Mr Gordon strongly submits a novel arguments relating to payment of consideration in the torrent land system. I must state that I was moved for a  
20 moment by the originality of the argument at the oral submissions stage. Rather than repeating his argument, which is well set out in his written submissions, let me give my reasons, as to why I am not inclined to agree with Mr Gordon.

[25] It is a well established principle of law that a contract can be enforced only  
25 if the promise is paid for by the promisee. The consideration must have a value in the eyes of the law. The consideration should be sufficient but need not be adequate. If a party decided to transfer for a sum less than what is regarded as its true value, then it is the parties business under the principles of party autonomy. The only requirement is that it must have an instinctive or special value.

[26] In the circumstances, the nominal value of \$5000 requested by the plaintiff  
30 for the transfer is acceptable in the eyes of the law. The plaintiff agreed to accept the consideration in future, which is also legal. The defendant failed to pay the consideration. It appears that the defendants intended to defeat the payment by never honouring the payment. In my mind, non-payment of the consideration by  
35 the defendants is dishonest, clearly imputes fraud and renders the contract invalid.

[27] I therefore concluded that the transfer of the property lacks consideration and is therefore invalid.

[28] The entire transaction is couched in fraud and I therefore conclude that the  
40 defendants are not entitled to rely on indefeasibility set out under section 40 of the Land Transfer Act Cap 131.

[29] Mr Gordon argues that the plaintiff's action is barred by section 59 of the  
45 Indemnity, Guarantee and Bailment Act for lack of the 'writing' requirement. Although the family arrangement is not, in a written form, Mr Naidu argues that the transfer is in writing (PW3 & PW4). I agree with Mr Naidu's argument on this point. Accordingly, I conclude that the plaintiff's action is not barred by section 59 of the aforesaid Act.

[30] The plaintiff died pending judgment. Mr Naidu must take steps to file the  
50 necessary papers for substitution to give effect to this judgment.

[31] The first defendant admitted that she received the rent of the property since the plaintiff left the premises on 11 October 2005. She said the rent was \$250 per month. I order that the first defendant refund the rent received from 11 October 2005 to date to the plaintiff's estate.

5 **ORDERS**

- 1 I declare that the transfer to the first defendant of Lot 30 on D.P 3165 being CT 15496 on 18 August 2204 is invalid.
- 2 I declare that the transfer to the second defendant of Lot 29 on D.P 3165 being CT 13915 on 18 August 2204 is invalid.
- 3 I order that the first defendant pay the rent received from 11 October 2005 to date to the plaintiff's estate.
- 4 The defendants or the Deputy Registrar of High Court Lautoka to retransfer both properties CT 15496 and CT 13915 to the estate of the plaintiff.

*Declarations and orders made.*

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