IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 328 OF 1978

Between:

1. RAJENDRA KUMAR s/o Hari Kissun — PLAINTIFFS
2. MANORAMA DEVI d/o Sundar Singh

- and -

1. GAFOORAN d/o Wali Mohammed — DEFENDANTS
2. SHAHIM BUKSH s/o Rahim Buksh

Mr. K.C. Ramrakha with Mr.A. Singh for the Plaintiffs.

Mr. H.K. Nagin for the Defendants

J U D G M E N T

It has been no easy task to determine the nature of the plaintiffs' claim against the defendants because of the very many amendments to the pleadings sought by the plaintiffs and the manner in which they were sought.

An amended Statement of Claim was filed on the 10th November, 1978, and an amended Defence thereto was later filed. On the 10th April, 1979, the parties by consent agreed to go to trial on the original pleadings.

At the hearing on the 12th August, 1980, Mr. Ramrakha for the plaintiffs, applied to amend the relief claimed by his clients. Leave to amend was granted. On the same day counsel agreed that affidavits

filed in support of and in opposition to an earlier application for an interim injunction be treated as part of the pleadings. The Court so ordered subject to the deponents being made available for cross-examination if required.

At the hearing on the 9th February, 1980, Mr. Ramrakha advised the Court that counsel had by consent agreed to further amendments of the Statement of Claim and Defence as set out in correspondence which he handed in.

The Court commented on the number of amendments that had been sought and counsel were directed to file amended pleadings. The amendments were approved. Counsel have not complied with the directive to file amended pleadings and it has been necessary to set out what transpired as a stranger perusing the Court file would find it difficult to ascertain what pleadings the Court considered. When the correspondence Mr. Ramrakha tendered is perused it is apparent that it contains no suggested amendments to the Statement of Claim but only four "further and/or alternative" allegations to the Defence to Counter-claim.

The nature of the plaintiffs' claim to relief and Defence to the counterclaim are confusing and contradictory. To give one example, they seek specific enforcement of an alleged contract which as an alternative defence to the counterclaim they allege was never concluded or was unenforceable.

The plaintiffs in their Statement of Claim allege that between the 31st day of October, 1977, and the 14th April, 1978, the first named defendant and her husband, Rahim Buksh negotiated with the plaintiffs for the sale of the first defendant's residential freehold property. The plaintiffs allege the asking price was $29,000 but the deal was subject to valuation by the Home Finance Co. Ltd. from which Company the plaintiffs were hoping to obtain a loan to enable them to pay cash

for the property.

The Home Finance Co. Ltd. valued the property at $19,500 and were only prepared to lend the plaintiffs that sum.

The plaintiffs allege that subsequent to that valuation at a time and place not specified, further negotiations took place and it was agreed between them and the first defendant that she would sell and they would purchase the first defendant's land with all improvements thereon together with certain chattels listed on a list attached to the Statement of Claim.

The agreed price for the property and chattels they say was $25,000 payable in the following manner :

1. $2,000 initial deposit which was paid on 31/10/77.
2. $1,000 paid on 21/1/78.
3. $2,000 paid on 5/4/78.
4. $20,000 - being $19,500 loan by Home Finance Co. Ltd. and $500 the plaintiffs had earlier paid to that Company. (No date stated as to when this was payable).

They further allege that pursuant to the later negotiations they were initially let into possession of part of the premises but after payment of the full $5,000 the first defendant gave them possession of the land on the 14th April, 1978.

They further allege that on the 14th May, 1978, the second named defendant, who is the son of the first defendant, endeavoured to evict them and they were forced to occupy a small house at the rear of the main premises which main premises he locked and occupied himself. They say that the second defendant then demanded payment of the price of $29,000 for the property and has since that demand refused or neglected to refund the plaintiffs the sum of $5,000. The original and still the substantative relief claimed by the plaintiffs is specific performance of the alleged contract and that the first defendant be ordered to convey the property to them at the price of $25,000.

The plaintiffs do not allege in the Statement of Claim that they are willing or able to complete purchase of the property. The basis appears to have been laid for an alleged breach of contract by the first defendant and for refund of the $5,000 paid by them but that relief was not originally claimed. This is now an alternative claim for relief.

The further and/or alternative claims for damages for wrongful dispossession, abatement of price or specific performance at the "price of $29,000 with abatement of price" makes it difficult to determine just what relief the plaintiffs do seek.

The defendants in their Defence tell a different story. They allege that as a result of certain negotiations in October 1977 the first defendant agreed to sell to the first plaintiff what they describe as "the land" together with certain chattels listed on the list attached to the Defence. Except for the omission of 4 items this list is the same as the list attached to the Statement of Claim.

The defendants say the $29,000 was payable in the following manner :

1. $5,000 as a deposit and in part payment forthwith.
2. $24,000 on or before 31st January, 1978.

They admit the $5,000 was paid by instalments on the dates alleged by the plaintiffs.

They deny the sale was subject to valuation and that there were further negotiations when the price was re-negotiated at $25,000. They admit, because of hardships suffered by the plaintiffs, that they were permitted to occupy the small house at the rear of the premises and also a room in the main premises. They also admit that the second defendant on the 14th May, 1978, asked the defendants to vacate "the land" which they allege was on the grounds of non performance by the plaintiffs of the terms of the sale and purchase agreement.

They further allege that the plaintiffs vacated the premises on 19th August, 1978, and agreed not to inhabit the premises at the back of the house "until the matters herein were finally settled."

I do not know what this quotation from the defence means. Counsel did not refer to it at the hearing. The plaintiffs they say forcibly re-occupied the premises on the 28th August, 1978. Then follows a statement in the defence which I quote in full :

> "That the Defendants are ready and willing and able to refund the deposits and part payment made by the Plaintiffs except that the Defendants have suffered special and general damages and will pray that the same be set off from the said deposit and part payment."

Then follows a counterclaim by both defendants seeking damages for breach of contract and forcible entry.

The second defendant has no interest in the land which is owned by his mother and has no claim against the plaintiffs. His inclusion appears to be an error on the part of his solicitors. No formal written agreement was entered into by the parties.

I have set out the parties' allegations in the pleadings at some length. As can be appreciated there is a serious conflict of evidence as to the nature of the contract. Both parties allege there was a contract although the plaintiffs by way of an alternative defence to the Counter-claim deny the existence of an enforceable or a concluded contract.

There is no dispute as to the identity of the land which the first defendant agreed to sell and the plaintiffs to purchase. There is also no dispute that the sale included certain chattels. I am satisfied that no inventory was taken of such chattels until the first plaintiff listed them on 7th April, 1978. However, the defendants admit all the chattels listed (except for 4 items) were included in the sale. I accept the list prepared by the first plaintiff.

The plaintiffs in their Statement of Claim do not allege that they agreed to purchase the property for $29,000 subject to valuation which is what they sought to establish in evidence.

I am satisfied from the evidence and hold as a fact that negotiations for the sale and purchase of the property commenced before the 31st October, 1977, and on that date the first plaintiff paid to the first defendant the sum of $2,000 by way of deposit. I also find as a fact that the first defendant himself made out receipt No. 70 dated 31/10/77 showing that the $2,000 was received from both plaintiffs by 'R. Buksh', the second defendant and stating thereon "Balance $27,000" and "$2,000 Deposit for House No. 9 C/T 6310 in Rifle Range". The first plaintiff also signed the receipt. It is not disputed that the first plaintiff was acting also for his wife the second plaintiff and that the second defendant was at all relevant times acting for his mother the first defendant. There are also exhibits 1 and 2 both signed by the first defendant and exhibit 2 signed also by both plaintiffs referring to deposit paid and description of the property.

I consider there is ample documentary evidence to establish the existence of an enforceable agreement between the parties for the sale and purchase of the land and chattel I consider therefore that there is no merit in the plaintiffs further and/or alternative defence pleading the Statute of Frauds and the provisions of the Indemnity, Guarantee and Bailment Act. It is convenient at this stage to dispose of that defence.

The next issue to decide is whether the sale and purchase agreement was subject to finance being arranged by the plaintiffs.

Exhibit No. 6, the receipt written by the first plaintiff to evidence the agreement does not have any notation thereon that purchase is subject to any conditions. The only evidence I have on the matter is the plaintiffs' allegation that the purchase was so subject and the

defendants denial.

Another issue however, which does assist in determining whether or not the purchase was subject to availability of funds and can be considered at the same time, is whether the parties re-negotiated the sale and purchase and agreed on a lower price of $25,000 when the Home Finance Co. Ltd. was not prepared to lend more than $19,500. On this issue there is some documentary and other evidence which leaves me in no doubt that the purchase was not made subject to finance being available and there was no re-negotiation of the price.

Mr. Brij Mohan, an executive of the Home Finance Co. Ltd. was called by the plaintiffs as a witness. He produced copies of certain documents I will be referring to shortly.

Mr. Brij Mohan pointed out that both the plaintiffs were civil servants and their joint eligibility for a loan was $25,000 and that is the loan the plaintiffs sought from his company.

In their application for a loan dated the 31st October, 1977, they disclosed they were providing $3,000 of their own cash. Figures were changed in the application, a matter I will be referring to later, but accepting the figure of $25,000 applied for and with their $3,000 they were seeking more than was required if the price was $25,000 as they allege even allowing for costs.

I have no doubt at all that the plaintiffs expected a loan of $25,000 to be forthcoming. Their eligibility was that sum and the Permanent Secretary for Finance by letter dated 14th December, 1977, advised the lending company that Government was prepared to guarantee a joint housing loan of $25,000 to the plaintiffs.

The Home Finance Company was however only prepared to lend $19,500 and required repairs costing $1,210 to be done to the premises. The plaintiffs did not seek to cancel the purchase agreement but allege they re-

negotiated the price - $19,500 for the land and buildings and $5,500 for the chattels. I do not believe them.

The first plaintiff wrote to the first defendant and her husband by letter dated 31st May, 1978, the original of which is attached as Exhibit D to the second defendant's affidavit sworn on the 25th August, 1978. That letter leaves me in no doubt that at the time it was written there had been no reduction of the purchase price of $29,000. He states in the letter :

(1) "We have paid you $5,000 and we also paid $500 to Home Finance.

(2) Home Finance is giving $20,000 and that makes $25,000.

(3) In the left over $4,000 we will pay further $800 to Saheem on day of transfer and $3,200 will be left.

(4) Then we will pay $200 each month to Saheem till January and whatever will be the balance we will pay in all by January 79."

There is no evidence that the first defendant agreed to vary the agreement.

The plaintiffs' application to the Home Finance Co. Ltd. is dated the 31st October, 1977, the date the $2,000 deposit was paid. There is a significant alteration in item No. 30 in the application. "Price agreed or offered (excluding furniture if any)". The figure originally inserted appears to have been 28,000 or 29,000, the figure 8 or 9 was altered to 5 and all figures struck out and the amount $25,000 inserted. These alterations can only have been done some time subsequent to filing the application as it was not until 31st January, 1978, that the plaintiffs were officially notified that the loan available was then $19,500. I have only a photocopy and I do not know if it is a photocopy of the duplicate the plaintiffs may have had or not.

I view the reference in the company's letter of offer referring to the plaintiffs' equity of $5,500 with some suspicion in view of the first plaintiff's letter of

31st May, 1978, which I have previously referred to. This equity figure was not referred to or explained but the significance of it is that the Company apparently believed the purchase price was $25,000. Mr. Brij Mohan did not state that the first defendant at any time confirmed this price.

The first plaintiff in evidence stated that the second defendant was pressing him to pay a further $4,000 and that if he did not pay it he would lose his $5,000. This was his explanation for writing the letter of the 31st May, 1978. He stated that he was compelled to sign. He admitted under cross examination that on 31/5/78 he did not have all the money required and was asking for time to pay the "extra $4,000".

The first plaintiff did not impress me at all. The burden of establishing that the purchase was subject to a Home Finance Co. Ltd. loan being available and that the price finally agreed after re-negotiations was $25,000 lies on the plaintiff. They have in my view failed to discharge that burden.

On the evidence before me it appears that the plaintiffs fully expected to raise a loan of $25,000 and committed themselves to purchase the property and chattels for $29,000.

I accept the second defendant's evidence that his parents were emigrating and required cash and that a term of the verbal agreement was that the full purchase price was to be paid "during school holidays" which would be not later than end of January or early February, 1978.

While I accept the second defendant's statement that $5,000 had to be paid by January, 1978, I do not accept his statement that the $5,000 paid by the plaintiffs was a deposit. It was clearly a deposit of $2,000 and $3,000 on account of the purchase price.

Miss Maureen Young, who lived in the premises, was present when the parties were negotiating. She was

called by the defendants. Her version as to what happened differs from that related by the plaintiffs and the second defendant. I think she was probably confused about later discussions when plaintiffs were in financial difficulties. She was however quite sure that a deposit of $2,000 was agreed and paid by the plaintiffs.

I accept that all purchase moneys were to be paid before the end of January. A period of 3 months from date deposit was paid was a reasonable period of time.

I find as a fact that the plaintiffs were not able to complete purchase by the end of January, 1978, and that was the situation when on 1st May, 1978, the second defendant who was acting for his mother notified the plaintiffs they would have to vacate unless they paid the full purchase price.

The first defendant did not cancel the contract for breach of contract by the plaintiffs when they defaulted on 31st January, 1978. It is apparent the plaintiffs were making desparate efforts to find the $4,000 they still required and the first defendant assisted all she could by allowing them to occupy part of the premises while giving them time to find the money.

On the plaintiffs seeking to enforce the contract they met the claim with a Defence and Counterclaim alleging breach of contract and seeking damages.

I find as a fact that the plaintiffs are in breach of contract. They have failed to pay the balance purchase price and have neither alleged or established that they are willing and able to complete.

The second defendant as I have already stated has no claim against the plaintiffs.

The first defendant has not established that she has suffered any special damages but does allege trespass to her land on the 28th August, 1978, which I find

established when the plaintiffs forcibly re-entered part of the premises and remained there until they vacated sometime in November, 1978. I do not accept the second defendant's vague statement that they were offered $32,000 for the property and had to reject the offer.

I earlier quoted paragraph 7(iv) of the defendants' defence in which they expressed willingness to refund deposits subject to set off of damages they alleged they suffered. I can only assume that the defendants considered they were not morally or legally justified in retaining the whole sum of $5,000.

If the first defendant did not through her son rescind the agreement in May, 1978, when he evicted the plaintiff, she does by her counterclaim claim general damages for breach which is clearly indicative that she has elected to treat the agreement as at an end.

I have held that the initial payment of $2,000 was a deposit. The subsequent two payments were not deposits but payment on account of the reduction of the purchase price.

I come now to consider the Statement of Claim and the Counterclaim.

I have held that the plaintiffs were in breach of the contract and they cannot obtain an order for specific performance. They have in addition failed to show that they are willing and able to complete the purchase.

Are they entitled to refund of the $5,000 they have paid and which they claim or any part of it? I am of the view that they cannot claim refund of the $2,000 which the parties agreed was a deposit. While there is no evidence that the parties ever considered what would happen to this deposit of the plaintiffs, it was clearly given as an earnest for their performance of the contract and I hold that the $2,000 is not refundable and is forfeited to the first defendant.

The two later payments of $1,000 and $2,000 were not deposits and I so hold. There was no agreement that these sums were to be forfeited if the plaintiffs defaulted and the first defendant rescinded the agreement.

The general principle with regard to rescission and forfeiture is that in every case where a person rescinds for breach by the other he shall not enjoy the benefits of rescission without giving up every benefit he has taken by the previous part performance. A deposit paid on land is an exception to this rule but that exception does not extend to further instalments of purchase money. That is the general rule if there is nototherwise express provisions in the contract.

In Mayson v. Clouet and Another (1924) A.C. p.980, the Privy Council held in an action for return of instalments paid that the rights of the parties depended upon the contract, and that, although the purchaser was in default, the instalments were recoverable, since the contract distinguished between the deposit and the instalments and provided for forfeiture of the deposit only.

In the instant case there was no agreement as to forfeiture of any payment after payment of the deposit and the general rule in my view applied.

Their Lordships in Mayson's case referred to Howe v. Smith, 27 Ch.D. 89. It was held in that action, brought by the original purchaser for specific performance which was refused, and who was permitted to amend his Statement of Claim to claim refund of deposit, that the deposit being a guarantee of performance of the contract and the plaintiff having failed to perform his contract within a reasonable time had no right to a return of the deposit.

Their Lordships in Mayson's case at p.986 when discussing Howe's case stated :

> "Howe v. Smith clearly comes to this, that if the learned judges had held that the deposit was only part payment and not a deposit proper they would have ordered its return."

The defendants are not entitled to retain the $3,000 but there is still the counterclaim to consider. I have held that the second defendant has no claim and that the first defendant has not established any special damages. I have rejected the claim that they lost a sale of $32,000.

The first defendant has established the breach of contract but she has not in my view established that she suffered any damage. She has established trespass by the plaintiffs when they forcibly occupied the premises and remained therein for about 3 months. For that she must be compensated in damages. I award her $500 in damages.

There will be judgment for the first defendant on the counterclaim in the sum of $500. On the plaintiffs claim there will be judgment for the sum of $3,000, the end result being that the first defendant will pay them $2,500.

In the circumstances there will be no order as to costs.

R.G. Kermode

(R.G. KERMODE)
ACTING CHIEF JUSTICE

SUVA,

27 MAY, 1981.