

IN THE SUPREME COURT OF FIJI  
Civil Jurisdiction  
ACTION NO. 739 OF 1980

Between:

NABONU LAND PURCHASE CO-OPERATIVE  
SOCIETY LIMITED

PLAINTIFF

- and -

DULLU SINGH s/o Mahabir Singh  
& OTHERS.

DEFENDANTS

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

Mr. H. Kohli for the Defendants.

J U D G M E N T

The plaintiff, a duly registered Co-operative Society, seeks an order for specific performance of an agreement alleged to have been entered into by the Society with the six defendants in respect of the alleged sale of the freehold land described in Certificate of Title No. 5339.

The defendants resist the making of such an order on a number of grounds which I will refer to after stating the facts.

The present registered proprietor of the land in question is the Melanesian Development Corporation. The defendants have purchased the land from the Corporation and their former solicitor Mr. Maqbool holds an executed registerable transfer which has not been registered because the plaintiff to protect its alleged interest in the land has

lodged a caveat against the title to the land.

On the land at all relevant times were a number of tenants or occupiers of the land most of whom are now members of the plaintiff society which was formed with a view to purchasing the land.

Early in 1980, 15 of the occupants of the said land applied to the Agricultural Tribunal claiming to be agricultural tenants of the said land. The said Melanesian Development Corporation and the six defendants in this instant action were respondents in all 15 applications to the Tribunal.

On the 10th June, 1980, there was a settlement between the applicants and respondents in all 15 applications. Each applicant withdrew his application on the terms and conditions recorded in the "Terms of Settlement", which I will refer to shortly which at the hearings before the Tribunal was filed by consent. The Tribunal recorded the terms of the settlement and gave leave to withdraw all applications subject to the terms of settlement and made no order as to costs.

The Terms of Settlement document was as follows :

- "1. Each of the applicants hereby withdraws his application on the following terms and conditions.
  - (a) The sale of C.T. 5339 from the First Respondent to the 2nd to 7th (inclusive) Respondent is to proceed in accordance with the Sale and Purchase Agreement but settlement to be deferred until 15th September, 1980.
  - (b) The 2nd to 7th Respondent shall sell to NOBONU LAND PURCHASE CO-OPERATIVE LIMITED or to a nominee appointed by the fifteen applicants all their right title and interest in C.T. 5339 together with all existing fencing on the land for the price of \$70,000.00 cash to be paid and completed before 15th September, 1980.
2. Each party to pay its own costs.
3. NABONU LAND PURCHASE CO-OPERATIVE LIMITED to withdraw its caveat and the existing Supreme Court Action against the First Respondent.

Dated this 10th day of June, 1980.

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(sgd) K.C. Ramrakha

Solicitor for 15 applicants and  
NOBONU LAND PURCHASE CO-OPERATIVE LTD.

(sgd) B.N. Sweetman

Solicitor for Melanesian Development  
Corporation.

Second Respondent (sgd) Gafoor

Third Respondent (sgd) Dallu Singh

Fourth Respondent (sgd) Bhairo Prsd

Fifth Respondent (sgd) Ganpat

Sixth Respondent (sgd) Mohd Taki

Seventh Respondent (sgd) Nur Sha

Solicitor for Second to  
Seventh Respondent (sgd) M.A. Maqbool. "

It will be noted that all 6 defendants in this action signed the document which was also signed by Mr. Maqbool their solicitor.

Mr. K.C. Ramrakha signed the document both as solicitor for the 15 applicants and for the plaintiff in this action although the plaintiff was not a party before the Agricultural Landlord and Tenant Tribunal.

It is not in dispute that all the 15 applicants withdrew their actions. The Melanesian Development Corporation subsequently sold and transferred the land to the defendants whose then solicitor Mr. Maqbool presently holds the title and executed transfer claiming a lien on them for unpaid costs.

So far then as the applicants and the Corporation are concerned they have fully complied with the terms of settlement. The plaintiff was a party to the settlement and agreed to withdraw a caveat and a Supreme Court action as stated in paragraph 3 of the agreement.

The correspondence received in evidence discloses what transpired after the 10th June, 1980.

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By letter dated the 3rd September, 1980, Messrs. Ramrakhas acting for the plaintiff wrote to Messrs. Maqbool & Co. then solicitors for the defendants advising that their client society was ready to settle and seeking particulars of the title and full names of Messrs. Maqbool's clients. Messrs. Maqbool replied to this letter on the 5th September, 1980.

On the 11th September, 1980, Messrs. Ramrakhas wrote again to the defendants' solicitors forwarding a transfer and advising inter alia that arrangements for payment of purchase price of \$70,000 had been arranged against delivery of a stamped registerable copy of the transfer and the title and they had arranged for \$1,400 stamp duty to be paid on receipt of the Commissioner of Stamp Duties assessment.

The letter also referred to Land Sales Tax which Messrs. Ramrakhas contended the defendants had to pay and that they had lodged a caveat against the title to the land to protect their clients' interest.

This letter was received by the defendants' solicitors on the 12th September and they replied by letter dated the 16th September pointing out that the transfer was incomplete as the transferees' names were not stated. They complained that there was no agreement that their clients would pay Land Sales Tax. They drew Messrs. Ramrakhas attention to the fact "that by the terms of the settlement your clients were to pay and complete transfer before 15th September, 1980". They also protested about the lodging of a fresh caveat. They returned the transfer document to Messrs. Ramrakhas.

It is quite clear from this last letter referred to that delay in settling the purchase was caused both by the defendants and their solicitor, Mr. Maqbool.

The transfer from the Melanesian Development Corporation is dated the 9th September, 1980. At the hearing it was disclosed that this transfer, which has been

stamped and is in registerable form, has not been registered. It could have been registered subject to the plaintiff's caveat or delivered with their executed transfer and the title on the settlement day. The Melanesian Development Corporation's transfer had not been registered when this action came on for trial because the defendants have not paid Mr. Maqbool's costs and he is holding the transfer and title. They were not ready to settle by the 15th September, 1980, although they could have been. Mr. Maqbool's costs could have been paid out of the purchase money. Mr. Maqbool also caused some delay. As solicitor for his clients he should have treated the transfer as a draft or being aware that Mr. Ramrakha was acting for the plaintiff a telephone call to Mr. Ramrakha would have elicited the name of the transferee which Mr. Maqbool could then have inserted in the transfer.

Mr. Maqbool was well aware that his clients were purchasing the land for \$50,000 and reselling for \$70,000. As a solicitor he should have been aware that Land Sales Tax could be involved and that the Land Sales Act provides that "unless otherwise provided in this Act land sales tax shall be chargeable on the seller of the land" (underlining is mine). It is a tax on land sales profits.

In the settlement in which he took part there was no mention of land sales tax and in his letter of the 16th September, 1980, he was not correct in stating that Mr. Ramrakha's clients were liable for the tax.

I have taken time to relate what transpired after the settlement. One of the defences put forward by the defendants is that the plaintiff was in breach of the contract which called for settlement by the 15th September, 1980.

The defendants did not admit that the plaintiff was a registered co-operative society. I am satisfied the defendant Ganpat knew. Denials of what is not an important issue or in issue at all only lengthens the hearing of an action. I am satisfied it is a duly registered co-operative society.

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The defendants in their Defence do not deny the facts stated in paragraph 5 of the Statement of Claim in which the settlement of the 10th June, 1980, is pleaded and the agreement by the defendants to sell the land to the plaintiff for the sum of \$70,000 to be paid and completed before the 15th September, 1980.

In answer to the facts alleged the defendants allege there was no binding agreement that the plaintiff was never a party to the Tribunal proceedings and there is no privity of contract between the plaintiff and the defendants.

There is no merit in this defence. It is immaterial that the plaintiff was not a party to the Tribunal proceedings. It was clearly a party to the settlement and through its solicitors Mr. Ramrakha was a signatory to the settlement document as a result of which the defendant was obliged to sell the land to the plaintiff or a nominee nominated by the 15 applicants. The plaintiff was a party to the contract. The defendants further argue that the contract is not valid because it is not under seal and that Mr. Ramrakha who purported to sign on behalf of the plaintiff held no valid power of attorney under seal or any authority under seal of the plaintiff.

Mr. Kholi who prepared the Defence and appeared for the defendants as a solicitor himself must be perfectly well aware that solicitors require no powers of attorney to act for their clients and it is very unusual to say the least for one solicitor to challenge the authority of a fellow practitioner to act for a client. If Mr. Ramrakha exceeded his instructions that is a matter between him and his clients.

While the plaintiff is by law a body corporate Mr. Kholi has adduced no evidence that it requires a seal or can only act under seal. No copy of its constitution or rules or by-laws has been adduced.

The real defence of the defendants is their allegations that if there was a valid agreement the plaintiff was in breach of such agreement in two respects. First they say time was of the essence and it did not pay the purchase price by 15th September, 1980, and secondly the plaintiff did not withdraw its caveat but lodged a fresh caveat.

As to the second alleged breach at the time of the settlement the parties believed the plaintiff had lodged a caveat against the title to the land. The memorials on the title disclose no such caveat but they do disclose that Jag Narayan, one of the applicants to the Tribunal had lodged a caveat on the 24th August, 1979. This caveat was cancelled by the Registrar of Titles on the 13th March, 1980. There was nothing in the agreement to prevent the plaintiff from lodging a caveat to protect its interests.

As regards time being of the essence the agreement does not so stipulate. I have already pointed out the steps taken on behalf of the plaintiff to complete by the stipulated time. Completion by the stipulated time was possible so far as the plaintiff was concerned but the defendants were not then and were not at the time of the trial in a position to settle and deliver an executed registerable transfer to the defendants.

In my view the plaintiff committed no breach of the contract. In any event the defendants did not seek to terminate the contract for alleged breach. As late as 8th October, 1980, when the defendants wrote to Messrs. Maqbool & Co. which firm was apparently asking them to sign the transfer they indicated they would not sign and gave reasons therefor but did not instruct that firm to notify the plaintiff's solicitor that the contract was terminated for breach.

I hold that the agreement entered into by the parties hereto and others mentioned in the agreement is a valid and enforceable agreement and that the plaintiff is not in breach of that agreement.

At the hearing Mr. Kholi for the defendants accepted without further proof that Mr. Ramrakha had in his trust account

the sum of \$71,400 and at the time of the trial was still holding that sum.

I come now to consider whether the plaintiff is entitled to an order for specific performance.

The defendants have pleaded as a defence that there is no valid contract between the parties and that there is a lack of mutuality.

While the wording of the "Terms of Settlement" may have been more explicit, I do not think there can be any doubt that the defendants agreed to sell and the plaintiff to purchase the property for \$70,000. The 15 applicants could have nominated someone else as purchaser but the subsequent conduct of the parties evidenced by the correspondence indicates that at the date of the contract and at all relevant times subsequently it was the plaintiff which was to purchase the land and not a nominee of the 15 applicants. I consider that if the plaintiff had defaulted the defendants could have sought an order for specific performance although it is likely only damages would be awarded.

This is not a case where damages is an adequate remedy which would defeat the just and reasonable expectations of the plaintiff society especially set up by its members who occupy the land and who could be liable to eviction.

Having considered all the evidence I am of the view that it is just and equitable that the plaintiff be granted the relief sought.

The defendants do not hold the title to the land nor the transfer executed by the Melanesian Development Corporation which documents their former solicitor is holding and claiming a lien thereon. This fact, however, would not make compliance with the order I propose to make impossible. The plaintiff has paid \$70,000 into Court and the defendants can authorise their present solicitor to



concur in Mr. Maqbool's costs being paid out of that sum in exchange for delivery of the documents he holds.

I accordingly declare that the agreement entered into on the 10th day of June 1980 by the parties hereto and others ought to be specifically performed and I so order.

I further order that the defendants do within one month from the date of this judgment deliver to the plaintiff or its solicitors Messrs. Ramrakhas a transfer of the said land in registerable form duly executed by them. I also order that the defendants deliver to the plaintiff or its said solicitors the transfer executed by the said Melanesian Development Corporation (if that transfer shall be then unregistered) together with Certificate of Title volume 54 folio 5339 free of all encumbrances other than the said caveat lodged by the plaintiff.

Upon compliance with the foregoing orders it is further ordered that the sum of \$70,000 in Court be paid to the defendants after deducting therefrom such sum as may be agreed by the parties, or in default of such agreement, as the Chief Registrar may estimate as being sufficient to cover costs due to the plaintiff when they are taxed.

It is further ordered that the defendants do pay to the plaintiff the costs of this action to be taxed, if not agreed, and that upon such agreement or taxation such costs be paid to the plaintiff out of the \$70,000 paid by it into Court.

The parties will have liberty to apply generally.

*R.G. Kermod*

(R.G. KERMODE)

ACTING CHIEF JUSTICE

SUVA,

27 MAY, 1981.