

10 **Hafoka v Soakai & another**

Supreme Court, Nuku'alofa

Martin CJ

Civil Appeal No.17/1990

10 April, 1991

*Contract - fraud - voidable - rescission - damages*20 *Fraud - rescission of contract - damages*

The appellant sued for return of a tapa which she had given to the second respondent, who had handed it on to the first respondent, for value, and who (the first respondent) had no notice of the fraud alleged by the appellant against the second respondent in that respondent had taken no steps to fulfill her part of the original bargain with the appellant. The appellant failed in the Magistrates Court.

Held on appeal:

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1. A contract obtained by fraud is not void ab initio.
2. It is voidable and can be rescinded by the innocent party subject to certain conditions, one of those being that if another person has acquired the property for value and without notice of the fraud then that other can keep the property and the contract cannot be rescinded.
3. Such was the position, here; and the Magistrate was correct.
4. But even if a contract obtained by fraud cannot be rescinded the innocent party can recover damages instead even although the time for completion of the contract had not expired, provided fraud could be proved.
- 40 5. Case remitted to Magistrate to hear and complete the appellants claim for damages against the second respondent.

Counsel for appellant ; Mr 'Etika

First respondent in person

No appearance behalf of second respondent.

Judgment

Mataele Hafoka ("Mataele") appeals against the decision of the learned magistrate when he dismissed her claim against the Respondents for the return of a tapa given by her to the second Respondent 'Ahovalu Lolohea (" 'Ahovalu"), who in turn gave it to the First Respondent Masao Soakai ("Masao").

The evidence shows that 'Ahovalu owed a debt to Masao. Masao agreed to accept a tapa in settlement of the debt. 'Ahovalu asked Mataele for a tapa which she promised to replace with a fine mat which she would weave and supply in the last week for November 1990. Mataele agreed, and handed over the tapa to 'Ahovalu, who gave it
50 Masao. He did not know where or how she obtained it.

Mataele visited 'Ahovalu and found that she had not even started to weave the promised fine mat. She therefore commenced this action in the Magistrates' Court on 8th November 1990. It was called on 19th November and adjourned to 23rd; 'Ahovalu did not attend and the Magistrate completed the case in her absence. He observed that the time for delivery of the fine mat had not expired and that 'Ahovalu was yet in breach of her agreement with Mataele and dismissed the claim, without prejudice to a further claim when the time for delivery had expired.

Counsel for Mataele argued that the contract was void, having been obtained by
60 fraud, and that 'Ahovalu had no title in the tapa which she could pass to Masao.

A contract obtained by fraud is not void ab initio. It is voidable. Subject to certain conditions, it can be rescinded by the innocent party. One of those conditions is that if another person has acquired the property for value and without notice of the fraud, he is entitled to keep it and the contract cannot be rescinded.

In this case there was uncontradicted evidence that Masao was given the tapa for value (in settlement of a debt) and that he did not know anything about how 'Ahovalu obtained it. That being so, Mataele has lost the right to rescind the contract and the
70 Magistrate was correct to dismiss the claim against Masao.

But even if a contract obtained by fraud cannot be rescinded, the innocent party can recover damages instead. Although the time for completion of the contract had not expired when the case was heard, Mataele was entitled to damages if she could prove that the contract had been obtained by fraud. The Magistrate should therefore have considered whether the evidence established fraud on the part of 'Ahovalu. If so

- (i) Mataele did not have to wait until the end of November to pursue her claim; and
- (ii) although she cannot recover the tapa, she can recover judgment for its value.

The appeal is therefore allowed to the extent that the claim against 'Ahovalu is
80 remitted to the Magistrate to determine that claim in the light of this guidance. The appeal against the dismissal of the claim against Masao is dismissed.