

IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. 2 OF 1991

(Lautoka High Court Civil Action No. 427 of 1981)

BETWEEN

Bhagwat Prasad
(s/o Kurkut)

Appellant

and

Nazar Singh
(s/o Charan Singh)

Respondents

Pyara Singh
(s/o Pritam Singh)

Jarnail Singh
(s/o Gyan Singh)

Mohan Singh
(s/o Charan Singh)

Mr V. Mishra for the Appellant

Mr J.R. Reddy for the Respondents

Date of Hearing: 4th August, 1992

Delivery of Judgment: 18th August, 1992

JUDGMENT OF THE COURT

The 1st Respondent, Nazar Singh, was the registered proprietor of a certain freehold land in Nadi. He subdivided his land and the subdivision plan was registered on 31st March 1977 as D.P. 4212 (Exhibit 10) in accordance with the provisions of the Land Transfer Act. The 1st Respondent lives in U.S.A.

On 16th November 1977 the Appellant entered into an Agreement (Ex 1) with the 1st Respondent through his registered Attorneys Pyara Singh (2nd Respondent) and Jarnail Singh (3rd Respondent) to buy Lot 1 on D.P. 4212 containing 1 rood for \$6,000. The sum of \$1,000 was paid and the balance was to be paid by instalments. The Appellant made no further payments.

Mr Manikam Pillay acted as Solicitor for both parties. The Appellant took possession of the land and built a house on it at a cost exceeding \$10,000. He built the house in accordance with a plan approved by the Nadi Town Council. The house was inspected by the Health Officer at Nadi Town Council who approved it. The Appellant has been living in the house since 1977.

In March 1990 the Appellant brought an Action in the Lautoka High Court against the Respondents 1, 2 and 3 collectively referred to in the Action as the 1st Defendant and one Mohan Singh as the 2nd Defendant. He is claiming breach of contract by the 1st Defendant and fraudulent misrepresentation by the 2nd Defendant. He asked for a number of remedies including entitlement to terminate the agreement and damages.

The trial judge (Sadat J.) in a reserved judgment dismissed the action and entered judgment for the 1st Defendant on the counter claim in the sum of \$5,000 for the balance owing with interest and costs. The basic facts appear from his judgment the relevant part of which reads as follows:

'....He is claiming that he did not get the full land he had agreed to purchase. He is claiming that the land in question was first shown to him by one Mohan Singh, the second defendant, who he says was the

"defacto agent" of the first defendant, Nazar Singh. Mohan Singh showed him the boundaries - the pegs. The plaintiff subsequently went to the office of Manikam Pillay where the parties signed the Agreement. The plaintiff says that when he had almost finished building his house one Vijay Kumar came and built a road through part of the area he had been shown by Mohan Singh as being the land being sold to him. The road was built and the plaintiff claims he suffered in that his house is now within 6 feet from the boundary and offends the Town Council Regulations. There is also a drain beside the road next to his house which is only two feet away from the house. The plaintiff also claims the defendants have not built a drain and as a result rain water gets into his compound.

The plaintiff called a number of witnesses. There is no doubt the land in question was shown to the plaintiff by Mohan Singh. PW5, Bechu Prasad, was also present when Mohan Singh showed the land to the plaintiff. Before the house was built Mohan Singh again showed the boundaries to the carpenter, PW4, Kuar Singh.

I find as fact that Mohan Singh was also present when the parties signed the Agreement in Manikam Pillay's office. The plaintiff, Bechu Prasad and Manikam Pillay said Mohan Singh was present. Even Pyara Singh, the defence witness said Mohan Singh was present. The plaintiff relied on Mohan Singh as far as the boundaries were concerned rather than checking with the plan.

The learned counsel for the plaintiff submitted that Mohan Singh had the authority to make representations which were binding on Nazar Singh and that in fact his representations were ratified by the attorneys of Nazar Singh by their conduct both expressed and implied. Both Mohan Singh and Nazar Singh are brothers. It appears that Mohan Singh indulged himself in excessive drinking and his brother did not trust him. Be that it may it was Mohan Singh who showed the property to the plaintiff and it was him who introduced the plaintiff to the attorneys of Nazar Singh. Mohan Singh may have acted as "defacto agent" for the vendor but what boundaries he showed to the plaintiff in the initial stage is not clear from the evidence. The plaintiff had signed the Agreement for 1 rood and that is what he got according to the plan. In fact the plan (EXHIBIT 9) submitted by PW3, Ami Chand, shows 12.8 perches as not the area that was included in the Agreement. The plaintiff cannot rely on any representation made by Mohan Singh. It is settled law that once an enforceable contract of sale of land has come into existence oral evidence is not admissible to show subsequent contradiction, variation or partial abandonment. Any such variation must, like the original contract, be evidenced in writing. The evidence that Mohan Singh showed the boundaries to the builder at the time of the construction of the house has no importance. One would expect a prudent builder to look at the boundary plan before commencing the construction.

It appears that the plaintiff relied more on the representation made by Mohan Singh and not the registered plan. The registered plan was in existence at the time the plaintiff signed the Agreement. In fact Manikam Pillay, the common solicitor, showed the plan. The plaintiff got what he signed for. Any prudent purchaser should inspect the property itself since the vendor will not in general be bound to disclose anything which would be apparent on such inspection. It may be desirable to inspect the development plan. Since the making of satisfactory preliminary inquiries and searches tends to cause delay,

the purchaser may omit such inquiries and searches. If he does so the contract should contain a condition entitling him to give notice to rescind if he afterwards finds the property subject to certain specified charges or restrictions. Here there were no such conditions in the Agreement. The land was clearly pegged and the purchaser would have known the exact boundaries if he checked with the plan but he relied on earlier inspection of the land with Mohan Singh. The purchaser himself is to be blamed.

The Appellant now appeals against the above judgment on the following grounds:

1. The learned Trial Judge erred in law and fact and drew inferences of fact and law not supported by evidence in the case.
2. The learned Judge failed to draw proper inferences or conclusions of fact, and law from the evidence produced by the Appellant/Plaintiff and his witnesses and in fact accepted by him as facts proved by the Appellant.
3. In particular, the learned Judge found and accepted as facts:-
 - (a) There is no doubt the land in question was shown to the Plaintiff by Mohan Singh, PW 5 Bechu Prasad was also present when Mohan Singh showed the land to the Plaintiff. Before the house was built, Mohan Singh again showed the boundaries to the Carpenter PW4 Kuar Singh.
 - (b) I find as fact that Mohan Singh was also present when parties signed the agreement in Manikam Pillay's office. The Plaintiff, Bechu Prasad and Manikam Pillay said Mohan Singh was present. Even Pyara Singh the defence witness, said Mohan Singh was present. The Plaintiff relied on Mohan Singh as far as the boundaries were concerned rather than checking with the plan.
 - (c) Both Mohan Singh and Nazar Singh are brothers.
 - (d) Mohan Singh may have acted as defacto agent.
4. The learned Judge erred in holding that "it appears that Mohan Singh indulged in excessive drinking and that his brother did not trust him" and even if it was so it does not affect the fact of representation by him.
5. The learned Judge erred in holding that "what boundaries Mohan Singh showed to the Plaintiff is not clear from the evidence", in light of the evidence of the Plaintiff and his witnesses.
6. The Plaintiff being a simple cultivator in good faith relied upon Mohan Singh's representations as the later was Nazar Singh's brother and he was the one who negotiated the sale with the Plaintiff and the only time the Plaintiff came to know about the

Attorneys of the Plaintiff was at the time of signing the agreement. In fact, the Plaintiff said in the presence of Manikam Pillay, Mohan Singh and Pyara Singh, Jarnail Singh and Bechu Prasad that Mohan Singh had shown him the boundaries and the attorneys not only did not contradict him but said "if Mohan Singh has shown the boundaries it must be right."

7. In all the circumstances and facts of the case, the learned Judge ought to have held that the defendants by Mohan Singh's and their representations led the Plaintiff up the garden and thereby prevented him from checking the boundaries against the plan, and the defendants are thus estopped from now claiming that the Plaintiff ought to have checked the boundaries against the plan.
8. In view of all the facts of the case, the learned Judge ought to have held in favour of the Plaintiff and awarded the reliefs claimed by the Plaintiff against both the defendants.

Mr V. Mishra argued, inter alia, that there was fraudulent misrepresentation on the part of Mohan Singh in his capacity as the defacto agent of the 1st Respondent/Defendant which entitled the Appellant to terminate the Agreement and obtain damages. Apart from the bald allegation of fraud against Mohan Singh in paragraph 7 of the Amended Statement of Claim (p.8a), there is no averment of fraud made nor particulars of fraud (as distinct from mere misrepresentation) given in the pleadings. Paragraph 7 reads as follows:

"7. The plaintiff by his Solicitors wrote letters dated 9th April, 1979 and 5th June, 1979 called upon the attorneys of the first defendant to get an injunction against Vijay Kumar Ltd. and get the drain removed from the plaintiff's land and to reduce the purchase price by way of compensation for damage suffered by him by misrepresentation by the second defendant as to the boundaries, but the defendant failed or neglected to do either, and the first defendant committed breach of agreement and the second defendant committed fraud."

It is settled law and practice that any allegation of fraud must be expressly pleaded together with the facts, matters and circumstances relied on to support the allegation (See Ord 18, 11 of the High Court Rules, 1988.)

As pointed out by 'Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice' (22nd Ed. p. 100), the acts alleged to be fraudulent should also be set out and then it should be stated that those acts were done fraudulently. See Re Rica Gold Washing Co (1879) 11 Ch.d. 36.

We, therefore, are not surprised that the learned trial judge did not touch on the issue of fraudulent misrepresentation at all. In fact a perusal of the Record shows there is no direct or inferential evidence to support the allegation of fraud against Mohan Singh.

The following facts found by the trial judge are indeed unassailable:

"The plaintiff had signed the Agreement for 1 rood and that is what he got according to the plan. In fact the plan (EXHIBIT 9) submitted by PW3, Ami Chand, shows 12.8 perches as not the area that was included in the Agreement."

If one were to examine Exhibit 9 one would see that if the area of 12.8 perches (as delineated on this plan) were to be added to Lot 1 the boundaries of this lot would be significantly altered. From being basically a rectangular lot it would be turned into somewhat triangular in shape with the frontage to Vatualevu Road increasing to almost twice the length of the rear boundary. This fact alone should have put the Appellant on guard bearing in mind (a) that the Deposited Plan 4212 (Ex 10) was shown to him, (b) that the lot being sold to him was described in the Agreement by reference to the Deposited Plan which was exhibited in the Court below by consent and (c) that D. P. 4212

clearly shows a right of way running along the whole length of Lot 1 sold to the Appellant. The Appellant contracted to get an area of one rood as shown in D.P. 4212 and he got one rood and he cannot now be heard to be complaining that he ought to have received 1 rood 12.8 perches notwithstanding the fact that he signed an Agreement prepared by an experienced solicitor. In this appeal the Appellant admits that he relied on Mohan Singh as far as the boundaries were concerned rather than check with the plan (see paragraph 3(b) of the Grounds of Appeal).

The Appellant's real complaint is that his house is now sited too close to the road and the drain built by one Vijay Kumar, i.e. only 2 1/2 feet away rather than 6 feet away. However, if Vijay Kumar is in fact encroaching on the Appellant's land by building a drain thereon then the Appellant's remedy is against Vijay Kumar.

It has not been suggested nor is there any evidence to the effect that the Appellant is required by the Nadi Town Council to shift his house further away from the boundary to avoid offending against any Town Council Regulations.

In our view the Learned Judge, for the reasons given and facts found by him, came to the right conclusion. In the circumstances we do not find it necessary to deal with each ground of appeal separately. We have no hesitation in dismissing this appeal but feel that in all circumstances each party should bear its own costs of this appeal.

Appeal dismissed. No order as to costs.

Michael Helsham

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Justice Michael Helsham
President, Fiji Court of Appeal

Moti Tikaram

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Sir Moti Tikaram
Resident Justice of Appeal

Mari Kapi

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Sir Mari Kapi
Justice of Appeal