

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0027 OF 2003S
(High Court Civil Action No. HBC 984 of 1986S)

BETWEEN:

AHILYA SHARMA

First Appellant

DINESH CHANDRA SHARMA

Second Appellant

AND:

MAHENDRA PRATAP SINGH

Respondent

Coram:

Sheppard, JA
Gallen, JA
Ellis, JA

Hearing:

Tuesday, 16th March 2004, Suva

Counsel:

Mr V. Kapadia for the Appellant
Mr V. Maharaj for the Respondent

Date of Judgment: Friday, 19th March 2004

JUDGMENT OF THE COURT

The respondent in these proceedings Mahendra Pratap Singh sought certain declarations and other associated relief in respect of land at Nausori of which Ram Chandra Sharma had been registered proprietor and which he had transferred to Dinesh Chandra Sharma his son, the second appellant. By judgment dated the 17th of April 2003 the Judge granted the declarations sought and indicated he would hear counsel as to the other relief claimed in the proceedings. The appellants appealed against that decision.

BACKGROUND FACTS

The factual situation in this case is complicated by the very long period of time the matter has taken to reach this stage and the material before the Judge was voluminous. We think nevertheless that the material facts for the purposes of resolution of the present dispute can be set out in a relatively precise way.

Ram Chandra Sharma was the registered proprietor of an area of land situated at Chandra Prasad Road Waila Nausori. On the 23rd November 1970 he entered into an agreement with Mahendra Pratap Singh the present respondent. That agreement is important and it is in the following terms.

"An AGREEMENT made the 23rd day of March One Thousand Nine Hundred and Seventy BETWEEN RAM CHANDAR SHARMA father's name Ram Prasad Sharma of Waila, Nausori in the Dominion of Fiji, landlord (hereinafter called the "Owner") of the one part AND MAHENDRA PRATAP SINGH of Suva in the Dominion of Fiji, registered surveyor (hereinafter called the "surveyor") of the other part WHEREAS the surveyor has prepared a subdivision plan of C.T. 1199 (part of) for lots 1 to being D.P. No.3405 (a copy whereof is attached hereto and hereinafter referred to as the "said Plan") AND WHEREAS the owner has agreed to transfer to the surveyor lot 10 in the said Plan in consideration of th3e surveyor agreeing to carry out certain subdivisional and engineering work for the owner as more particularly described hereunder.

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. The surveyor will
 - (a) prepare a proposed plan of lot 8 in the said Plan subdividing it into 2 lots.
 - (b) lodge the Plan of the said subdivision of Lot 8 with the Subdivision of Land Board.
 - (c) survey the said proposal of lot 8, prepare Plan and lodge same with the Registrar of Titles for registration.

- (d) *prepare a Proposed Plan for three lots out of Certificate of Titles 9168 and 9169 lodge the said Plan with the subdivision of Land Board; survey the said Lot; prepare the Plan and lodge same with the office of registrar of Titles for registration.*
 - (e) *Prepare a proposed Plan for the remaining 8 acres of Certificate of Title 1199 and lodge same with the Subdivision of Land Board for its approval.*
2. (a) *The surveyor will supervise the construction of all the roads and drain work until it is finally approved by the appropriate authorities.*
- (b) *It shall be the duty of the owner to engage workmen and material at all times so that the surveyor is not hindered or delayed in carrying out his duties.*
- (c) *All proposals to be lodged with the Subdivision of Land Board by 24th December, 1970.*
3. *All out pockets in connection with the items hereinabove shall be borne by the owner.*
- 4.(a) *In consideration of the services to be rendered by the surveyor as hereinabove provided the owner hereby agrees to Transfer to the surveyor lot 10 in Deposited Plan No. 3405 at or for the price of \$1300: 00 (One Thousand Three Hundred dollars) which shall be paid by the surveyor on or before the 31st day of May, 1971 PROVIDED THAT it is hereby expressly agreed that any unpaid purchase price after 31st May, 1971 shall bear interest at the rate of ten dollars per centum per annum PROVIDED THAT the said purchase price shall be paid in any case not later then the 31st day of December, 1971.*
- (b) *if for some reason the proposal for lot 8 as provided in 1 (a) herein above is not approved then the sum of \$100.00 (One Hundred Dollars) shall be added to the said purchase price of \$1300:00 (One Thousand Four Hundred Dollars).*
- (c) *Upon payment in full of the said purchase price the owner shall execute a document of transfer transferring the said Lot 10 to the surveyor at the costs and expense of the Surveyor.*

5. *The costs of this agreement shall be borne equally by the parties hereto.*

*SIGNED by the said RAM CHANDAR)
SHARMA in the presence of)
SIGNED by the said MAHENDRA)
PRATAP SINGH in the presence of)"*

There is a considerable dispute between the parties as to the extent to which the obligations under that contract accepted by the respondent were carried out. It is the contention of the respondent that eventually all the obligations were performed. There is no dispute however that they were certainly not performed within the time contemplated by the agreement. The respondent contended that this was largely occasioned by difficulties connected with the proposed subdivision of lot 8. These arose by reason of the fact that the land concerned was low lying and subject to flooding so was not suitable as a residential lot. It is the respondent's contention that Ram Chandra Sharma was fully aware of these problems and that the two parties continued to co-operate to resolve them.

A further agreement was entered into between the parties on the 24th August 1971. This is a comparatively short document which we were told was prepared by the parties themselves.

It is in the following terms:

"AN AGREEMENT made on the day of 24th August One Thousand Nine Hundred and Seventy One BETWEEN RAM CHANDRA SHARMA father's name Ram Prasad Sharma of Waila, Nausori, in the Dominion of Fiji. Landlord (hereinafter called the Owner) of the one part and MAHENDRA PRATAP SINGH of Waila, Nausori, in the Dominion of Fiji, registered Surveyor (hereinafter called the Surveyor) of the other part WHEREAS the Surveyor already prepared proposals of C.T. 1199 (Balance of) lots 1 to 44 as per SLB 27/1/1613.

The surveyor has been fully paid up for his services till now.

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. (a) *The Surveyor will prepare engineering plans of SLB27/1/1613 and lodge to the S.L. Board as soon as possible but not later than 10th November, 1971.*

- (b) *The surveyor will attend to all requisition and consult landlord prior to any changes.*
- 2. *The surveyor will supervise the construction of all the roads and drain works to the satisfaction and final approval of S.L. Board.*
- 3. *It shall be the duty of the landlord to engage workmen and provide material at all times so that the surveyors work is not hindered.*
- 4. *Any lodgment fees paid by the Surveyor is to be refunded by the by the owner on the production of official receipts.*
- 5. *On the Basis of 32 perches for each lot as approved, the maximum possible lots to be surveyed.*
- 6. *It is further agreed that the surveyor will provide all the surveying, engineering and supervising services necessary for the ultimate registration of the final survey plans with the titles office.*
- 7. *The total fees agreed for the above services of the surveyor is Two Thousand five hundred dollars \$2,500.00) i.e. 1600 for eng. Plans, 300 supervision 600 title Deposit - \$1,200 (One thousand two hundred dollars). The balance to be paid after the registration of the final deposited plans.*
- 8. *The deposit mentioned above may be utilized to pay the balance owing on lot 10 SLB27/1/1613 in that case subject to survey and final registration, the said lot 10, to be transferred to the surveyor at the surveyors cost. Landlord to complete road by end of July, 1973.*

*Signed by the said RAM CHANDRA SHARMA
 Signed by the said MAHENDRA PRATAP SINGH
 WITNESS:"*

On the same day, that is the 24th August 1971 Ram Chandra Sharma signed a receipt for the sum of \$1,200.00 from the respondent.

Although various contemplated subdivisions were eventually completed by a survey firm (by which the respondent was employed) lot 10 was never transferred to the respondent or registered in his name. The respondent however erected a building on lot 10 variously described as a "boy house" and a "house for a maid" and he stated in oral evidence that he had been physically assisted by Ram Chandra Sharma in erecting this building.

The relationship between the two men deteriorated and there was an acrimonious correspondence between Ram Chandra Sharma and the respondent. A considerable number of letters were produced but no oral evidence was called in respect of them and the extent to which reliance can be placed upon them has to be regarded as somewhat doubtful.

On the 12th November 1973 Ram Chandra Sharma wrote to the respondent care of the surveyors who carried out the survey work complaining that the respondent had failed to carry out the obligations arising from the agreement dated 24th August 1971, complaining about the quality of the work and stating "please note your failure to abide by the agreements has made it null and void. Therefore you are not entitled to any fees etc. as promised services had not been rendered. Be reminded now that there is no agreement in force and you are illegally "squattering" on my unsubdivided land and arrangements being made by my lawyers Messrs. Ramrakhas to evict you from the land and claim damages for unnecessary expenses and delay."

There followed various letters between solicitors. On 30th April 1976 the respondent wrote to Ram Chandra Sharma indicating that he was not prepared to alter the shape of the block of land as purchased. On the 25th August 1976 the surveyors wrote to Ram Chandra Sharma regarding the proposed subdivision and referring to the agreement with the respondent, this letter contained the following comment "during the survey I understand you instructed Kelepi to relocate the eastern boundary of lot 10 to the position shown in green. This relocation of the green boundary has resulted in Mr Singh's refusal to sign the plan since the shape of Singh's block has been altered. " The letter also indicated that the respondent had placed a caveat on the title and that the writer was not prepared to act as an arbitrator between Ram Chandra Sharma and the respondent. Ram Chandra Sharma gave one month's notice to the respondent to vacate lot 10 on the 26th March 1984 and on the 18th October that year issued a writ seeking vacant possession. This action proceeded through various procedures until it was dismissed by Rooney J. in 1986 and on the 4th July 1986 an appeal against that dismissal was dismissed by this court.

In about 1978 the respondent began building a house on lot 10 and it was alleged that the value of this building was some \$50,000.00. There seems to have been considerable correspondence between the parties with various local authorities as to whether or not the house ought to have been built at all.

On the 15th November 1984 Ram Chandra Sharma transferred lot 10 to his son, the second appellant Dinesh Chandra Sharma. On the same day he took a mortgage back over the land from his son for the full sum of the purchase price which was stated to be \$15,000.00 and that mortgage was registered. During the course of the proceedings to which reference has already been made the caveat filed by the second respondent had been removed. On the 17th September 1986 following the decision of this Court dismissing the appeal of Dinesh Chandra Sharma the respondent in his turn commenced these proceedings against Ram Chandra Sharma and Dinesh Chandra Sharma seeking the following orders.

AND THE PLAINTIFF CLAIMS:-

- (a) *A declaration and or order that a Second Caveat No.239779 lodged by the Plaintiff on the said land remain in force and effect until the hearing and determination of this action;*
- (b) *A declaration that the purported transfer dated 15th day November, 1984 being transfer No. 222577 whereby the 1st Defendant transferred his interest in the property described as Lot Number 10 on Deposited Plan Number 4483 comprised and described in Certificate of Title Number 17691 is fraudulent, illegal and a sham transfer designed to defeat the legitimate interest of the Plaintiff;*
- (c) *A declaration that the purported Mortgage dated the 15th day of November, 1984 being mortgage No. 222578 executed by the 2nd Defendant in favour of the 1st Defendant is a sham mortgage, is fraudulent, null and void and of no effect;*
- (d) *An Order that the 1st Defendant and or the 2nd Defendant do convey any transfer to the Plaintiff the aforesaid land free of encumbrances;*
- (e) *Damages for breach of contract;*

- (f) *Interest on the amount of such damages at such rate and for such period as the Court shall think just;*
- (g) *Costs of this action;*
- (h) *Such further and other relief as this Honourable Court may seem just and expedient."*

No statement of defence was filed until December 1991. That statement of defence included a counterclaim. These proceedings then carried on their desultory much delayed way until they were finally heard in September of 2002. Ram Chandra Sharma died before the proceedings came to trial and the first appellant in this case is his executrix.

Oral evidence was called before the Judge and was given by the respondent and by Dinesh Chandra Sharma. Judgment was delivered on 17th April 2003. The Judge granted the declarations a, b and c sought in the statement of claim as set out above and ordered Dinesh Chandra Sharma to transfer lot 10 to the second respondent free of encumbrances. He indicated he was prepared to hear counsel as to the other relief sought. From that decision the appellants have appealed.

Although the history of this matter is extremely complex in the end the matters before us can be condensed into 2 questions.

The first is whether or not the second respondent was entitled to an order for specific performance in respect of lot 10 and the second which is of course inter related with the first is whether the respondent is entitled under the provisions of the Land Transfer Act to have the title to lot 10 transferred to him free of encumbrances.

Specific Performance

The Judge considered on his interpretation of the 2 agreements that the parties had proceeded on the basis that the first agreement had been performed. He considered, that being so, the second respondent was entitled to specific performance of clause 8 of the second agreement providing for the transfer of lot 10. He then had to consider the

question of indefeasibility of title and came to the conclusion for which he gave reasons that the title of Dinesh Chandra Sharma was impeachable for fraud as that is understood in the Land Transfer Act.

Mr Kapadia in a forceful submission contended first that the Judge's conclusion that the respondent had completed his obligations under the first agreement and was therefore entitled to specific performance was wrong in both fact and law.

With regard to fact he contended that the evidence was clear the obligations had not been completed within the time frame contemplated by the agreement itself and he argued that the respondent had himself conceded in oral evidence that he had not personally completed the obligations imposed upon him.

Mr Kapadia submitted that it was not open to the respondent to rely upon the completion of the subdivision by the surveying firm to which Ram Chandra Sharma had ultimately entrusted the matter, even though the actual work had been carried out by the respondent, by then employed by that firm. He maintained that the correspondence showed Ram Chandra Sharma had to pay to that firm a larger sum than had originally been contemplated by the first agreement.

The difficulty in the way of the factual arguments arises, as the Judge in the High Court pointed out, from the second agreement. That was of course subsequent to the first agreement and, as the Judge said, makes no reference to the first agreement, let alone giving any indication that the parties considered it had not been complied with. Whether or not Mr. Kapadia's argument can succeed is dependent upon construction of the second agreement and in particular the provisions of clause 8. Unfortunately it appears this agreement was drawn by the parties themselves and lacks the precision which one would hope to see in a professional document. Mr Kapadia submitted that the words "subject to survey and final registration" in clause 8 of the second agreement imposed an obligation on the second respondent to complete the survey requirements undertaken in the balance of the second agreement before lot 10 could be transferred to him.

The Judge took the view that there were a number of factors which told against such an interpretation. First he noted that on the pleadings before him the appellants had not alleged any breach of the first agreement but had rather relied on allegations of breach of the second agreement. He considered that clause 8 of the second agreement could itself be construed as an indication the parties had regarded the first agreement as having been completed.

While we think that the answer is to some extent equivocal we are of the view that the Judge was right. Clause 8 may reasonably be seen as a recognition that the second respondent was entitled to have lot 10 transferred to him subject to completion of the financial obligations, and could therefore be regarded as evidentiary. If that interpretation be correct then the qualification "subject to survey and final registration" relates to lot 10 alone rather than the other subdivisional proposals set out in the earlier provisions of the agreement.

The amount which the second respondent was required to pay under the provisions of clause 8 was the "balance owing" which must be a reference to obligations under the first agreement and support the contention no dispute arose under it. That plainly was the view the parties took of the situation, since on the same day Ram Chandra Sharma signed a receipt indicating he had received the amount described as "the full purchase for lot 10."

The second respondent has been in possession of the land concerned for many years and has expended funds on it. On the evidence accepted by the Judge this was an action at least initially supported by Ram Chandra Sharma who was said to have assisted in the building of the first construction on the land.

In addition there can be no doubt that Ram Chandra Sharma has had the benefit of the balance paid by the second respondent at the time of the second agreement for many years and there has never been any suggestion of the return of those funds.

On such findings the requirements for the issue of an order for specific performance were met in this case subject to the indefeasibility question with which we shortly deal.

Indefeasibility

Obviously no order for specific performance could issue if Dinesh Chandra Sharma was entitled to rely upon indefeasibility under the provisions of the Land Transfer Act Cap. 131. Section 40 of the Land Transfer Act in Fiji provides "except in the case of fraudno person dealing with the proprietor.... shall be affected by notice, direct or indirect of any trust or unregistered interest and the knowledge that any such trust or unregistered interest exists shall not be imputed as fraud." The question of the meaning of fraud in that context has been explored by this court in *Ram Nandan v. Shiu Dutt* Civil Appeal No. 29 of 1982. In that decision this court discussed the authorities and it is unnecessary for us to further explore them. What constitutes fraud for the purposes of s.40 is now well settled. Fraud involves dishonesty. This court specifically approved the statement of Salmond J. in *Wellington City Corporation v. Public Trustee* in [1921] NZLR 423 where he said" it is true that mere knowledge that the trust or other unregistered interest is in existence is of not itself to be imputed as fraud. A purchaser may buy land with full knowledge that it is affected by a trust and the sale may be a breach of trust on the part of the seller but the purchaser has the protection of s.197 unless he knew or suspected that the transaction was a breach of trust. Fraud in such a case consists in being a party to a transfer which is known or suspected to be a violation of the equitable rights of other persons."

In this case the Judge was satisfied, (and he of course had heard oral evidence) that Dinesh Chandra Sharma was aware of the claim which the second respondent had to lot 10 at the time that the lot was transferred to him. He was then 23 years of age and while he could have as a young child had no knowledge of the origins of the relationship between his father and the second respondent he must have been aware at the time of the transfer, of the dispute between them. That could not of course have been sufficient to give rise to an imputation of fraud. He might after all have honestly believed that his father was entitled to deal with the lot as he saw fit. The Judge however noted that the

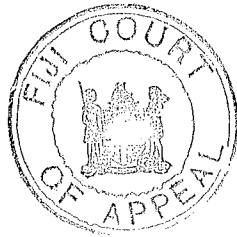
he was not very impressed by Dinesh Chandra Sharma's account of why lot 10 had been transferred to him. The Judge noted that an explanation had been given that Ram Chandra Sharma owed Dinesh Chandra Sharma sums of money for unspecified work done for him over a period. He apparently stated that his father owed him some 10 to 15 thousand dollars for this work without giving any indication as to how this sum was made up. It is significant in such circumstances that a mortgage back was given for \$15,000 this being the consideration for the transfer. As the Judge pointed out this contradicted the contention that the lot was transferred for services rendered.

We were informed that a different explanation had been given by Dinesh Chandra Sharma in the previous proceedings already referred to whereby his father and he had sought possession of lot 10 from the second respondent. In that case it appears that the explanation for the transfer was said to have been ill health of Dinesh Chandra Sharma. We think it was open to the Judge to conclude that in the light of quite unsatisfactory and contradictory explanations being given for the transfer, co-incidental with the transfer taking place at a time when proceedings were contemplated by the parties, that the transfer was no more than a sham designed to deprive the second respondent of any possibility of retaining the land, which he then occupied and a sham to which Dinesh Chandra Sharma was party since it was from him that the contradictory explanations were put forward.

If Dinesh Chandra Sharma participated in a sham transaction designed to prevent the second respondent from obtaining title to the land then this would clearly come within the definition of fraud referred to by Salmond J. and accepted in this court in *Ram Nandan v. Shiu Dutt Supra*. Accordingly we agree with the Judge that Dinesh Chandra Sharma was not entitled to rely upon indefeasibility of title and that it was open to the Judge on the findings of fact which he made, having had the advantage of an oral hearing, to make the directions and declarations he did.

Outcome

The appeal is dismissed and the case is remitted to the Judge in the High Court to make such further orders as may be necessary. The respondent is entitled to costs which we fix in the sum of \$2,000.00 together with disbursements to be fixed by the Registrar.



J. J. Sheppard

Sheppard, JA

D. J. Gallet

Gallet, JA

A. J. Ellis

Ellis, JA

Solicitors:

Messrs. Sherani and Company, Suva for the Appellants

Messrs. Maharaj Chandra and Associates, Suva for the Respondent