

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 276/2007

Between: Vijay Nand Sharma  
Plaintiff

And: Suruj Kuar and Raj Mati  
Defendants

Appearances : Ms S.Devan for the plaintiff

Mr Suresh Maharaj for the first defendant

Date of hearing: 11<sup>th</sup> March, 2013

### **Judgment**

1. This is a purchaser's action for specific performance of a sale and purchase agreement executed between the plaintiff and the defendants with damages as an alternative remedy. The defence of the first defendant is that the second defendant, her daughter fraudulently got her to sign the agreement.

#### **2. *The statement of claim***

2.1 The statement of claim filed on 25<sup>th</sup> June, 2007, states that the defendants, (as executrices and trustees of the estate of Ram Prasad) are the registered proprietors of certificate of title no. 6739 being lots 1 & 3 on DP 1312 containing an area of 2 acres 3 roods 35 perches land known as Waibola, (the land). Ram Prasad was the first defendant's husband.

2.2 On 14<sup>th</sup> April, 2004, the plaintiff made a written offer for the purchase of the land for the sum of \$435,000.00 to Wm. Scott Grahame & Co, the vendor's solicitors. The offer was accepted by the defendants. The acceptance was formalised by a sale and purchase agreement executed on 29<sup>th</sup> April, 2004. The 10% deposit was paid.

2.3 The statement of claim proceeds to state that the defendants instituted action against Sarab Jeet, the first defendant's son for vacant possession of the land. The court refused to grant vacant possession.

2.4 The plaintiff states that he is ready to effect settlement of the balance purchase price of \$ 391,500.

**3 The statement of defence of the first defendant**

3.1 The first defendant, in her statement of defence filed on 4<sup>th</sup> February, 2009, states that the second defendant fraudulently got her to sign the offer to purchase and sale and purchase agreement. She was advised by the second defendant that she was executing documents relating to estate matters. She was not told in clear terms that she was selling or entering into a sale and purchase agreement.

3.2 The first defendant did not receive legal advice from the solicitors.

3.3 She is illiterate and cannot execute documents. She affixes her thumb print. The affixing of her signatures on the offer letter and sale and purchase agreement "*are questionable*".

3.4 The execution of the offer letter and sale and purchase agreement was obtained by misrepresentation of facts.

3.5 The statement of defence concludes that the second defendant "*over powered (the first defendant's) mind and ..took undue advantage of the trust reposed in her.. as her mother (being) of advanced age*" and illiterate.

4 The plaintiff filed reply joining issue with the averments in the first defendant's statement of defence.

**5 The second defendant**

5.1 On 25<sup>th</sup> June, 2007, the plaintiff had filed inter parte summons for an interim injunction restraining the defendants from sub-dividing, selling or mortgaging the land. In her affidavit in reply to that summons, the second defendant stated that the plaintiff is entitled to be transferred the land, in terms of the sale and purchase agreement. Coventry J had granted the interim injunction.

5.2 On 9<sup>th</sup> June, 2011, Ms Devan, counsel for the plaintiff had informed the Master that the plaintiff does not seek to proceed against the second defendant with

regard to the relief of specific performance, since the second defendant was removed as trustee of the estate of Ram Prasad.

**6 The determination**

- 6.1 The question that arises for decision in this case is whether the sale and purchase agreement of 29<sup>th</sup> April, 2004, is valid and enforceable.
- 6.2 PW1, (Michael Arjun, a solicitor with Wm. Scott Grahame & Associates) testified that the first and second defendants came to his office. They informed him that the estate of Ram Prasad, (the first defendant's husband) owed city rates of \$ 43,564.38 on CT 6739 and taxes of \$18,344 to the Inland Revenue. They intended this debt to be settled from the sale proceeds of the land. His firm advertised the land. They were also instructed to file section 169 eviction proceedings against Sarab Jeet, the first defendant's son, as he was occupying the land. The first defendant had placed her thumb print on the affidavit in support of that application.
- 6.3 PW1 said that his late father, Narendra Arjun and PW 3, (Artika Prasad), solicitors of his firm drafted the sale and purchase agreement. Albeit he did not witness the first defendant signing the agreement, PW1 said he was aware that she had not indicated that she had not understood its contents.
- 6.4 PW1 said he drafted a memorandum of settlement of 20<sup>th</sup> June, 2005, to complete the sale, after the completion date set out in the sale and purchase agreement had passed. He explained the document to the first defendant in Hindi and English and she signed it. I find this to be an incomplete document, as the plaintiff had not signed it, as pointed out by counsel for the first defendant, Mr Maharaj.
- 6.5 The plaintiff, (PW2) in his evidence, said that he saw an advertisement for the sale of the land. He contacted PW1. PW1 then, convened meetings with the defendants. The first defendant participated in the discussions. The first and second defendants wanted an early settlement of their financial issues. The defendants said that their price for the land for \$435,000.00. The plaintiff requested two weeks to carry out a due diligence on the land. After that, he gave a written offer to purchase land. The offer was accepted by the defendants, as evidenced in the offer letter. There followed the execution of the sale and purchase agreement. The late Narendra Arjun had explained the contents of the agreement to the plaintiff and witnessed his signature. PW3 witnessed the signature of the first



defendant. The pertinent points in the agreement were explained by the late Narendra Arjun to the defendants.

- 6.6 In cross-examination, the plaintiff denied that the land was sold at a giveaway price. The defence sought to produce a valuation report. I upheld Ms Devan's objection that there was a failure to discover the existence of that document to the plaintiff, as admitted by Mr Maharaj.
- 6.7 PW 3, in her evidence said she explained the contents of the sale and purchase agreement to the first defendant in Hindi. The first defendant printed her name and then placed her left hand thumb on each page of the agreement. There was no indication by her that she was not happy to sell the land. She kept repeating that money was due to the Lami Town Council. In cross-examination, PW3 reiterated that she explained each clause of the agreement to the first defendant, in Hindi. The sale price was described in numerical figures.
- 6.8 The first defendant's case, as pleaded in her statement of defence is that the second defendant, her daughter overpowered her and fraudulently got her to execute the offer letter and sale and purchase agreement.
- 6.9 In *Fiji Development Bank v Raqona*, (1984) 30 FLR 151 the Court citing *Saunders v Anglis Building Society*, (1971) AC 1004 stated that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms.
- 6.10 It is not enough to allege that "*the mind did not go with the pen*", to use the phraseology of Lord Donovan in *Muskham Finance Ltd v Howard*, (1963) 1 All ER 81 at pg 83. His Lordship stated further:

*What has to be established, if the plea of non est factum is to succeed, is that the misrepresentation which caused the signature was a misrepresentation of the character and class of the document in question, and not a misrepresentation simply as to its contents.*

- 6.11 The first defendant, in her evidence, denied that she signed the offer letter, the sale and purchase agreement and the memorandum of settlement. She said that she does not sign documents, but places her thumb impression. Her evidence on this point was supported by DW2, (Maharaj Prasad, the first defendant's son). It transpired in the cross-examination of the first defendant that while she had placed her thumb impression in the power of attorney she gave to the second defendant,

in the revocation of that power of attorney she placed her thumb impression and signature with initials. It also emerged that she had signed the memorandum of settlement of 20<sup>th</sup> June, 2005, which I have already referred to.

6.12 The first defendant did not give any evidence that the second fraudulently got her to execute the impugned documents nor did the defence call the second defendant to testify. Her evidence that she does not sign documents, but places her thumb impression is contradictory and quite implausible with the first defendant's case, which is founded on fraudulent misrepresentation. To my mind, the question whether she signed or affixed her left or right thumb print is irrelevant.

6.13 There was no assertion that the second defendant had benefitted from the transaction. As Lord Shaw said in *Poosathurai v Kannappa Chettiar*, (1919) LR 47 Ind App 1 at 4 and cited by Lord Scarman in *National Westminster Bank v Morgan*, (1985) 1 All ER 821 at pg 829:

*It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.*

6.14 Next, the statement of defence contends that the first defendant did not receive any legal advice from the solicitor. I do not accept this contention. PW3 said that she explained the contents of the sale and purchase agreement in Hindi to the first defendant. I accept the evidence of PW3. Her evidence was confirmed by the plaintiff. I found PW3 as well as PW1 to be independent and truthful witnesses. They did not have any vested interests nor was it alleged that they had a conflict of interest.

6.15 Moreover, Wm. Scott Grahame & Co were the first defendant's solicitors. They drafted her late husband's last Will and obtained probate of his estate. She asked them to advertise the land and execute the sale and purchase agreement for the weighty cause that the Lami Town Council had instituted legal proceedings against the estate of her late husband. They acted with informed consent.

6.16 Before I part with this case, I would refer to an action (no 133 of 2008) filed by the first defendant against the second defendant and three others. The first defendant, (as plaintiff in that case) in her statement of claim issued on 10<sup>th</sup> April, 2008, had alleged that the second defendant had fraudulently obtained her power of attorney and transferred four properties of the estate of Ram Prasad to



the defendants. On 10<sup>th</sup> June,2009, the Court had (a) ordered that pursuant to the terms of settlement entered between the parties,the transfer of the four properties was null and void, (b) discharged the second defendant, as trustee of the estate of Ram Prasad, and (c) appointed three sons of the deceased as joint trustees.

6.17 It is pertinent that the first defendant had not pursued her allegation in her statement of claim that the second defendant had fraudulently misled the first defendant to sign the sale and purchase agreement sought to be enforced by the plaintiff in the present case .

7 On a totality of all the circumstances, I conclude that the sale and purchase agreement was voluntarily entered into by the first defendant. In my judgment, the plaintiff is entitled to specific performance of the sale and purchase agreement, upon the payment of the balance sum of \$ 391,500 .

8 **Orders**

- a) The plaintiff is entitled to specific performance of the sale and purchase agreement dated 29<sup>th</sup> April,2004,upon the payment of the sum of \$ 391,500.
- b) The first defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 3000.

22<sup>nd</sup> April,2014



*A.L.B. Brito-Mutunayagam*

Judge