

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No.: 143 of 2014

BETWEEN : **BIJEND PRASAD RAM** medical doctor and company director of
361 Waimanu Road, Suva
1ST PLAINTIFF

AND : **JOJI MALANI** medical doctor and company director of 361
Waimanu Road, Suva
2ND PLAINTIFF

AND : **TROPICAL HEALTH INCORPORATED [FIJI] LIMITED** a
limited liability company of 361 Waimanu Road, Suva
3RD PLAINTIFF

AND : **FNP INVESTMENT LIMITED** of 33 Ellery Street, Suva
1ST DEFENDANT

AND : **BANK OF BARODA** a Government of India undertaking
incorporated in India and carrying on its business in Fiji
2ND DEFENDANT

Counsel : **Mr. I. Fa** for the Plaintiffs
Ms. Saro K. S for the 1st Defendant
Mr. D. Sharma for the 2nd Defendant

Dates of Hearing : 22nd October, 2014

Date of Judgment : 3rd November, 2014

JUDGMENT

INTRODUCTION

1. The 1st and 2nd Plaintiffs are directors and also the shareholders of the 3rd Plaintiff Company whose principal line of business is to provide medical services for a fee. 1st

Defendant had provided venture capital as well as loan facilities to the 3rd Defendant. 2nd Defendant is a commercial bank and it was the primary mortgagees of the premises contained in the title No CT 20104. The Mortgagor (3rd Plaintiff) had defaulted the payments of mortgage rentals for a considerable time, and a notice was accordingly given, and a mortgagee sale was conducted in 2013. Upon the acceptance of successful tender two sale and purchase agreements were executed, for land and chattels respectively. The registration of the title in the name of the purchaser for land CT20104 in the registrar of land could not be completed primarily due the caveat lodged by the 1st Plaintiff. The executions of the sale and purchase agreements were on **18th September, 2013**. The Mortgagor, along with the 1st and 2nd Plaintiffs are seeking for an interim injunction preventing the sale of the mortgaged property (the order A in the summons seeking injunction) alternately a restraining order against the Defendants from dealing with said property for which mortgagee sale was executed. As order (C) the Plaintiffs are seeking restraining order against Defendants from removing any chattels from the premises. The ownership of the chattels had been with a third party upon the execution of the sale and purchase agreement relating to chattels.

ANALYSIS

2. The Plaintiffs are seeking following orders in the summons dated 2nd June, 2014
 - A. *An order for an injunction **restraining the 1st and 2nd Defendants** their servants against whomsoever and whatsoever **from selling by way of mortgagees sale the 3rd Plaintiff's property** situated at 361 Waimanu Road, Suva; being CT20104 until further orders of this court.*
 - B. *Alternatively an order that the 1st and 2nd Defendants, their agents and servants whomsoever and whatsoever be **restrained by way of injunction from dealing** with property of the 3rd Plaintiff situated at 361, Waimanu Road, Suva*
 - C. *An order that the 1st and 2nd Defendants, their agents and servants whomsoever and whatsoever be **restrained by way of injunction from removing any chattels, plant and equipment** of any kind from the property of the 3rd Plaintiff situated at 361, Waimanu Road, Suva being CT 20104 in any manner whatsoever until further orders of this court.(emphasis added)*

3. At the outset it should be noted that orders (A) and (B) above are alternative. The order (A) cannot be granted as it was a *fait accompli*. The sale of the property depicted in CT 20104 was already executed in mortgagee sale on 18th September, 2013! **More than 9 months before the summons was filed.**
4. In *Vere v NBF Asset Management Bank* [2004] FJCA 50; ABU0069.2003S (11 November 2004)(unreported) Fiji Court of Appeal held that there is no right of redemption to the mortgagor once an unconditional tender was accepted. But the 2nd Defendant had already executed sale and purchase agreements for land and chattels, separately.
5. The Plaintiff relied on clause 24 of the sale and purchase agreement of CT 20104 which provided 90 day period for the parties (2nd Defendant was the vendor, and the purchaser was not made a party to this action by the Plaintiff) to obtain any dissolution of injunction and removal of caveats. The failure to do so *ipso facto* would not rescind the sale and purchase agreement of CT 20104, but it only gave an option to the parties to rescind it. There is no evidence of either party exercising or intending to exercise this option.
6. The Plaintiffs' counsel contended that since 90 day period had lapsed the sale and purchase agreement cannot be executed. This cannot be accepted as correct interpretation of the clear words in the said clause which granted only an option for the parties to the said sale and purchase agreement to rescind it. The Plaintiffs who were not the parties to the sale and purchase agreement and also who had vested interest, cannot rescind it or claim such a position without evidence to that effect.
7. The fact that the Mortgagee (the vendor of the sale and purchase agreements i.e the 2nd Defendant), is objecting to the injunction is sufficient to reject the said contention and in any event by not making the purchaser of property in CT 20104 to this action by the Plaintiff, also precludes them from speculating on their action. Though the counsel contended such position in his oral submission there is no evidence or even a statement in the affidavits filed by the Plaintiffs to that effect. This fact is not a disputed fact. There is

undisputed material before this court no party had rescinded the sale and purchase agreement relating to CT20104.

8. It has to be borne in mind that there is no such clause similar to clause 24 of the sale and purchase of CT20104, contained in the sale and purchase agreement relating to the chattels. So as regards to the chattels the ownership has passed upon the execution of the sale and purchase agreement relating to chattels and the absolute right of ownership had passed to the purchaser.
9. In the order (C) of the summons seeking injunction the Plaintiffs are seeking an order to restrain removal of said chattels by the Defendants, but had conveniently not made the purchaser, who had already obtained the possession and ownership upon the execution of the sale and purchase agreement relating to the said chattels.
10. It is futile even to attempt any restrain 1st and 2nd Defendants from removing any chattels when sale and purchase agreement of the chattels had already transferred the rights of chattels to a third party to this action, including possession and ownership of the said chattels. If the Plaintiff desired any restraining order regarding chattels he ought to have made the owner of the said chattels a party to this action. Without doing that the Plaintiff cannot get any restraining order regarding the chattels as there was a distinct sale and purchase agreement relating to chattels and that had been executed and ownership granted to a third party. The order (C) in the summons for injunction is frivolous and seeking such an order is abuse of process, to say the least.
11. Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 510 held,
'The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.'

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial'

12. Order (B) contained in the writ of summons relating to the injunction, is dealing with the property depicted in CT 20104. This was an alternate order to (A) in the said summons, which I have already dealt.
13. In the said order (B) the Plaintiffs are seeking restraining the dealing with the property depicted in CT20104 and the sale of the said land through a mortgagee sale to third party was completed upon the execution of the sale and purchase agreement relating to the land on 18th September, 2014. The 1st Plaintiff lodged a caveat in the land registry preventing such transfer being registered in the land registry and removal of the said caveat was ordered by the Master in June, 2014. There was no evidence of appeal against said decision and the present application for injunction was filed in May, 2014.
14. What is remaining to be done regarding the sale and purchase agreement of the property described in CT 20104 is the registration of the transfer. The main obstacle for that was the caveat lodged by the 1st Plaintiff, which was removed by the order of the Master.
15. 1st Defendant had also obtained a mortgage over the same property and it had also lodged a caveat. This needs to be removed in order to registrar the transfer, but that is an issue between the purchaser (who was not made a party to the action by the Plaintiff) and the 1st Defendant.
16. It is also pertinent that the **3rd Plaintiff** who is the registered owner of the property comprised in CT 20104 had entered in to a **Deed of Parri Passu Securities** with the 1st and 2nd Defendants relating to said property.
17. The primary mortgagor of the CT 20104 is the Bank of Baroda (2nd Defendant). The default notice of the mortgage was given in January, 2013 and the mortgagee sale and acceptance of the successful tender were completed and the sale and purchase agreement was executed on 18th September, 2013. For more than 9 months the Plaintiffs did not seek an injunction claiming restraint of the mortgagee sale, till it was executed.

18. Since the sale was completed with the signing of the sale and purchase agreement there is no possibility of obtaining final injunction. It is also clear that the reason for the mortgagee sale was lack of cash or equity, hence it is unlikely that the Plaintiffs will be able to compensate the Defendants in any way if he is not successful in this action. Comparatively, the Defendants are in a better position to compensate and damages will be an adequate remedy for the Plaintiffs for their claims if they succeed.

19. In *Ashworth and others v Royal National Theatre* [2014] 4 All ER 238 it was held at p240;

*‘The test for interim relief is set out in **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504, [1975] AC 396. In this case the issues are first, whether there is a serious question to be tried with a real prospect that the claimants will obtain specific performance or a final injunction in substantially the form of the interim relief sought; secondly whether, if there is, damages would be an adequate remedy for them for the interim period; and thirdly, if not, whether the balance of convenience lies in favour of the interim relief they seek. Determining where the balance of convenience lies requires consideration of a range of matters, including the prejudice to the claimants on the one hand if relief is not granted or to the National Theatre on the other if it is. The underlying principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. While a mandatory order of the type sought here will often be more likely to cause irremediable prejudice than a negative order, what is required is an examination of what on the particular facts of this case are the likely consequences of granting or withholding relief: **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16, [2009] 5 LRC 370, [2009] 1 WLR 1405.’ (emphasis added)*

20. The final relief sought in the writ of summons against the 2nd Defendant is contained in the prayer 2(ii) which states as follows;

*“An order for an injunction restraining the 1st and 2nd Defendants their servants and agents whomsoever and whatsoever **from selling by way of mortgagee’s sale the 3rd Plaintiff’s property being CT 20104**”*

21. *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 510 Lord Diplock held,

*‘As to that, the governing principle is that the court should **first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of***

the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction'.

22. The mortgagee sale, which the Plaintiffs seek to restrain as final injunction in the statement of claim, had completed with the execution of the sale and purchase agreement between the parties. There is no right of redemption of the mortgagor contained in the said sale and purchase agreement of CT20104. (see *Vere v NBF Asset Management Bank* [2004] FJCA 50; ABU0069.2003S (11 November 2004)(unreported)

23. The objective of the interim injunction is succinctly stated by Lord Diplock as follows (*American Cyanamid* [1975] 1ANER 504 at 509)

*'The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action **if the uncertainty were resolved in his favour at the trial**; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.'*(emphasis is mine)

24. In *American Cyanamid* (supra) Lord Diplock at p 510 further held,

'It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance

of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.'

25. Even on balance of convenience the sale and purchase was completed more than a year ago and already the chattels in the property were transferred to the purchaser. So it is highly inconvenient to all parties to prevent or delay the transfer. The loss to the Defendants far exceeds any damages claimed by the Plaintiffs. It should also be noted that even the delay of more than 7 months taken to remove the caveat had accrued interest for the loan to the 2nd Defendant, which adversely affect the Plaintiffs. If the transfer is not completed the interest will accumulate. From the date of execution of the sale and purchase agreement more than a year had passed, mainly due to actions of 1st Plaintiff.
26. The main allegation of the Plaintiffs is that 1st Defendant had not provided sufficient equity it had promised in 2009. So, the alleged cause of action is for breach of contract by the 1st Defendant and the 2nd Defendant was not a party to said contract upon which the writ of summons filed. The position of the Plaintiff was that if 1st Defendant invested in the equity of the 3rd Defendant as stated in its letter dated 4th September, 2009 that would have cleared the debt of the 2nd Defendant.
27. This is a farfetched argument, for restraining of the mortgagee who had exercised its right to obtain its dues. In any event, there are loan agreements entered between the Plaintiffs and the 1st Defendant after 2009 and there is no evidence of allegation of breach of contract till this action was filed. The 3rd Plaintiff was party to several loan agreements after said letter of 2009.
28. All the parties have negotiated and enough flexibility was granted to the Plaintiffs, before the mortgagee sale was completed and sale and purchase agreement was executed on 18th September, 2013. It should also be noted that 3rd Plaintiff and the Defendants had entered a Deed of Parri Passu relating to securities including the property CT 20104 and all parties are bound by that, too.

29. In *Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321 , at 324 Danckerts LJ held,

‘The point is a comparatively short one, though the history of the case is complicated. The point is whether it is still open to a mortgagor (or borrower) to redeem when the mortgagee has entered into a contract for the sale of the mortgaged property which contains a provision (the property being leasehold) requiring the vendor to obtain the landlord’s licence to assign—or, more accurately in the present case, his consent to the assignment. The learned judge held that the borrower’s right of redemption was not available, and in my opinion he reached the right conclusion.’(emphasis added)

30. The said case was applied in Fiji Court of Appeal in *Vere v NBF Asset Management Bank* [2004] FJCA 50; ABU0069.2003S (11 November 2004)(unreported) and also in more recent case *Nakuta v Housing Authority* [2012] FJCA 39; ABU0036.2011 (8 June 2012)(unreported). So the law relating to time of completion of sale relating to mortgagee sale of property is clear. The registration of the transfer is not the completion of the sale of the land. The sale had completed more than a year ago and any further delay is detrimental not only to the Defendants, but also to the Plaintiffs due to the accumulation of the interest. The present summons is an abuse of process for further delaying the transfer of the land upon the removal of caveat by the court. The summons for injunction filed on 2nd June 2014 is struck off and loss is summarily assessed at \$3000 (\$1,500 each for two defendants).

FINAL ORDERS

- a. The summons seeking injunction is struck off.
- b. The cost of this summons is summarily assessed \$1,500 for each for 1st and 2nd Defendants.
- c. The matter is to take normal cause.

Dated at Suva this 3rd day of November, 2014.



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Justice Deepthi Amaratunga
High Court, Suva