

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 19 of 2016

BETWEEN : **SATYA SIWAN GOUNDAR** of Navo, Nadi in Fiji, Transport Manager.

PLAINTIFF

AND : **ARUMUGAM** of 3 Leith Court, Manukau City, Auckland, New Zealand,
Retired.

1ST DEFENDANT

AND : **TAMENDRA GOUNDAR** of 3 Leith Court, Manukau City, Auckland,
New Zealand.

2ND DEFENDANT

Appearances : Mr A. Bale for the plaintiff
: No appearance for the defendant

Date of Hearing : 06 October 2017

Written Submission: 20 October 2017 & 23 February 2018 (Supplementary)

Date of Ruling : 26 February 2018

R U L I N G

Introduction

[01] This ruling concerns a preliminary issue on limitation period whether the claim is filed after the relevant period of limitation prescribed by the Limitation Act (the Act).

[02] The matter was set down for formal proof hearing on 06 October 2017. Before the commencement of the hearing, the court wanted the plaintiff to address the issue

of limitation period as the claim appears to have been filed out of the limitation period. Accordingly, counsel appearing for the plaintiff agreed to file a written submission on the issue. I am grateful to counsel for filing a comprehensive submission addressing the issue raised by the court.

Background

- [03] On 7 August 1975, Nagamma passed away leaving a Will behind. Pursuant to the Will, the executors obtained a Probate on 2 March 1976. Nagamma's Will appointed her sons Arumugam and Deo Raj as Trustees of her Estate. The beneficiaries of her Estate are all her sons namely, Arumugam, Deo Raj and Muthu Swamy (now deceased). To date, Nagamma's Trustees have only attended to the Transmission by Death to themselves as Executors and Trustees of her Estate.
- [04] Deo Raj, one of the trustees died on 5 May 2002, leaving one remaining Trustee being Arumugam, the first defendant in this action. The beneficiaries at this point are as follows: (a) Arumugam [first defendant], Muthu Swamy's wife, Krishnamama, Deo Raj's wife Mallamma and upon her death her son Satya Siwan Goundar [Plaintiff] [Both Trustees as well for Deo Raj's Estate].
- [05] Now, the first defendant is the only surviving Executor and Trustee of Nagamma's Estate and he has not effected the distribution of the same. He had purportedly assigned his powers and duties to his son **Tamendra Goundar** [the second defendant] via a Power of Attorney.
- [06] In the meantime, on 27 July 2009, the plaintiff and the second defendant signed a Memorandum of Agreement where the plaintiff was the vendor and the second defendant was the purchaser. In that Agreement, the plaintiff as vendor agreed to sell and the second defendant as the purchaser agreed to purchase a third of Nagamma's Estate being the plaintiff and his mother **Mallamma's** entitlement from Deo Raj's share. Further, the consideration amount for the property was \$50,000 which was to be paid within 6 months of the Agreement. The defendant did not abide by the Agreement. Since the parties involved family members, the plaintiff was reluctant to take legal action but instead allowed some years for the second defendant to settle.

[07] The plaintiff alleges that the second defendant had started fraudulently dealing with the said trust property without distributing it among the beneficiaries in accordance with the Will of Nagamma.

The Law

[08] Section 9 of the Limitation Act, Cap 35 (the Act) states as follows:

“Limitation of action in respect of trust property

- 9-(1) *No period of **limitation** prescribed by the provisions of this Act shall apply to an action by a beneficiary under a trust, being an action-*
- (a) *in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
 - (b) *to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his or her use. (Emphasis added)*
- (2) *Subject as aforesaid and to the provisions of the Trustee Act 1966, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of **limitation** is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:*

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

- (3) *No beneficiary as against whom there would be a good defence under the provisions of this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he or she could have obtained if he or she had brought the action and this Act had been pleaded in defence.” (Emphasis provided)*

Discussion

[09] The plaintiff brought a claim against the defendants by writ of summons filed 9 February 2016 seeking, among other things, an order directing the first defendant execute the lawful distribution of Nagamma’s Estate to allow Deo Raj’s Estate.

- [10] The first defendant is the Trustee and Executor of the Estate of Nagamma by virtue of her Will. He is performing his fiduciary duty through his attorney, the second defendant who is the son of the first defendant.
- [11] The plaintiff is one of the beneficiaries of the Estate of Deo Raj who died on 5 May 2002. Deo Raj was one of the beneficiaries of the Estate of Nagamma.
- [12] The plaintiff's cause of action is founded on a fraudulent breach of trust and damages caused by the fraudulent breach and recovery of the trust property.
- [13] The defendant had acknowledged the plaintiff's interest in the property in dispute by entering into a sale and purchase agreement with the plaintiff on 27 July 2009, where the plaintiff and the second defendant in reliance of the power of attorney from the first defendant entered into a sale and purchase memorandum of agreement ['the agreement'] for the one third of the property of which the plaintiff was a beneficiary for the consideration sum of \$50,000. The consideration was to be paid within 6 months from the date of the agreement (27 July 2009). The second defendant failed to pay the consideration sum as agreed. The plaintiff was waiting for the consideration sum to be paid until he realised that the second defendant was fraudulently dealing with the property.
- [14] The plaintiff states that the second defendant, without making any payment towards the consideration sum, started dealing with the trust property in 2015. It was then, the plaintiff realised that he had been deceived by the second defendant in obtaining the agreement in order to enable him to undertake dealings for the development of the trust property.
- [15] The limitation period is not applicable to an action by a beneficiary under a trust, being an action in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy (see section 9 (1) (a) of the Act).
- [16] The plaintiff has brought this action as a beneficiary under trust property in respect of a fraudulent breach of trust to which the defendants as trustees were party or privy.
- [17] I accept the plaintiff's submission that the plaintiff's right of action accrued on or about November 2015 upon realising that the second defendant acting in the first

defendant's power of attorney undertook fraudulent dealings of the trust property thus a fraudulent breach of trust.

[18] I find, for the reasons set out above, that section 9 of the Limitation Act has no application to the plaintiff's claim and that the action is not caught by the Limitation Act. Accordingly, the plaintiff could proceed with his claim. I make no order as to costs.

The Final Outcome

1. The claim is not caught by the Limitation Act.
2. The plaintiff may proceed with the claim.
3. No order as to costs.

M. H. Mohamed Ajmeer
26/2/18

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M. H. Mohamed Ajmeer

JUDGE

At Lautoka

26 February 2018

Solicitors:

For the plaintiff: M/s Lal Patel Bale Lawyers

