

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 122 of 2009

BETWEEN : MANOJ KUMAR
PLAINTIFF

AND : SAHEED AHMED
1ST DEFENDANT

Appearances: Mr. Anil J. Singh for the Plaintiff
Mr. Sunil Kumar for the Defendant
Hearing: 19 November 2015
Date of Ruling: 24 May 2019

RULING

INTRODUCTION

1. The plaintiff, Manoj Kumar ("**Kumar**"), is the registered proprietor of all that land comprised in Crown Lease No. 17744. This land is described as parts of Nakoke & Nabuyagiyagi formerly CTs 2438 & 31/3000 & (Pts of) Nakoke & Nabuyagiyagi Formerly Lot 1 ND 5158 containing an area of 2.6608 ha.
2. Kumar's lease over CL 17744 was registered on 23 June 2009 at 12.56 p.m. The lease term is 30 years effective from 01 January 1997.
3. Kumar's action began as a section 169 application. However, I directed that the matter proceed by way of *viva voce* evidence.

4. As the registered proprietor of the lease, Kumar has a right to exclusive possession of the said land, and, with that, the right to an Order for eviction against any person who is on the land illegally.
5. That is exactly the kind of Order Manoj seeks against the First Defendant, Saheed Ahmed Khan ("Khan"). The only way by which Khan may succeed in avoiding an eviction Order against him is if he proves that he has an equitable proprietary interest in the land.

EQUITABLE PROPRIETARY INTEREST

6. In this case, the equitable interest which Khan claims stems out of some sale and purchase agreement which was purportedly entered into between him and the Kumar's mother, Rai Mati, over a portion of the land in question.
7. Generally, an equitable interest which attaches to land is good against the whole world except a *bona fide* purchaser for value without notice. An equitable interest in land may arise where valuable consideration has been paid for property or where all has been done that is necessary to complete the transfer by the transferor.
8. I have to determine first and foremost whether or not a sale and purchase agreement was in fact entered into between Khan and Rai Mati. Assuming that a sale and purchase agreement was in fact entered between the Rai Mati and Khan, the two following questions then arise:
 - (i) is that agreement binding and enforceable on Kumar? The agreement of course would bind Kumar in his capacity as personal representative of the estate of Rai Mati. Did Kumar acquire the lease in question in his capacity as personal representative of the estate of Rai Mati?
 - (ii) in any event, does the agreement accrue to Khan an equitable proprietary interest in the land in question and if so, should that interest rank in priority over Kumar's subsequent legal interest, whether it was acquired in his capacity as administrator of Rai Mati's estate or in his personal capacity. This raises two further sub-issues:

- (a) whether such an equitable interest, which legally speaking, was yet inchoate, lapses at the expiry of the old lease.
- (b) if it survives the expiry of the old lease, then the priorities issue I have raised above will need to be considered.

BACKGROUND

9. As I have said, Kumar is the registered proprietor of C.L 17744. He is the surviving eldest son of the late Ms. Rai Mati. Ms. Rai Mati died on 05 September 2005. Up to the time of her death, Rai Mati was the administratrix and trustee of the estate of the late Ram Lal. Lal was her father in law. He died on 18 November 1975. Upon his death, Lal's wife Shiu Raji was appointed the executrix / trustee of his estate.
10. Shiu Raji died on 10 December 1981 leaving the Ram estate administered. Then Letters of Administration De Bonis Non was granted to Lekh Ram. Lekh Ram died on 23 June 1990 with the Ram Estate yet un-administered still. Letter of Administration De Bonis Non was then granted to Rai Mati on 11 December 1990. After Rai Mati's death, Letters of Administration over her estate was granted to Kumar on 15 November 2005.

SOME OBSERVATIONS

11. There is a need for caution in assessing evidence on a claim based on an agreement allegedly made by a deceased person. In **Weeks v Hrubala** [2008] NSWSC 162 at [20], Young CJ said that in such cases, the courts would normally look for some corroboration, even though, strictly speaking, corroboration is not necessary¹.
12. In **Plunkett v Bull** [1915] HCA 14; (1915) 19 CLR 544, Isaacs J said:

¹ As Young CJ said:

*In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see **Re Hodson** (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.*

..... and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as *prima facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

WAS THERE AN AGREEMENT BETWEEN THE PLAINTIFF'S LATE MOTHER AND THE 1ST DEFENDANT?

13. I have examined the following documents in detail. These include documents tendered for the plaintiff, for the defendant and for the Director of Lands:

- (i) 21/12/93 – Sale and Purchase Agreement between Rai Mati and Shaheed Ahmed Khan (defendant)
- (ii) 20/01/95 - Copy of a letter dated 20 January 1995 purportedly by Rai Mati to defendant
- (iii) 21/03/95 Letter of 21/03/95 of Jasbir Singh & Associates, Solicitors for defendant seeking consent to commence litigation against Mrs. Rai Mati as executrix trustee of the estate of Lekh Ram pursuant to a purported agreement between Rai Mati and defendant.
- (iv) 11/09/95 Letter dated 11/09/95 by Divisional Surveyor Western (“DSW”) to Jasbir Singh & Associates (“JSA”) re CL 7157 pursuant to the latter’s letter of 21/03/95 advising that consent is refused as “**consent was not obtained for the agreement dated 21.12.93**”.
- (v) 02/11/95 – Letter by Singh & Fatiaki to defendant. Rai Mati is still willing to deal with you for the sale of her 4 acres...at a price of \$50,000. Offer is valid for 7 days.
- (vi) 09/11/95 – Letter by DSW to JSA stating that a portion of land that the administratrix of the estate of Lekh Ram wishes to subdivide and transfer to defendant had been leased to one Warda Raju. Consent cannot be granted until related confusion is sorted out.
- (vii) 11/12/96 – Letter by defendant to DSW. Stating that he had paid a deposit of \$14,000 sometime in 1993 for 4 acres but trying in vain to have it transferred to him by Rai Mati because subdivision not complete and due to error in title.
- (viii) 15/06/01 – Variation of Agreement. For defendant to return 1 acre to vendor in consideration of vendor transferring further 2 acres of land that had been wrongly added to Warda Raju’s lease. Defendant to pay a further \$12,000 to Rai Mati and further \$5,000 for the dwelling house. Defendant agrees he owes a total of \$29,000 and to meet all costs and fees of Lands Department. Defendant to pay initial deposit of \$5,000 and monthly installment of \$200 (notably, Rai Mati purportedly signed this on 06/06/03).
- (ix) 19/06/01 – Agreement between Rai Mati and defendant for sale and purchase of 3 acres. Acknowledges that the defendant had paid \$20,000 and balance of \$16,000 is outstanding and possession already given to and taken by defendant.

- (x) 25/06/01 Letter dated 25/06/01 by Saheed Ahmed Khan to DSW applying for consent .
- (xi) 03 July 2001. Advice by Department of Lands that consent has been granted to Sale & Purchase Agreement over CL 7157 in consideration of \$31,000. There is a minute that appears to be written on 01/08/01 saying that outstanding rental to be collected prior to endorsement of transfer.
 Note: there is another minute of 13 February 20018. Noting that Manoj Kumar (“*plaintiff*”) came to office today with a letter requesting a waiver. He has paid \$5,000 and Accounts to calculate the interest and then he shall pay the balance.
 A latter note dated 11/03/08 suggests that the request for waiver was not recommended.
- (xii) 04/03/02 –Letter from DSW to Babu Singh & Associates – seemingly acknowledging that Rai Mati has failed to sub-divide promptly to transfer 3 acres to defendant and that earlier consent was given on the understanding that she was to subdivide promptly.
- (xiii) 30/07/03 – Letter by Rai Mati to FEA consenting to then transfer of her meters to defendant. “I have now sold the above Lot to Mr. Saheed Ahmed”. Note – the date on the letter was tampered to “30th Jan 2004”.
- (xiv) 06/05/04 – Letter by DSW to Rai Mati to advise that Lot 3 SO4471 was wrongly surveyed and included in Lot 1 ND 5158 and leased to Warda Raju. Both leases now being surrendered and fresh leases will be issued.
- (xv) 27 August 2004 – Letter from DSW to Khan & Associates to advise that (Pt of Lot 1 ND 5158) now Lot 3 SO 4471 is being surrendered from Warda Raju’s lease and included in the lease of the estate of Ram Lal.
- (xvi) 20/06/05 – Transfer. In consideration for the sum of \$30,000. NB. Unusual looking transfer**** Note. The area is 2.6608 ha (6 acres 2 roods 12 perches).
- (xvii) 11/07/05 – Letter from DSW to Rai Mati as administratrix of Ram Lal estate to advise that DSW cannot forward variation and extension for stamping and registration because Rai Mati has not provided 6 true copies of Letters of Administration.
- (xviii) 22/01/08 – File Minute from LD4/10/1462. Records that an inspection of the property was carried out by an Officer from the DSW. Noting that “there is no sign of any cultivation....the area is currently lying idle overgrown with.....except for the few house site..... Shaheed Ahmed has a wooden structure on part of Lot 3 SO 4471. Shaheed uses the house as his workshop (shop fitting)”
- (xix) 01/10/08; 20/03/09 & 08/06/09 – Letters by Sunil Kumar to Director of Lands stating the following:
- Defendant and Rai Mati had sale and purchase agreement 19/06/01
 - Consent granted 03 July 2001 and endorsed on 02/08/01
 - Rai Mati has since passed
- Defendant is aware that Department is in the process of issuing a lease to Manoj Kumar.
- (xx) 17/01/13 – Letter by Department of Lands to Manoj Kumar. Letter states that

after inspection on 09/01/13, it was found that the land has been used as a dumping ground for scrap metal. This is an Agricultural lease therefore it should be cultivated as such. Comply or you will be served with a "Notice to Breach" of Lease Conditions.

- (xxi) 06/02/13 – Letter by Lands. Notably, it states that the land is leased to Manoj Kumar for 30 years effective from 01/01/97.
14. Notably, a bank statement (Account No. 460951640) of Rai Mati shows that the balance standing in that account has never exceeded \$100-00 (one hundred dollars) at any time
15. The following copies of receipts were tendered by the defendant:
- (i) 21/12/93 – Receipt No.013. Received from Shaheed Ahmed \$3,000-00 being for deposit for purchase of 2 acres. Signed by Rai Mati
 - (ii) 21/03/94 – Receipt No. 019. Received from Shaheed Ahmed \$2,000-00 being for deposit for purchase of 2 acres including 4 lots approved for sub-division. Signed by Rai Mati
 - (iii) 07/04/94 – Receipt No. 021. Received from Shaheed Ahmed \$5,000-00 being for deposit for purchase of 2 acres. Signed by Rai Mati
 - (iv) 25/01/94 – Receipt No. 015. Received from Shaheed Ahmed \$1,500-00 being for deposit for purchase of 2 acres. Signed by Rai Mati
 - (v) 21/06/01 – Fiji Revenue Receipt No. 301888. Consent Fees by Shaheed Ahmed. \$33-00
 - (vi) 29/12/04 – Fiji Revenue Receipt No. 164181. By Rai Mati. \$95-63 Subdivision Fee
 - (vii) 29/12/04 – Fiji Revenue Receipt No. 84207. By Saheed Ahmed \$184-00 Khan. Rezoning Fee. **NOTE:** The Station that issued this receipt is "Nadi Hosp".
 - (viii) 29/12/04 – Fiji Revenue Receipt No. 84208. By Saheed Ahmed \$100-00 Khan. Sub division Fee. **NOTE:** The Station that issued this receipt is "Nadi Hosp".
 - (ix) 09/06/05 – Fiji Revenue Receipt No. 326664. By Rai Mati. \$293-01 Stamp Duty & Various Fees.
 - (x) 22/07/05 – Delivery Docket No. 7713 of S.Khan's Furniture Industries - being for various itemized land payments for past payments made on 28/06; 6/7; 22/7 and future payments made 2/8; 23/8 and 2/9. \$260-00
 - (xi) 04/08/05 – Fiji Revenue Receipt No. 486791. By Shiu Raji. \$33.75 Consent to Transfer.

16. There is evidence that the defendant and the late Rai Mati did enter into a sale and purchase agreement on 21 December 1993. Consent was not granted to this arrangement for one reason or another as noted in a letter dated 11 September 1995 by the DSW. There is evidence of two separate agreements in June 2001. One was made on 15 June 2001. The other was made on 19 June 2001. The consent granted on 03 July 2001 appears to be conditional upon payment of outstanding rental. There was nothing in the agreement to suggest that Khan had agreed by contract to assume the obligation of settling the outstanding rental. That obligation of course would fall on the lessee, Rai Mati. However, she never ever settled the outstanding rental.

Nadi Hospital?

17. There is no clear evidence that the consideration which the parties had agreed to was ever paid in full at any time by Khan. I note that Khan produced two Fiji Revenue Receipts on 29 December 2004. These were issued by the **Nadi Hospital**. One of these was issued purportedly on account of some "**Rezoning fee**". The other was issued for some "**Sub-division fee**". Without any explanation as to why or how the Nadi Hospital would be receiving and receipting payments for rezoning and subdivision, I find it hard to accept these receipts as evidence of anything relevant in this case. This can only go against Khan's credibility.
18. The defendant, it seems, had a solicitor at all material times. So did the late Rai Mati. Ideally, of course, such payments should be made through the lawyers who would properly account for and receipt the payments.

Delivery Docket?

19. Also, some of the payments were recorded in a delivery docket dated 22 July 2005. The entries on the docket include payments made a month earlier and also payments made months later. Again, I do not accept this evidence. Again, this goes against the credibility of Khan.
20. I find that there is not enough clear evidence before me that the consideration had been paid by Khan.

IS THE AGREEMENT ENFORCEABLE AGAINST THE PLAINTIFF?

21. Whatever agreement there was between Khan and Rai Mati, it cannot be enforced against Kumar personally. Of course, it can only be enforced against Rai Mati's estate, of which Khan is the personal representative.
22. Generally, as I have said, a purchaser of land who purchases land under a binding and unconditional contract of sale, has an equitable interest in the land. The extent of that equitable interest is commensurate with the purchaser's ability to obtain specific performance. Of course, a legal estate will later vest in the purchaser upon payment in full of the purchase money and execution of a formal transfer document. The view is that a purchaser's equitable interest is commensurate only with his ability to obtain specific performance.
23. In Legione v Hateley [1983] HCA 11; (1993) 152 CLR 406 for example, Mason and Dean JJ in their joint judgment stated at page 446 said:

"In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, at p.349).

24. In Stern v McArthur [1998] HCA 51; (1988) 165 CLR 489, Deane and Dawson JJ in their joint judgment stated at para 2:

"As Dean J pointed out in Kern Corporation v Walter Reid Trading Pty Ltd [1987] HCA 20; (1987) 163 CLR 164, at p.191, it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser's interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction, as well as specific performance in the strict sense."

25. Similarly, the New Zealand position is explained in *Sale of Land* (2000) 2nd ed by DW McMorland at page 299:

"In broad terms, the passing of the equitable estate to the purchaser depends upon the availability, at least at a theoretical level and without consideration of any defence which might be available to the vendor, of specific performance, or possibly of an injunction. There must be a contract, either directly for the sale of the land or for an option to purchase, such that the purchaser can take all of the necessary steps to obtain specific performance of that contract, the vendor cannot legally prevent those steps being taken, and the circumstances are such that, if the purchaser did take those steps, specific performance would not be unavailable for jurisdictional as opposed to discretionary reasons. It is the ultimate ability in equity to compel the vendor to transfer the estate or interest which gives the purchaser the equitable estate or interest."

26. Of course, as I have said, specific performance can only be obtained if a vendor and a purchaser have entered into a binding contract. Usually, one of the many factors to be considered is whether damages are inadequate in lieu of specific performance. If not, then the court may order specific performance. Part-performance is usually also relevant.
27. In **Re CM Group Pty Ltd's Caveat** [1986] 1 Qd R 381, it was held that property did not pass in equity until the required municipal council approval was obtained. In **Brown v Heffer** (1967) 110 CLR 344, an interest in equity did not pass because the required consent of the Minister had not been obtained.
28. There is evidence that the Director of Lands, on 03 July 2001, consented to an agreement. It is not clear to me whether that consent was granted in relation to the 15 June 2001 Agreement or to the 19 June 2001 Agreement. Either way, the Director had reserved consent to the transfer subject to settlement of all rental arrears.
29. The rental arrears was never ever settled by Kumar nor the late Rai Mati during her lifetime.
30. According to Kumar's evidence, after Rai Mati died, he went to the Department of Lands in Lautoka to inquire about the lease. It was there that he was told that

lease 7175 had expired on 31 December 1995. He was also told that, if he was interested in having a lease issued to him personally, he would have to pay off all the arrears of lease 7175 and also to obtain Letters of Administration.

31. Upon that advice, Kumar went and applied for letters of administration. This was granted to him on 15 November 2005. (Letters of Administrative De BONIS NON 44301). He then went to the Department of Lands and made arrangements to settle the rental arrears, which over the years had accumulated to \$12,000. He said it took him a year to settle the debt. He tendered the bundle of receipts from the Department of Lands which are marked PEX3.
32. A lease was then granted to him on 23 June 2009 at 12.56pm (marked PEX2). This new lease that was granted to him was registered as Crown Lease No. 117744 on 23 June 2009.
33. Notably, C.L 17744 and C.L 7175 actually cover the same area of land.
34. C.L 7175, as I have said was originally issued to the plaintiff's late step grandfather, then passed down to his step father, and then to his mother. It expired in 1996.
35. C.L 17744 was granted to the plaintiff in 1999. This was three years or so after the original C.L 7175 had expired.
36. The agreement which Khan relies on to assert his equitable interest, pertained to the expired CL 7175.
37. I accept Kumar's evidence that the only reason why he obtained the probate was so he could clear off the estate's rental arrears on the old C.L 7175 lease. That was what the Lands Department required, obviously, so the payment could be properly accounted for.
38. I accept the evidence also that the new lease CL 17744 is issued to Kumar personally rather than in his capacity as administrator of Rai Mati's estate. The evidence is that the arrears that had accumulated over the old lease from the time it was first issued to the time it expired. That was the evidence of Kumar in chief

which I accept. There was no compelling reason for the Department of Lands to renew an expired lease to an estate which had breached that essential condition pertaining to the payment of the annual rental.

39. Also, I take into account that Kumar, at first, had gone to the Lands Department personally to inquire about the lease. The evidence suggests that he was interested in a new lease to him personally. The evidence is also strong that the Lands Department had issued him a lease on that basis, as indicated by letters written by the Department in 2013.
40. Kumar's evidence is that the Lands Department is not happy about the land being used as scrap metal yard. The Department actually issued him a Notice to clear the land off scrap metal.

COMMENTS

41. In my view, Khan could have protected his interest by seeking an interim injunction against the Director of Lands from issuing a new lease to Manoj personally.
42. Once that new lease is issued to Kumar personally, and registered, the land becomes vested in his name personally and not in his capacity as administrator and trustee of the estate.
43. I also observe that Khan's use of the land as a scrap metal yard and as a timber yard is contrary to the lease classification of the land, for both the old and the new lease. It is a deliberate flouting of the Director of Lands' condition about the use permissible for this land.
44. A photograph was tendered in evidence which shows the extent to which Khan had used the land as a "scrap metal yard". The fact that he did all that over the years in total disregard of the Director of Land's stipulations, gives one an uneasy feeling about his standing on any moral scale. Accordingly, it is hard for this court to find, in the circumstances, any solid ground to extend any equity to him. After all, he who seeks equity must come with clean hands.

45. The only remedy for Khan is to seek damages against the estate of Rai Mati. Even then, he still faces the same evidential and other hurdles which I have highlighted.

CONCLUSION

46. I find in favour of the Plaintiff and accordingly, I order that the defendant vacate the land in question within one month from the date of service to him of the sealed Order.
47. As costs follow the event, I order costs in favour of the plaintiff which I summarily assess at \$800 -00 (eight dollars only).



A handwritten signature in blue ink, consisting of stylized, overlapping letters.

Anare Tuilevuka
JUDGE
Lautoka