

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 367 of 2017

**BETWEEN:** JUDITH JOY BISHELL of 755a Remuera Road, Remuera Auckland, New Zealand, Retired.

PLAINTIFF

**AND:** SHAMSHAD ALI of Lot 41 Naiyala Subdivision, Nausori, Fiji, Businesswoman.

DEFENDANT

**BEFORE:** Justice Vishwa Datt Sharma

**COUNSEL:** Ms. P. L. Narayan (with Ms. J. Rabuka for Deven P Sharma) - for the Plaintiff  
Ms. S. Kant - for the Defendant

**DATE OF RULING:** 16<sup>th</sup> March, 2019 @ 9.30 am

RULING

*[Summons for Trial of preliminary issues on the pleadings pursuant to Order 33 Rule 3  
of the High Court Rules 1988 and the inherent jurisdiction of this High Court]*

INTRODUCTION

- [1] Before court is the Plaintiff's Summons and Affidavit in Support seeking for an order that the following questions or issues raised by the pleadings in this action be tried as preliminary issues before the trial of the other questions or issues in this action and that until the determination of the preliminary issues all further proceedings in this action be stayed and that such further directions be given for the trial of the preliminary issues as may be necessary.

The above mentioned preliminary questions or issues are the following:

- (a) Did Nishar and the Plaintiff jointly own the property comprised in NL 13788 after their purchase in 1982 until Nishar's death?
  - (b) Did the sole ownership of the property vest in the property under the law of survivorship upon Nishar Ali's death until she disposed the property?
- [2] This application is made pursuant to Order 33 Rule 3 of the High Court Rules 1988 and the inherent jurisdiction of the Honourable Court.
- [3] The Plaintiff's application was opposed by the Defendant who accordingly filed an Affidavit in Opposition.

THE LAW

- [4] Order 33 Rule 3 of the High Court Rules 1988 provides as follows:

"The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

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BACKGROUND FACTS

- [5] In 1970 the Plaintiff married Nishar Ali (now deceased).
- [6] Sometimes in 1982, Nishar Ali and the Plaintiff as joint owners purchased a property comprised in NL 13788 being Lot 13 on Tamavua sub-division situated at 13 Matanikutu, Tamavua. Certified copy of NL 13788 and the certified copy of the Transfer No. 192162 shows the transfer of Nishar's name spelt as Nisar.
- [7] Nishar Ali died on 26<sup>th</sup> April, 2011.
- [8] On 27<sup>th</sup> November 2014, the record of death of Nishar Ali was registered on the property. The Plaintiff sold the property to Classic Paint and Hardware Supplies Limited on 2<sup>nd</sup> August 2016.
- [9] The Defendant in her Statement of Defence filed on 24<sup>th</sup> June 2018 is disputing the Law of survivorship on joint ownership.
- [10] The Plaintiff in her Affidavit in Support referred to her claim and in particular paragraphs 4 and 11 respectively as hereunder:
- (i) Paragraph 4 of my claim where I say that I and Nishar were joint owners of the property. In her defence, the Defendant at paragraph 4 has stated that she has no idea what kind of lessee agreement there was. The Annexures A and B clearly state that the property was held in joint tenancy; and
  - (ii) Paragraph 11 of my claim I say that upon Nishar's 'death on 26h April, 2011, I became the sole proprietor and/or lessee of the property. I have been advised by my solicitors that upon the death of one joint owner of any property, the survivor of the joint tenant becomes the owner of the said property. In her defence at paragraph 11 the Defendant denies and refers to a Deed of Family Arrangement.

DETERMINATION

[11] The Plaintiff is asking court that the following questions and/or issues raised by the pleadings in this action be tried as preliminary issues before the trial of the other questions of issues in this action -

The above mentioned preliminary questions or issues are the following:

- (i) Did Nishar and the Plaintiff jointly own the property comprised in NL 13788 after their purchase in 1982 until Nishar's death?
- (ii) Did the sole ownership of the property vest in the property under the law of survivorship upon Nishar Ali's death until she disposed the property?

[12] Further order sought by the Plaintiff's summons is that until the determination of preliminary issues all further proceedings in this action be stayed and that such further directions be given for the trial of the preliminary issues as may be necessary with in indemnity costs.

[13] The substantive action was commenced by way of a Writ of Summons. The Statement of Defence together with a Counterclaim has been filed by the Defendant. Thereafter Reply to Defence and Defence to Counterclaim was filed by the Plaintiff. Subsequently, the Defendant's Counterclaim and the application to amend the Counterclaim was struck out by application. The Statement of Defence remained intact. The Affidavit verifying the Plaintiff's and the Defendant's list of Documents were filed. Parties were ready to conduct a pre-trial conference but it failed. Hence, the cause in terms of the pre-trial conference is yet to be undertaken by both parties to this proceedings for the reasons best known by them.

[14] Upon the perusal of the Defendant's Statement of Defence, it can be found that the Defendant pleaded that she was only aware of the *draft Deed of family arrangement* in which their son Richard Nishar Ali was appointed as the Indented Administrator. This particular Deed also mentions that 50% of the deceased's property shall go to Richard and Catherine (Deceased's daughter).

[15] In the Defendant's Affidavit in Opposition at paragraph 12, she states "that as to paragraph 13 of the Plaintiff's Affidavit I understand that Nishar Ali has been registered as the owner of the

property and I do not know why the Plaintiff is being confused in that regard, as registration means everything and Registered Lessee itself is the answer of the deceased's co-ownership with the Plaintiff. And I further say that this particular issue has to be tested and verified with documentary evidence that will take few minutes to be done as the registration of Titles record would be conclusive evidence.

- [16] At the hearing of the Plaintiff's summons, the Plaintiff summoned and called the Deputy Registrar of Titles as a witness to give evidence and tender the respective NL 13788 as exhibit P1 into evidence.

The NL 13788 as per the Memorandum of Lease in question was transferred into the names of Nisar Ali (deceased) and Judith Joy Bishell the Plaintiff herein on 27<sup>th</sup> May 1982 as joint tenants. Subsequently the respective NL 13788 then records the death of Ali Nisar on 27<sup>th</sup> November 2014 at one of the folios.

Finally, on 2<sup>nd</sup> September 2016 the same NL 13788 in question was transferred to Classic Paint & Hardware Supplies Limited.

- [17] According to the Plaintiff, she claims that she and Nishar were joint owners of the said property. She further stated in her Affidavit in Support that upon Nishar's death on 26<sup>th</sup> April 2011, she became the sole proprietor and/or lessee of the property. She has been advised by her solicitors that upon the death of one joint owner of any property, the survivor of the joint tenant becomes the owner of the said property.

- [18] On the other hand, the Defendant in her Statement of Defence at paragraph 4 has stated that she has no idea what kind of Lease Agreement was there. Further, in her Statement of Defence at paragraph 11, the Defendant denies that the survivor of the joint tenant becomes the owner of the said property and that she was only aware of the draft Deed of Family arrangement in which their son Richard Nishar Ali was appointed the intended Administrator and the Deed mentions that 50% of the Deceased's property shall go to Richard and daughter Katherine.

[19] Whatever it may be, and as far as this court is concerned both issues and on preliminary questions:-

- (a) Did Nishar and the Plaintiff jointly own the property comprised in NL 13788 after their purchase in 1982 until Nishar's death?
- (b) Did the sole ownership of the property vest in the property under the law of survivorship upon Nishar Ali's death until she disposed the property?

Have nexus with the pending substantive matter before this court.

[20] They are both substantive triable issues and needs to be determined on merits and evidence at a full hearing rather than on prima facie evidence alone.

[21] The substantive matter [Writ of Summons] is required to complete the cause of action in terms of the High Court Rules 1988. In particular a pre-trial conference to be conducted wherein the issues can be discussed and ironed out and/or the pre-trial minutes to be filed and to let the action be entered for trial before an honourable Judge of the High Court for hearing and determination accordingly.

[22] For the aforesaid rationale, the Plaintiff's Summons seeking for the questions or issues raised by the pleadings in this action to be tried as preliminary issues before the trial of the other questions or issues until the determination of the preliminary issues and that all further proceedings in this action be stayed is hereby accordingly dismissed.

[23] The Plaintiff's Application proceeded to a full hearing in order to determine the outcome as hereinabove. Therefore, in these circumstances, the Defendant is entitled to the costs summarily assessed at \$500 to be paid within the next fourteen (14) days' timeframe.


#### **FINAL ORDERS**

[1] The Plaintiff's Summons for trial of preliminary issues on the Pleadings filed on 4<sup>th</sup> July 2019 is hereby dismissed.

- [2] The Plaintiff to pay the Defendant summarily assessed costs of \$500 within fourteen (14) days' timeframe.
- [3] The substantive matter to complete the pre-trial conference and all other cause of action in terms of the High Court Rules 1988 and to allow the matter to be entered for trial for hearing and determination.
- [4] The preliminary issues to be dealt with within the Pre-Trial Conference.
- [5] Orders accordingly.

Dated at Suva this 16<sup>th</sup> Day of March, 2020



  
Vishwa Datt Sharma  
Judge