

**IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION**

**Civil Action No. HBC 241 of 2019**

**BETWEEN : JITEND PRASAD aka JEETENDRA KUMAR aka JEETENDRA  
KUMAR DOUGLAS of Lot 48, Dilo Street, Nakasi**

**Plaintiff**

**A N D : SUNNY SHENAN KUMAR of Lot 40, Ballart Street, Verata.**

**Defendant**

**Counsel: Plaintiff Mr. Vulakouvaki J  
Defendant Mr. Singh.K**

**Date of Hearing 21, 22 August, 2023**

**Date of Judgment 26. September, 2023**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff had transferred property comprised in Lease No 286251, Lot 48 on DP 7780, (the Property) to Defendant. According to Plaintiff the transfer to Defendant was to obtain a loan from a bank through Defendant as Plaintiff could not obtain a loan. Plaintiff was to pay the loan installments till final settlement of the said loan obtained by Defendant. According to Defendant when the Property was on sale he had approached Plaintiff and offered to purchase it and had also obtained partial finance through a loan from a commercial bank and for this loan the Property was mortgaged. Plaintiff also claims fraud by Defendant for the transfer of the Property.
2. Plaintiff was in need of money to complete a house he had built in another location. For completion of said construction he sought offers for sale of the Property. Defendant had offered the price agreed between the parties. There was no trust created, though parties were known and related. There was no evidence of Plaintiff and or Defendant to declare constructive trust. Plaintiff's evidence is contrary to statement of claim as he had never offered or attempted to pay the loan installments relating to the mortgage of the Property.
3. Defendant had allowed Plaintiff to remain in the property, free of charge, while he was allowed to collect the rentals from tenants from the date of transfer of the Property on 21.12.2017 to June, 2018 when Plaintiff asked to re transfer the Property to him for amount paid. Defendant did not agree to this.

4. Plaintiff had abused this small window of opportunity granted to him by Defendant, and refused to vacate the Property and also stopped collection of rentals from tenants.
5. Plaintiff is granted vacant possession of the property. Plaintiff is also granted lost rentals from the property since June 2018 to September, 2023.

#### **FACTS**

6. Following Facts are admitted at pre trial conference;
  - a. Parties are related to each other as Plaintiff and Defendant's father are siblings.
  - b. The Property in issue situated on Lease No 286251 comprised in Lot 48 on DP7780.
  - c. The Property consist of flats rented out.
  - d. Defendant obtained a loan from commercial bank, to purchase it.
  - e. Defendant collected rentals one and half years from the purchase of it.
  - f. Defendant sought vacant possession in another action which was stayed.
7. Defendant in this action seeking vacant possession and also damages for breach of contract by Plaintiff. He is also seeking rentals since purchase of the Property.
8. Plaintiff admit the transfer of the Property to Defendant but in the amended statement of claim state:
  - a. The Property was to be his principal of abode during his lifetime and his family home.
  - b. Plaintiff and the Defendant had a cordial relationship with each other and the plaintiff treated the defendant as his own son.
  - c. In 2017, the plaintiff wanted to take out a loan from the bank in order to complete construction of another house he was building in Nausori.
  - d. Plaintiff's loan application to the bank was rejected as he did not meet the requirements and was therefore ineligible as a borrower.
  - e. Plaintiff sought the assistance from Defendant in order to obtain the funds to complete a house he was building in Nausori.
  - f. Defendant agreed to assist the Plaintiff by obtaining a loan for purchase of the Property for \$95,000.00 and this Plaintiff to pay for the settlement of the loan through payment of mortgage installments deducted from Defendant's account with the mortgagee.
  - g. Plaintiff signed transfer documents to transfer the Property to Defendant.
  - h. Parties had mutually agreed that the Defendant will hold the property in trust for Plaintiff until such time Plaintiff paid off the loan of \$95,000.00 with Westpac Bank.

- i. In breach of that trust and bad faith, the defendant transferred the property to himself and filed an application for vacant possession against the plaintiff and his family under HBC 0029/19.
  - j. Defendant was under a fiduciary obligation to keep the house in trust until the plaintiff paid off the mortgage.
  - k. There is a fiduciary duty on him to act in the best interest of the plaintiff.
  - l. Unknown to the Plaintiff the Defendant had a fraudulent intention to keep the Property for good.
  - m. Defendant's fraudulent act he devised a ploy and bought a property worth of \$280,000.00 for only \$95,000.00.
9. Defendant had denied any trust between them in the purchase of the Property through mortgage of the same to a commercial bank. He had allowed the Plaintiff to remain on the Property while he collected rentals from tenants till June, 2018.
  10. After about one and half years from sale Plaintiff wanted to repay the purchase price and obtain the Property and Defendant did not agree to transfer it to Plaintiff.
  11. Accordingly, Plaintiff had stopped Defendant from collecting rentals from the Property since June, 2018.
  12. Defendant had also sought summary action to evict which was stayed by Master.
  13. Defendant is counterclaiming on the basis of last registered title holder to the Property and also seeking rentals collected by Plaintiff since 2017, and also general damages for breach of agreement and also legal cost

#### ANALYSIS

14. Plaintiff's statement of claim had particularized particulars of breach as follows,
  - i. Breach of constructive trust by the defendant in converting the property for his own use.
  - ii. Breach of fiduciary duty by the defendant as a trustee of the plaintiff.
  - iii. Breach of duty by the defendant in how he held himself out as a reliable and trustworthy person.
  - iv. That the defendant took advantage of the simple mindedness of the plaintiff to unjustly enrich himself.

- v. That because of the defendant's conduct the plaintiff purportedly sold his house for \$95,000.00 when it was in fact worth over \$280,000.00.
  - vi. Misleading and/or deceptive conduct and acts in transferring the property to the defendant with no intention of returning the same.
  - vii. Fraudulently depriving the plaintiff of his property.
15. Plaintiff and his daughter gave evidence for Plaintiff. Plaintiff's evidence was that he never sold the Property to Defendant and he was unaware of the contents he signed. This cannot be accepted as truth. Plaintiff had entered in to transfers and mortgages earlier. He had after this dealing sold another premises. In such a context he cannot be ignorant as he claims on the analysis of evidence.
  16. Plaintiff's daughter could not give evidence regarding the transfer of the Property. She was not involved in that transfer and she was not told about how he got money to complete another house at different location. She married and moved to another residence by 2017 and did not know the dealings relating to the Property.
  17. A taxi driver who gave evidence for Defence told that Plaintiff informed him that he sold the Property to Defendant, for \$95,000. This shows Plaintiff had told third parties that he already sold the Property. The correctness of the statement is not proved but this evidence proves that Plaintiff had uttered such a thing.
  18. The solicitors who executed sale and purchase agreement and also solicitor who executed transfer of the Property gave evidence and confirmed the execution of said documents which are not disputed. They both denied having any knowledge about a trust between the parties. In the light of such evidence, if there was an agreement between the parties it was a secret agreement.
  19. So, if there was a trust it needs to be deduced from the evidence of Plaintiff. Plaintiff in his evidence stated that he was in need of money to complete another construction hence he transferred the Property to Defendant to obtain a bank loan. If so why he needed \$95,000 was not clear. It is clear that he did not need \$95,000 to complete the construction.
  20. Plaintiff's position cannot be accepted if so why he should tell a taxi driver that he had sold the property to Defendant for \$95,000.
  21. Plaintiff admitted that about one and half years after transfer of the Property to Defendant he had allowed Defendant to collect the rentals from tenants.
  22. According to Defendant after transfer of the Property to him on 21.12.2017, Plaintiff had taken him to the Property and introduced to tenants as the new landlord though he remained in the Property. He had asked tenants to pay the rents to Defendant. This can be accepted as Plaintiff in his evidence admitted Defendant collecting rents after transfer of the Property. If the Property was to hold in trust there was no need to ask tenants to pay rents to Defendants.
  23. In the statement of claim at paragraph 17 Plaintiff stated that he had agreed to pay the monthly installments of loan obtained by Defendant to purchase the property. This was

not proved at trial and Plaintiff did not produce evidence to show such payments were made or even attempted.

24. This cannot be accepted as loan was only for \$70,000 and another \$25,000 was provided by Defendant, so how was this to be paid not explained by Plaintiff. This shows that Plaintiff's statement of claim was frivolous and used to remain in possession of the Property to frustrate the Defendant.
25. Plaintiff was allowed to stay in the Property till completion of the construction for which he had utilized the money paid by Defendant through the loan obtained from a Bank and also funds he had obtained privately.
26. Defendant had obtained a loan of \$70,000 from a commercial bank to be paid in four years. The loan was provided on 21.11.2017 and the transfer of the Property to Defendant was on the same day. The Property was also mortgaged.
27. According to statement of claim Plaintiff had agreed to reimburse the loan installments deducted by the mortgagee, but no such evidence was given when Plaintiff gave evidence. He was unable to produce such payments. Plaintiff had not paid any installments deducted by the mortgagee.
28. Plaintiff was not aware of the instalments paid by Defendants as there was nothing to show such amounts were revealed or requested by Plaintiff.
29. Defendant admitted that he allowed Plaintiff to remain in possession, till completion of the premises he was building. This can be accepted on test of probability considering close relationship between the parties. This humanitarian gesture was abused by Plaintiff. Plaintiff had not only refused to vacate the Property but instituted this action to delay eviction. This shows his reluctance to vacate the Property, without a reasonable cause.
30. In terms of Sale and Purchase Agreement vacant possession of the Property was to be given on the date of settlement which was 21.12.2017 in terms of Clause 4 and 6 of the said Agreement. This was not done as Plaintiff had no place to live at that time.
31. Despite the right to obtain vacant possession Defendant had allowed Plaintiff to remain possession for him to complete the construction of the alternate premises which remained incomplete state due to lack of funds.
32. Plaintiff's daughter who gave evidence did not know about the sale of the Property as she had moved to another residence after marriage and she was not aware of any arrangement with Defendant.
33. Plaintiff's evidence at hearing on balance of probability failed to prove a trust regarding the Property. Defendant was able to prove that he purchased it through a bank loan of \$70,000 and private fund totaling to \$95,000.
34. According to valuation marked D2 the market value of the Property was \$60,000. One main reason Plaintiff stated in the statement of claim that the sale of the Property for \$95,000 was a trust as it was worth more than \$280,000, which was more than four times of the market value at that time. This again was not proved.

35. Defendant stated that mortgagee Bank was reluctant to provide the loan initially but when he provided private equity for the purchase it agreed to provide the loan for the purchase of the Property.
36. From the analysis and behavior of the Plaintiff, he is attempting to delay inevitable eviction, seeking various grounds for equitable relief.
37. Plaintiff had failed to prove that the transfer of the Property to Defendant was a trust. Plaintiff had abused the small window of opportunity to remain in possession of the Property till completion of the house which could not complete due to lack of funds. Plaintiff had sold the Property to Defendant to obtain funds for the said purpose. In such a circumstance Defendant had allowed Plaintiff to remain in possession, till completion of the said residence.
38. Plaintiff had completed the construction that was stalled due to lack of funds at that time he sold the Property to Defendant. Instead of moving to newly completed residence, Plaintiff had sold the said premises and did not vacate the Property but want to purchase it for the same price he sold.
39. Defendant did not agree to re-transfer the Property for the same price after nearly about one and half years from the sale. Till then Plaintiff had allowed Defendant to collect the rentals from the Property while he was in possession of one flat.
40. From June, 2018 after Defendant refused to transfer the Property for \$95,000 Plaintiff had stopped Defendant from collecting rentals through fear of violence.
41. Analysis of evidence prove that Plaintiff had sold the Property to Defendant for \$95,000 and there was no fraud committed as Plaintiff as well as Defendant were aware of the transactions they performed and the sale was above market value estimated by valuer.
42. Sections 39, 40 and 41 of Land Transfer Act 1972, contain the word 'fraud', yet there is no definition of fraud in the said Act. In *Stuart v Kindston* (1923)32 CLR 309 at 359 Starke J stated  
'No definition of fraud can be attempted, so various are its forms and methods'.
43. The 'fraud' under Land Transfer Act 1972, is different from common law concept and it is not confined to deceit or fraudulent misrepresentation (see *Latec Investment Ltd v Hotel Terrigal Pty Ltd* [1965] HCA 17; (1965) 113 CLR 265 at 273 per Kitto J). So, it has a wider meaning than the common law definition, but narrower than equitable fraud. (see Hinde McMorland & Sim Land Law in New Zealand/Commentary/Chapter 9 Title by Registration/3 THE LIMITS OF INDEFEASIBILITY/(2) EXCEPTIONS MADE BY THE LAND TRANSFER ACT ITSELF: I FRAUD 9.018 The nature of Fraud).
44. So, claim for equity needs to be separated from claim for fraud, but suffice to state that Plaintiff had failed to prove the claim on constructive trust and also on fraud.

### Counter Claim

45. Plaintiff as the last registered proprietor is entitled to possession of the Property with immediate effect. He was allowed to collect rentals till June, 2018 and he allowed Plaintiff to remain in one flat without a charge. Sale and purchase agreement allows immediate vacant possession of the Property. Plaintiff and Defendant by mutual consent allowed Plaintiff to remain in possession while Defendant collected rentals from other tenants. This had stopped from June, 2018.
46. Accordingly Plaintiff had collected rentals since June, 2018. According to Plaintiff there is only one tenant and rental is about \$500 p.m.
47. Considering Plaintiff's evidence rental value of the Property is more than \$500 pm. Plaintiff was served notice to vacate on 13.7.2018.
48. Accordingly Defendant is entitled to lost income from the Property at the rate of \$500 pm from July, 2018 to date of September, 2023.
49. Plaintiff in his evidence stated that he had paid his solicitor a substantial amount of money for this action, and the intention of the Plaintiff was to avoid the trial and remain in possession when he had no reasonable cause of action on fraud and or equity.
50. Considering the circumstances cost of this action this is a fit and proper case to award indemnity cost. Defendant in his evidence stated that he paid his lawyer \$15,000 for this action. This was not challenged. Defendant had asked the same amount as cost in the statement of claim. Plaintiff in his evidence stated that he had paid his solicitors more than twice this amount. So I award a cost of \$15,000 on indemnity basis in favor of Plaintiff.

### **CONCLUSION**

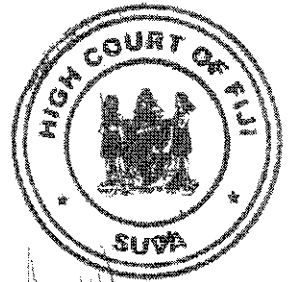
Plaintiff's claims on fraud as well as equity fails. Plaintiff had transferred the Property to Defendant for \$95,000 when its market value was about \$60,000 on the valuation. This had resulted even the bank refusing to provide a loan for entire \$95,000. So the allegation contained in statement of claim that the Property was worth \$280,000 was without any evidence to support. Similarly by subsequent conduct and documents executed by Plaintiff there was no evidence of any trust to hold the Property by Defendant. It was the Plaintiff who had changed his mind and wanted to reverse the transfer after one and half years. Plaintiff had prevented Defendant collecting rents since June, 2018. Accordingly the Plaintiff's statement of claim is struck off.

Defendant had proved its counter claim for vacant possession and also for damages for lost rentals from July, 2018 five years and two months (62months at the rate of \$500pm) for \$31,000

**FINAL ORDERS**

- a. Statement of claim is struck off.
- b. Defendant is granted vacant possession of the Lease No 286251 described as Lot 48 on DP7780.
- c. Damages from loss of rental assessed at \$31,000 to be paid by Plaintiff.
- d. Cost of this action on indemnity basis assessed at \$15,000.

Dated at Suva this 26<sup>th</sup> day of September, 2023.



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Justice Deepthi Amaratinga  
High Court, Suva