

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

Civil Action No. HBC 133 OF 2013

**BETWEEN :** **VIVEKA NAND** of Lautoka Fiji but presently of United States of America, Contractor.

**PLAINTIFF**

**A N D :** **BHASKARA NAND AND VISHNU NAND** both of Saweni, Lautoka, Shopkeeper and Stock Clerk respectively.

**DEFENDANTS**

**Counsel** : Mr W Pillay for plaintiff  
Mr E Moapa for the defendants

**Date of Hearing** : 22 September 2015

**Date of Judgment** : 25 January 2016

**J U D G M E N T**

**Introduction**

[1] Plaintiff's action against the defendants arises out of a sale and purchase agreement dated 11 August 2007 executed between the parties. Through writ of summons filed in July 2013 the plaintiff claiming specific performance of the sale and purchase agreement. He also claims injunctive orders against the defendants not to interfere, transfer, assign the property comprised in Certificate of Title no. 18704 ("the property"), and an order for account under tenancy agreement dated 11 August 2007.

- [2] Defendants claim dismissal of the action on the ground that the plaintiff failed to pay the defendants the purchase price of \$32,000.00 within a year and to take over the bank debts thereafter.

**Facts of the case**

- [3] Facts of the case are gleamed in the pleadings and may be summarised as follows.
- [4] Bhaskara Nand and Vishnu Nand (the first and second defendant respectively) are the registered proprietors of a land by virtue of Certificate of Title No. 18704 (hereinafter called "property"). In August 2007, Vivekanand (the Plaintiff) as Purchaser and the Defendants as Vendors executed a Sale and Purchase Agreement for the sale and purchase of the land (hereinafter referred to as "the Agreement") for the consideration as stated therein. The plaintiff and the defendants are bothers.
- [5] According to the plaintiff, the Defendants owed him considerable monies as he (the Plaintiff) had provided funds for purchase of the property which had a store and which was bought from one Ms Sangeeta Maharaj. He also paid US\$13,000.00 for payment of business, and purchased other amenities. In return the Defendants were to run the shop on the property and pay the Plaintiff half the profits after payment of the monthly bank repayment. The property was registered in the name of the Defendants. Prior to the sale and purchase agreement the Defendants had not paid the Plaintiff his share of the profits and had acknowledged a debt to the Plaintiff of \$62,500.00 by virtue of Acknowledgement of Debt dated 13<sup>th</sup> February 2006. The acknowledgement was before a Solicitor. The Acknowledgement of Debt states:-



- “1. The Debtors will pay the said Creditor a sum of \$32,500.00 (thirty two thousand five hundred dollars) by raising loan from Colonial National Bank.*
- 2. The Debtors will pay the Creditor the balance sum of \$30,000.00 (thirty thousand dollars) within 6 months with an interest of 5%. If the Debtors fail to pay the said sum of \$30,000.00 (thirty thousand dollars) within 6 months then the Creditor further allows them to pay the said sum of \$30,000.00 within 3 years with an interest 10%.”*

[6] In return for the Plaintiff giving up all other claims and taking over the bank debt to Colonial National Bank owed by the Defendants which is secured by a mortgage over the property which approximately \$80,000.00 the Defendants were to transfer the property to the Plaintiff.

[7] Pursuant to the sale and purchase agreement the day of settlement was to be within a year from the date of execution of the agreement which expired on 11 August 2008, but the property was not transferred to the Plaintiff.

[8] The defendants have different story. They say that, under the sale and purchase agreement (clause 4.1 (a)) the defendants were to pay the plaintiff a sum of \$32,000 within a year. In fact the condition was that the plaintiff purchases the property in the sum of \$32,000 within a year plus he takes over all bank debts owed by the defendants upon the payment of the purchase price (clause 25 – special terms). According to them, the plaintiff failed to pay the purchase price of \$32,000.00 within a year and to take over the bank debts thereafter.

#### **Agreed facts**

[9] The following matters were agreed between the plaintiff and the defendants by their solicitors at a Pre-Trial Conference held on 1 September 2014.

- 1. The Defendants are the registered proprietors of Certificate of Title No. 10704 [sic] containing one rood one perch and on tenth (1/10) of a perch.*



2. This was an acknowledgement of debt dated 13<sup>th</sup> February 2006 before a Nadi Solicitor Mr Babu Indrashekar Singh which stated as follows:-

- “1. The Debtors will pay the said Creditor a sum of \$32,500.00 (thirty two thousand five hundred dollars) by raising loan from Colonial National Bank.
2. The Debtors will pay the Creditor the balance sum of \$30,000.00 (thirty thousand dollars) within 6 months with an interest of 5%. If the Debtors fail to pay the said sum of \$30,000.00 (thirty thousand dollars) within 6 months then the Creditor further allows them to pay the said sum of \$30,000.00 within 3 years with an interest 10%.”
3. The Plaintiff was the Creditor and the Defendant was the Debtor in the Acknowledgement for the sale and purchase of Certificate of Title No. 10704 [sic].
4. On the 11<sup>th</sup> August 2007 the Plaintiff and the Defendants signed an Agreement for the sale and purchase of Certificate of Title No. 10704.[sic]
5. Pursuant to the sale and purchase agreement the date of settlement was to be within one year from the date of execution of the agreement which expired on the 11<sup>th</sup> day of August 2008.
6. The Defendants did not transfer Certificate of Tile No. 10704 [sic] to the Plaintiff by the 11<sup>th</sup> day of August 2008. Pursuant to the consideration stated therein.
7. There was a tenant on the subject land and the Plaintiff was to buy the stock and chattels from the tenant and operate the shop himself or through any person appointment by him once the agreement expired.
8. There was a liquor license on the shop which was to be transferred to the Plaintiff once the tenancy expired pursuant to the Agreement.
9. The Plaintiff wrote to the Defendants’ lawyers Babu Singh & Associates appointing a settlement for the 25<sup>th</sup> of June 2013.
10. The Defendants have refused to settle.

#### **Agreed documents**

[10] The following documents were also agreed between the plaintiff and the defendants by their solicitors at the Pre-Trial Conference held on 1 September 2014.



1. *Copy of Certificate of Title No. 18704.*
2. *Copy of Acknowledgement of debt dated 13<sup>th</sup> February 2006 by the Defendants to the Plaintiff.*
3. *Sale and Purchase Agreement between the Defendants and the Plaintiff dated 11<sup>th</sup> August 2007.*
4. *Copy of letter dated 14<sup>th</sup> June 2013 from Mishra Prakash & Associates to the Defendants.*
5. *Copy of letter dated 17<sup>th</sup> June 2013 from Mishra Prakash & Associates to Babu Singh & Associates.*

**Agreed issues**

[11] The issues that are to be decided by court as agreed at PTC are that:

1. Whether the Defendants owed the Plaintiff \$32,500.00 when the agreement was signed by the parties before Babu Singh & Associates.
2. Whether the Defendants owed any further monies to the Plaintiff. Whether the Plaintiff had provided any funds when the land was purchased and registered in the name of the defendants.
3. Whether the Plaintiff had provided any funds when the land was purchased and registered in the name of the Defendants.
4. Whether the Plaintiff also paid US\$13,000.00 and for payment of business and purchase of other amenities.
5. Whether the Defendants were to run the shop on the said land and pay the Plaintiff half the profits after payment of the monthly bank repayment after purchase went throw.
6. Whether prior to the sale and purchase agreement the Defendants had not paid the Plaintiff his share of the profits and had acknowledged a debt to the Plaintiff of \$62,500.00 by virtue of Acknowledgement dated 13<sup>th</sup> February 2006.
7. Whether the Defendants have after agreeing to transfer the property to the Plaintiff by the 11<sup>th</sup> of August, 2008 continued to make profits from the grocery and liquor shop and quantum thereof.

8. Whether the Plaintiff is now entitled to full share of profits from the 11<sup>th</sup> August 2008 from the Shop.
9. Whether there has been part payment of \$32,500.00 by the Plaintiff for the property.
10. Whether in return for the land the Plaintiff giving up all other claims against the Defendants and whether he had agreed to take over the bank debt to Colonial National bank owed by the Defendants which was secured by a mortgage over Certificate of Title No. 10704 [sic] which approximated \$80,000.00 at the time the Defendants were to transfer Certificate of Title No. 10704 [sic] to the Plaintiff.
11. Whether the Plaintiff has been ready to pay stamp duty and other fees and whether he has come back to Fiji at least twice to take possession.
12. Whether the Defendants have flatly refused to transfer the land, liquor license and the shop and/or refused to pay money owing to him.
13. The Defendants are taking the profit from the grocery and liquor shop and are converting the same and applied it for their own uses and purposes.
14. Where there has been breach of contract by the Defendants and whether the Defendants are unjustly enriching themselves by taking the profits and/or the rental of the shop which the plaintiff is entitled to.
15. Whether at the time the sale and purchase agreement was signed the Defendants had rented the premises to Keshwa Enterprises at a rental of \$1,700.00 per month.
16. Whether the Colonial national Bank mortgage over the subject land is being paid by the defendant and quantum of their payments.
17. Whether the Defendants are to pay damages to the Plaintiff and quantum thereof.
18. Whether the Plaintiff is entitled to enforce the agreement.
19. Whether the Defendant has exercised its rights under clause 14.1 (b) of the Sale and Purchase Agreement and forfeited settlement with the Plaintiff.



## **EVIDENCE**

[12] At trial, the plaintiff (PW1) gave sworn evidence while the second name defendant (DW1) on behalf the defendants.

### **Plaintiff's evidence:**

[13] The plaintiff gave sworn evidence. In his evidence he stated that, he moved to the USA for employment in 1986. He came to Fiji in 1998. When he comes he brought some US\$ 7,000.00. He opened a store in Saweni Lautoka. The defendants and other family also helped. The defendants were to run the shop. There was an oral arrangement on sharing of net profit. According to which Vishnu Nand will have 25%, Bhaskra Nand will have 25% and he will have 50%. A liquor license was also obtained from the store account. According to him, Accountant sells him you guys making about \$150,000 yearly profit. He did not receive any share of the profit from the shop. He negotiated from US with Sangeetha Maharaj and bought the property (store property) for \$150,000. He sent \$50,000 direct to Sangeetha and the defendants arranged the balance money. They obtained a bank loan of \$80,000.00 and \$20,000.00 was taken from store account. The property was transferred in the defendants name as he could not come to Fiji due to financial constraints. He did not ask the defendants to show any financial statements of the store.

[14] When giving evidence regarding the sale and purchase agreement stated that, *'I thought I don't have to pay \$32,500 they still owe me from \$62,500.00 they pay me only \$32,000 and they still owe me money with interest.'* He also stated that the defendants did not give a written notice that they are repudiating the sale and purchase agreement.

[15] Under cross examination PW1 stated that, there was a family meeting and talked about operating the shop, but he agreed that there was no

documentation. He has no knowledge of the total profit of the business. When asked whether he paid the \$32, 000 he said, 'Not yet'. He admitted that he did not demand any accounts of the business from the defendants or the accountants.

### **Defendant's evidence**

- [16] DW1 gave evidence on behalf of the defendants. He in his evidence stated that, they bought the property from Sangeetha 3 years after running the business on that property. During that period the plaintiff have to come and stay in their family house. He did not have any meetings with the plaintiff regarding the shop. But, he stated, the plaintiff used to bring US\$2,500.00-US\$3,000.00 (sometimes US\$1,800.00) and give it to Bhaskara Nand to keep in the shop safe and he asked some Fijian dollars same amount (sometimes over). They did not record that amount he used to take Fijian dollars from Bhaskara Nand and stuff and goods to take it home and give it to families when visiting. He also stated that the plaintiff will get all American dollars when he leave for America saying that he will give next time when he come to Fiji. They asked the plaintiff to help them in \$50,000.00 to buy the property from Sangeetha as they got only \$100,000.00. Then the plaintiff had told them to go ahead with the settlement and he will give \$50,000.00 to Sangeetha from there (US) and told them to return the money when he needs it. DW1 was not sure whether he paid \$50,000.00 to Sangeetha.
- [17] He also stated that, problem arose when the plaintiff came to Fiji again after purchase of the property. The plaintiff wanted to put the defendants out of the shop. The defendants refused to do so. There was no partnership agreement between the plaintiff and the defendants.



[18] DW1 told, the acknowledgement of debt for \$62,000.00 was signed in 2006. This is because the plaintiff wanted \$50,000.00 he sent to Sangeetha with interest.

[19] When giving evidence DW1 stated that, after one year of execution of the sale and purchase agreement they went to their lawyer's office (Babe Singh's office) and told the lawyer's clerk Praveen about the settlement. They called the plaintiff who was in America to remind him of the settlement. He then told them, *'I don't have time for you guys and I don't have money for you people.'*

[20] Under cross examination he stated that, he would not have involved in the business if it were a partnership business. There was no agreement to share profit with the plaintiff, not even verbally. They paid \$32,000.00 in terms of acknowledgement of debt and did not pay the balance because the plaintiff did not want that.

## **Analysis**

[21] By writ of summons issued on 23 July 2013 the plaintiff claims against the defendants for an order for specific performance of the sale and purchase agreement dated 11 August 2007 ('the agreement'). The defendants filed statement of defence and state among other thing that the claim is statute barred in terms of section 4 of the Limitation Act, Cap.35. I therefore deal with the issue of statute bar in the first instance.

## **Limitation Act**

[22] The defence that the claim is time barred has been raised in the statement of defence and in the submission filed by the defendants. The issue then to be decided firstly by the court is that whether or not

the claim is statute barred pursuant to section 4 of the Limitation Act. Section 4 (1) so far as material provides:

*'4.-(1) - The following action shall not be brought after the expiration of sim years from the date on which the cause of action accrued, that is to say-*

- (a) Action founded on simple contract or on tort;*
- (b) ...;*
- (c) ...;*
- (d) ...;*

*(2) An action for an account shall not be brought in respect of any matter which arose more than six years...'*

[23] The plaintiff seeks an order that the defendants do give full accounts of all proceeds received under Tenancy Agreement dated 11 August 2007 with Keshwa Enterprises and all income and outgoings since they took over the grocery store and liquor license from Keshwa Enterprises.

[24] In evidence the plaintiff stated that in 1998 he had a verbal agreement with the defendants to share profit of the grocery store. He stated that the defendants mutually agreed to set up a grocery store funded by him (the plaintiff) to assist his two brothers. Obviously, cause of action in relation to the grocery store arose sometime in 1998. By summons filed in July 2013 which is some 15 years after since cause of action arose in respect of the grocery store in 1998, the plaintiff seeks particulars of accounts. Section 4 (2) of the Limitation Act prohibits an action for an account to be brought in respect of any matter which arose more than six years. The plaintiff has brought an action in respect of the grocery of which cause of action arose more than six years in this instance 15 years after cause of action arose. The action in respect of the grocery is brought against section 4 (2) therefore it is statute barred, and must be dismissed accordingly.

### **Specific Performance**



[25] I now turn to the claim for specific performance. The plaintiff claims specific performance of the sale and purchase agreement dated 11 August 2007 and executed between the parties. The agreed price for the purchase for the property was \$32,000.00. According to the agreement the plaintiff as purchaser must pay the purchase price and bank debts as follows:

**(a) A sum of \$32, 000.00 within 1 year from the date of execution of this agreement.**

**(b) The bank debts to Colonial National Bank will be taken over by the purchaser upon payment of \$32,000.00 (See Cl. 5.1).**

[26] It will be noted that the date of settlement was within one (1) year from the date of execution of the agreement. The agreement was executed on 11 August 2007. As purchaser the plaintiff ought to have paid the purchase price and taken over the bank debts on or before 10 August 2008. However, the plaintiff failed to pay the purchase price and take over the bank debts within one year of the execution of the agreement as stipulated by clause 5.1 of the agreement.

[27] There is no evidence before the court that the plaintiff paid the purchase price and took over the bank debts within 1 year from the date of execution of the agreement. In the statement of claim filed on 23 July 2013 (some 6 years after the date of execution of the agreement) the plaintiff under para 17 states that, the plaintiff wrote to the defendants lawyers Babu Singh & Associates appointing a settlement date for the 25<sup>th</sup> of June 2013 on which settlement was to take place at the Office of the Registrar of Titles Office but the defendants have refused to settle.

[28] It is important to note that the plaintiff through his solicitors informs the defendants that he is ready for settlement some 6 years after the agreement was executed. This clearly shows that the plaintiff did not

pay the purchase price and take over the bank debts and settle the agreement within 1 year.

[29] If there were any default by the vendors (defendants), the plaintiff had remedy under clause 15 of the agreement which provides:

*15.1 If the vendor shall make default in the performance or observance of any stipulation or agreement on the vendors' part herein contained and if such default shall continue for the space of fourteen (14) working days from the due date then and in any such case the purchaser without prejudice to any other remedy available to it may at its option exercise all or any of the following remedy namely:*

*(a) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be refunded to the purchaser without reduction.*

*(b) May sue for specific performance of this Agreement.*

*(c) May claim damages in addition to seeking specific performance of this Agreement.*

[30] It is true that the plaintiff is entitled to sue the defendants for specific performance of the contract under the above clause if there were any default on the part of the defendants in complying with their obligations in terms of the contract and if that default continued for the space of 14 days from the due date.

[31] The agreement was to be settled within 1 year from the date of execution. The agreement was executed by the parties on 11 August 2007. Accordingly the due date for settlement of the contract including 14 days grace days was about 28 August 2008. The plaintiff has made his claim for decree for specific performance on 23 July 2013, i.e. some 6 years after the date of execution of the agreement and after 5 years from the due date.



[32] Time was of essence of the agreement (see, Cl.13.1 of the agreement). The date for settlement could have been extended by mutual agreement by the parties because pursuant to Cl.20.1 the agreement shall not be changed or modified in any way subsequent to its execution except in writing signed by the parties.

[33] There has been no evidence in court to show that the date for settlement was extended by the parties in writing signed by them.

[34] In **Narayan v Shah** [1975] FJCA 5, [1975] 21 FLR 139 (28 Nov. 1975) Fiji Court of Appeal held:

*'1. The receipt that constitutes an enforceable contract although there was no reference to a date for possession nor was there any reference to the assignment of the cane contract held by the appellants.*

*2. As the respondent has taken no effective action to enforce the contract for 5 years, he was barred from seeking a decree of specific performance. Accordingly the case would be referred to Supreme Court to assess damage for breach of contract.'*

[35] The above case is relevant to the current case. In this case too, the plaintiff has taken no effective action for 5 years. Plaintiff's evidence fails to prove that he had complied with his obligation under the contract or at least, that he was ready to settle the contract by paying \$32,000.00 and by taking over the bank debts (\$80,000.00) being the purchase price within a year.

[36] The plaintiff seeks a decree of specific performance which is an equitable remedy. In order to obtain any equitable remedy the plaintiff must establish that there has not been undue delay in enforcing his right under the contract as equity will not assist (see, *Narayan v Shah* (supra)). In the matter at hand the plaintiff fails to establish that he has not been undue delay in claiming specific performance. In the circumstances, the plaintiff will be barred from seeking a decree of

specific performance. I would dismiss the plaintiff's claim for specific performance of the agreement accordingly.

## **Damages**

[37] The plaintiff also seeks for an order the defendants do pay damage for breach of contract and unjust enrichment.

[38] As stated earlier, the plaintiff had defaulted in fulfilling his obligation under the contract. He did not pay the purchase price within stipulated time and demand for execution of the property. His evidence does not show that he had paid \$32,000.00 and had taken over the bank debts as required by the agreement within a year. Instead, he maintained that he did not pay the sum of \$32,000.00 to the defendants because they already own him money by virtue of acknowledgement of debts signed by the defendants on 13 February 2006. It states that:

1. *The Debtors will pay the said Creditor a sum of \$32,500.00 (thirty two thousand five hundred dollars) by raising loan from Colonial National Bank.*
2. *The Debtors will pay the Creditor the balance sum of \$30,000.00 (thirty thousand dollars) within 6 months with an interest of 5%. If the Debtors fail to pay the said sum of \$30,000.00 (thirty thousand dollars) within 6 months then the Creditor further allows them to pay the said sum of \$30,000.00 within 3 years with an interest 10%."*

[39] The defendants admit that they signed the acknowledgement of debts but state that the debts stated in the acknowledgement was waived by the plaintiff when they sign the sale and purchase agreement. According to acknowledgement of debts signed on 13 February 2006 the defendants agreed to pay the total sum of \$62,500.00. A sum of \$32,500.00 was to be paid by raising loan from Colonial National Bank. No time frame was set for the payment of \$32,500.00. However,



the balance sum of \$30,000.00 within 6 months with an interest of 5%. The plaintiff never demanded the acknowledged debts from the defendants.

[40] In evidence DW1 stated that the plaintiff told them that he would forego his claim under the acknowledgement of debts when executed the sale and purchase agreement. PW1 denied that he renounced his claim under the debt acknowledgement by the defendants.

[41] The sale and purchase agreement without any ambiguity states that as purchaser the plaintiff must pay a sum of \$32,000.00 as part of the purchase price. If the defendants were indebted to the plaintiff in the sum of \$32,500.00 the clause that the plaintiff must pay \$32,000.00 would not have appeared in the sale and purchase agreement. When they sign the sale and purchase agreement, If the defendants had indebted to the plaintiff in the sum of \$32,500.00 the plaintiff would not have agreed to include a clause in the agreement that he (plaintiff) will pay to the defendants a sum of \$32,000.00. I therefore reject PW1's evidence that he did not pay \$32,000.00 being part of the purchase price as the defendants had to pay him that sum to him by virtue of acknowledgement of debts.

[42] The plaintiff had failed to pay the sum of \$32,000.00 and to take over the bank debts (\$80,000.00) being the purchase price for the property within the time frame allowed by the agreement namely 1 year. The plaintiff has brought this action some 5 years from the due date for settlement. After some six years of execution of the agreement, the plaintiff states that he is ready to settle the agreement. This clearly shows that the plaintiff had failed to fulfil his obligation under the agreement. The plaintiff has breached the terms of the agreement. Therefore he is not entitled to claim damage against the defendants. Accordingly I would dismiss his claim for damage against the defendants.

[43] As winning party, the defendants are entitled to costs. Taking all into my account I would summarily assess costs at \$2,000.00.

### **Conclusion**

[44] For the foregoing reasons, I would dismiss the plaintiff's claim with summarily assessed costs of \$2,000.00.

### **Orders of the Court**

1. Plaintiff's claim is dismissed
2. Plaintiff will pay summarily assessed costs of \$2,000.00 to the defendants.

*M H Mohamed Ajmeer*

.....  
**M H Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**25 January 2016**

### **Solicitors:**

For plaintiff: Messrs Gordon & Co, Barristers & Solicitors

For defendants: Messrs Babu Singh & Associates, Barrister & Solicitors