IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 274 of 2006

BETWEEN : **SAHEED AHMED KHAN** of Nadi Town, Nadi.

First Plaintiff

AND : **BADRUL NISHA** of Korociri, Nadi, Domestic Duties.

Second Plaintiff

AND : **AJIJUNISHA HUSSEIN SAHIB** of Bountiful Estate, Namaka, Nadi, Domestic Duties as Executrix and Trustee of the Estate of Mohammed Hussein Sahib also known as Mohammed Hussein.

Defendant

Counsel : Sunil Kumar for the Plaintiff
D.S. Naidu for the Defendant

RULING

BAKGROUND

1. These are my findings following a trial of this case wherein the plaintiffs are seeking various forms of damages against the defendants. Below I set out the background of the case based on basic facts which are uncontroverted.

Plaintiffs & Defendant – Family

2. Saheed Ahmed Khan (**"Saheed"**, 1st Plaintiff) and Badrul Nisha (**"Nisha"**, 2nd Plaintiff) are husband and wife. Ajijunisha Hussein Sahib (**"Ajijunisha"**, Defendant) is the mother of Nisha. She is the surviving widower of the late Mohammed Hussein Saib (**"Saib"**) and the holder of probate over the Saib

estate. Saib passed away on 15 December 2003. He left all his property to Ajijunisha[1].

Crown Lease LD 4/10/1398 – Lot 89 – Sub-Division

3. The late Saib was the lessee of a large portion of Crown Land situated in Waqadra in Nadi. The said land is legally described as Crown Lease LD 4/10/1398 (**"the land"**).

4. In April 1985, Saheed and Nisha moved in to occupy a portion of Saib's land. The portion of land in question was about a quarter of an acre in size. That portion of land would become Lot 89 some years later on the basis of an approved scheme plan for the subdivision of the land. For the sake of clarity, I will refer to the said portion of land as Lot 89 right through from when the plaintiffs started occupation and well before the said scheme plan came into existence.

Sub-Division of CL LD 4/10/1398

5. In 1994 (i.e. some nine years or so after Saheed and Nisha had moved onto Lot 89), the entire land (i.e. Crown Lease LD 4/10/1398 of which Lot 89 was a part) was assigned to a company operating in the name and style of Southa Pacifika Company Limited (**"SPCL"**).

6. What SPCL actually acquired was a development lease to develop and subdivide the land. This development lease was made possible through an arrangement that SPCL had with Saib[2].

[1] The Will & Probate in the Defendant's Bundle of Documents was tendered through M=DW1 Mohammed Hakim and marked DEX2.

7. The exact nature of that arrangement is recorded in an Agreement which was executed on 27 June 1994 between Said and Saheed. The said Agreement is annexed to the Defendant's Bundle of Documents and was tendered in evidence and marked DEX 1 (page 4-12) through Mr. Mohammed Hakim, the sole witness for the defendant (DW1). Notably, by its nature, the Agreement was one which ensured that Saib and/or his successors would maintain an equitable proprietary[3] interest over the land and the Lots that were to be carved out of it after subdivision.

8. One feature of that arrangement that came through in the evidence of Saheed and also Hakim, and which is also pleaded by Saheed, is that, after subdividing the land, SPCL was obligated to then transfer each Lot to Saib. It was Saib who would then sell, and transfer each lot, to their respective purchasers.

9. Also, as part of the deal, four of the Lots were to be reserved for SPCL (or its Managing Director personally).

10. It is common ground between the parties that, for one reason or another, SPCL succeeded in carrying out subdivision work on a major portion of the land. However, it could not complete the entire project for two basic reasons. The first was because SPCL's managing director, a Mr. Volavola, had to spend some

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[2] According to the statement of claim, in 2004, Saib entered into an agreement with SPCFL on the following terms:
(1) that SPCFL pay Saib $170,000.
(2) that DOL issue a Development Lease.
(3) SPCFL subdivide the land and obtain relevant approval from DOL.
(4) After subdivision, SPCFL to transfer Lots to Saib.

[3] That Saib had maintained an equitable interest in the land despite SPCL holding a development lease over the land was recognised by Mr. Justice Connors on 9 September 2005, in HBC 198 of 2005 where Connors J in an action brought by Ajijunisa Hussein Sahib, against SPICL and the Director of Lands directing the plaintiff to re-enter and take possession of all commercial Lots numbered 89, 90, 94, 95, 96 and 97 and residential Lots 37, 75, 76, 77, 78, 79 and 80 of land comprised in LD 4/10/1398 which has not been developed by SPICL for which Development Lease No. 12527 was issued.
"And all these lots for which the plaintiff is equitable owner be transferred to Plaintiff".

time in prison. The second was due to some niggling boundary issues with a Housing Authority project that was happening alongside it.

By What Arrangement Did Saheed & Nisha Move in To Occupy Lot 89 in 1985?

11. Saheed's evidence in chief is that he and Nisha had entered into an agreement with Saib for the sale of Lot 89 to them. He said that the agreement was made before he and Nisha moved in to occupy Lot 89 in 1985. He asserts in chief that it was pursuant to Saib's promise and assurance that Lot 89 would be assigned to them after a formal sub-division that he and Nisha relocated from where they were in Nadi town to Lot 89 and erected a factory thereon.

12. I observe that the said sub-division, of course, would happen when SPCL came onto the scene some nine or ten years after Saheed and Nisha began occupation of Lot 89.

13. Saheed concedes both in chief and under cross-examination that the agreement that he had with Saib was not recorded in writing. He also agreed that no prior written consent of the Director of Lands was ever obtained for the said dealing. The plaintiff's position, to paraphrase from a pleading of theirs in the Nadi Magistrates Court which is annexed to an affidavit of Saheed, is that the agreement:

> ".....was never legalized in the form of a Sale and Purchase Agreement as Mohammed Hussein Sahib was the first plaintiff's father in law and second plaintiff's father".

14. Saheed said that the agreement was that he and his wife would pay $8,000 to Saib for Lot 89 which they would clear off at the rate of $100-00 (one hundred

dollars only) per month until the purchase price is fully paid off. They claim that in fact, they did pay a total of $16,000 to the defendant for Lot 89[4].

15. I note that, at that rate, it would take the plaintiffs a little over six and a half years to clear off the sale and purchase debt.

16. The defendant would assert that the $100-00 per month that the plaintiffs were paying to Saib was in fact rental over Lot 89.

17. Mohammed Hakim (DW1), the defendant's sole witness, said thus in examination in chief:

> Q: Your brother in law, Plaintiff are you aware the furniture shop ... of brother in law, on what condition he occupied this.
> A: My father told me he gave it on rent.
> Q: Who built Furniture shop?
> A: My father.
> Q: Who paid building construction?
> A: Father.

And later:

> Q: When did you fist come to know about Lot 89 being sold to brother in law.
> A: It was never sold.
> Q: From whom did you hear, who told?
> Q: You know the case?
> A: Yes, Saheed demanding he'd bought the land.
> Q: What you say?
> A: I need to say it never bought but on rent.
> Q: The property still in estate of father?
> A: Under my mother's name.
> Q: Development lease on land?
> A: Yes, Lease on Estate of Mohammed Hussein to Ajijunisha.

18. As I have said above, Saheed concedes in his evidence and pleadings that all his dealings concerning Lot 89 were never consented to by the Director of

[4] Saheed said in examination in chief and also deposes in his affidavit sworn on 23/08/06 that his wife and he had paid a total of $16,000 to Saib for the transfer of the said Lot to them. And that in reliance on the promise and receipt of monies by Saib, he and his wife constructed the factory on the lot at a total cost of "about $75,000" and operated the said joinery on the land.

Lands as required under section 13 of the State Lands Act[5]. The said section 13 provides as follows:

> *Protected leases*
>
> **13**.-(1) Whenever in any lease under this Act there has been inserted the following clause:-
>
> "This lease is a protected lease under the provisions of the Crown Lands Act"
>
> (hereinafter called a protected lease) **it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained**, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.
>
> **Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.**
>
> (2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.
>
> (3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.
>
> (4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent.
>
> (5) For the purposes of this section "lease" includes a sublease and "lessee" includes a sub lessee.

The Factory

19. It appears to be not in dispute that the plaintiffs had operated a joinery on Lot 89 in a building erected thereon. They did so immediately after they moved in 1985.

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[5] As Saheed deposes in his affidavit sworn on 23/08/06 at paragraph 9:
"The deceased agreed that my wife and I purchase one portion of the land for the sum of $8,000 and that we could pay the sum of $100 per month to settle that purchase price".

20. For the said business operation, the Nadi Town Council had issued a Business Licence No. 0786/85. Saheed said that he and his wife had some heavy machinery in the said building which were the tools of their trade. That they had such machinery is not seriously disputed.

21. The parties disagree however as to who actually constructed the building (**"factory"**). The plaintiffs assert that they built the factory. The defendants allege that the factory was built by the late Saib.

22. In 2004, the factory was torn down by the defendant's agents. The plaintiffs allege that all their heavy wood-work machinery therein was thrown out in the process. As a result, some of these were damaged.

23. Saheed said in evidence, that the reason why he has filed this claim HBC 274/06 is to seek damages for the loss of his business for which he was earning between $40,000 to $60,000 per month, for loss of machinery to the total value of $120,000 and for the loss of his factory which is valued at $75,000. He also said that he seeks damages for loss of business.

24. The defendant's position is that the machinery was thrown out following a distress notice for non-payment of rent. This is discussed in full below.

Break in Possession Over Lot 89

25. Evidence came through during cross-examination of Saheed that, in 2004, he and Nisha did vacate Lot 89. After they vacated Lot 89, a man by the name of Hirdesh Chand moved in and would occupy Lot 89 for some years.

26. In fact, Hirdesh Chand would carry out a joinery operation from the building erected thereon Lot 89. This much is not disputed.

27. What Saheed said in evidence was that Hirdesh Chand came onto Lot 89 upon an arrangement that he had with the said Hirdesh Chand. Saheed said that Hirdesh Chand was actually renting Lot 89 and the machineries thereon from Saheed.

28. The evidence that came through at trial was that the machineries were thrown out of Lot 89 following a Notice of Distress For Non Payment of Rent by Hirdesh Chand.

29. Under cross-examination however, it was pointed out to Saheed that in an affidavit he had sworn in July 2007, he had deposed that Hirdesh Chand was in fact leasing Lot 89 and the factory from the defendant. Saheed was evasive on this point.

Q: Look at your affidavits. You state factory was rented out to Hirdesh Chand by Defendant.
A. .....

S. Kumar: Which affidavit?

Q: You had affidavit filed 18 or 13 July 2007 in this case.
Paragraph 3.3 you state you sold him joinery machinery for $60K.
A: Yes.
Q: Para 3.4 of Saheed's Affidavit read.
A: Not true.
Q: Page 8 of affidavit read
A: Yes my signature. Witnessed by Prem Singh.
3.4 was true.
Q: Para 3.6 read.
A: True.
Q: Para 3.8 read.
A: True
Q: Para 3.14 read.
A: Yes.
Q: Any receipts?
A: Done by my father in law.
I have records. Records is in my affidavit.

30. Under further cross-examination, Saheed conceded that he had sold his machineries to the said Hirdesh Chand:

Q: You say you had all machinery in Examination in Chief -$120K. Any records.
A: No records.
45 years.
Q: I put to you, in 2007, Defendant was renting out property to Hirdesh.
A: after my vacation – yes.
Q: You had no interest in machinery except through Hirdesh. You'd sold.
A: Yes.
Q: When distress against Hirdesh?
You tried to come back.
A: .....
Q: You used Hirdesh to come back to factory.
A: Only to get machinery.
Q: Bill of Sale – where?
A: (searching)
Q: Not annexed to affidavit.
A: .....
Q: Bill of Sale – Did he pay $600.
A: No.
Q: Did you ..... Bill of Sale.
A: Yes. He shifted to other premises with machines. I got machines from there in Nadi town.

Soured Relationship Between Plaintiffs & Defendant

31. It appears that the relationship between Saib and Nisha on the one hand and their mother-in-law/mother, Ajijunisha, on the other, began to sour after the death of Saib. It is hard to pinpoint that "souring point" exactly.

COMMENTS

32. Clearly, Saheed and Nisha have resiled from pursuing Lot 89. They appear to argue though that, notwithstanding the fact that their arrangement with the late Saib was not reduced in writing, and the fact that there was no prior consent of the Director of Lands, they had relied on the promise by Sahib and had acted to their detriment accordingly. Their entitlement to claim for the following damages would flow from that.

(i) the loss of the factory,

(ii) the loss of business profits/opportunity, and

(iii) the recovery of all the monies paid pursuant to the arrangement they had with the late Saib).

33. If Saheed and Nisha were seeking specific performance of the agreement they purportedly had with Saib, they would first have to establish that they had an agreement with Saib and secondly, that the agreement they has was valid and enforceable.

34. In the absence of a written agreement, it would be hard for them to establish these.

35. I agree that an oral agreement can be enforceable in some situations. However, when it comes to dealings in land, this is almost near impossible because of the statute of frauds provision. In Fiji, the statute of fraud provision is found in section 59(d) of the Indemnity, Guarantee and Bailment Act. This section provides as follows:

> **59**. No action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

36. Having said that, of course, there are situations where an equitable interest in land may be created where the formalities required for the creation of a legal interest have not been done. Generally, this is only possible where the parties have signed a written contract or agreement and there has been sufficient acts of, for example, part performance such as to create an equitable interest.

37. However, even if there is a written agreement and there has been some act of part-performance, an interest in equity cannot be created where a prior regulatory consent required by statute has not been obtained.

38. 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.

39. Notably, the Privy Council decision in **Sheila Maharaj v Jai Chand** [1986] A.C 898 was one where an oral agreement between an estranged husband and his wife for the latter to occupy the house was held to give rise to a claim for proprietary estoppel in favour of the wife against the husband who wanted to repossess the house. However, the Privy Council, in its reasoning, made it clear that the said oral agreement, and the proprietary estoppel it created, did not violate section 12 of the Native Land Trust Ordinance, which section required that any dealing in native land is null and void without the prior written consent of the Native Land Trust Board.

40. I do not think **Sheila Maharaj** would assist the plaintiffs in any way in this case.

41. In **Snell's Equity** at page 576 (29th Edition 3rd Impression 1994), the learned authors say as follows:

> 'No equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty

42. It is impossible for Saheed and Nisha, in the absence of any written agreement with Saib, and in the absence of any consent by the Director of Lands to their "arrangement", to assert that an equitable proprietary interest could, nonetheless, accrue to them, such as to entitle them to the equitable remedy of specific performance.

43. As Mr. Justice Gates (as the Chief Justice then was), in **Indar Prasad** [2001] 1 FLR 164 said at page 170:

> "Whatever the nature of the permission granted to [the Defendant] (by the lessees) to occupy the relevant State Land, it was clearly unlawful because it lacked the Director's consent....."

And at 171:

> "Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."

44. In **Chand v Prakash** [2011] FJHC 640; HBC169.2010 (7 October 2011), the following comments of Mr. Justice Callanchini (as the President of the Court of Appeal then was) applies the same principle:

> Promissory or equitable estoppel is described in Halsbury's Law of England Fourth Edition Volume 16 at paragraph 1514:
>
> > *"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."*
>
> **However, there is a principle that the doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has enacted is to be invalid.** (Halsburys Laws of England supra at paragraph 1515).

45. Having said all the above, Saheed and Nisha are not asking for equitable damages either, in lieu of specific performance in terms of **Johnson v Agnew** [1980] AC 367. If they were, they would first need to establish an entitlement to the equitable remedy of specific performance, before they can begin to convince this court that they are entitled to the remedy of equitable damages in lieu of specific performance.

46. On case authorities cited above, they would not be able to establish an entitlement to the equitable remedy of specific performance.

ISSUES

47. I am of the view that the plaintiffs cannot claim for any consequential loss and damages for breach of contract by the defendant simply because they cannot establish that they had an agreement with Saib and, even if they had an oral agreement, that the said agreement was valid and enforceable. Having said that, the main issue in this case, as I see it, is whether or not the plaintiffs are entitled to damages nonetheless, given the nature of their occupation of Lot 89.

48. Below I deal with each head of damage sought.

LOSS OF FACTORY

49. Saheed claimed in evidence that he and his wife built the factory in question out of their own money and that the factory was worth $75,000. On this assertion, he relied mostly on the evidence of one Taitusi Navunikema (PW2)

of Namotomoto Village in Nadi who is a Company Director. PW2 said as follows:

A: I still remember when manager in BM Patel 1985, he purchased some material.
My truck delivered materials.
Truck No.
Materials- Chemicals
- Blocks
- Cement
Q: Can you recall quality you supplied.
A: Can't recall.
Q: Anything else you recall about land you delivered to.
A: No.
Q: ----

50. It was put to Saheed in cross-examination that Saib had built the factory in question. When asked, Saheed could not produce any plans for the building, or any receipt, or any consent from the Nadi Town Council, or any consent from the Director of Lands to erect the said building.

Q: Consent of Director of Lands?
A: No. My father in law's .....
Q: I put to you, you never built it.
A: Not true.
Q: Any plans you have?
A. No
Q: Did you obtain consent of Nadi Town Council?
A: No.
Q: Put to you, father in law built it.
A: No.
Q: Any receipts of money you may have spent in building property?
A: Yes.
Q: You not annexed.
A: Not sure.
Q: Show it in bundle of documents.
A: Not sure.

51. Mohammed Hakim (DW1) gave evidence for the defendant. He is a preacher in Auckland New Zealand and Saheed's brother in law and the defendant's son. He responded as follows under some cross-examination by Mr.Kumar:

Q: Who constructed Plaintiff factory?

A: My father financed it.
Don't know who built it.
Q: Why you ask workers to dismantle belong to father?
A: 2006, there was a subdivision lease was given. It was blocking the factory. Factory was blocking the subdivision in order to make the road.
Q: You know size of factory?
A: Yes
Q: How was it blocking subdivision?
A: Surveyor of Vinod Patel has told me.
Q: But you did not have power to destroy father's property, if it belonged to father.
A: After – father – mother owner.

52. To be able to recover for loss of the factory, the plaintiffs would first have to establish that they did in fact erect the factory in question out of their own expenses and also produce evidence which verify what the factory was worth. Even if they were able to do these, there is the niggling issue that the said so-called "factory" was erected without the regulatory consent of the Director of Lands or the planning approval of the Nadi Town Council.

53. However, even if the plaintiffs were able to establish all the above, they would still have to get around the following comments by Mr. Justice Byrne in **Mani Lal and Others –v- Satya Nand** (1994) 40 FLR 94 at page 100 which Callanchini J cited in **Chand v Prakash** (supra) and which, in my view, is applicable on all fours in this scenario before me:

> "I am satisfied that the Defendant must have known that no consent of the Director of Lands had been obtained to his occupation. Before taking possession of the land he was under a duty to make all relevant enquiries as to the Plaintiff's title and since the land in question obviously was not freehold in my judgment one of the first steps he should have taken was to enquire whether the Director of Lands had given his consent to the transaction. **If the Defendant proceeded to erect a building on the land either knowing that the Director of Lands had not given his consent or oblivious to the lack of such consent he cannot hold this against the Plaintiff**".

54. In my view, the building in question which the plaintiffs claim they built, was an illegal structure, in the absence of any consent of the Director of Lands and

in the absence of any regulatory planning approval of the Nadi Town Council. Accordingly, the plaintiffs cannot hold it against the defendant, assuming of course that the plaintiffs did in fact erect the said structure. I believe though that the structure was erected by the late Said.

55. Accordingly, I would make no award for the loss of the factory. If I may add, an illegal structure on a Crown or i-Taukei land is exposed to the risk of being torn down in any event.

LOSS OF PROFIT TO BUSINESS

56. It would appear to me that the loss that the plaintiffs claim under this head is for the loss they allegedly suffered as a result of the disturbance suffered by the defendant's action in evicting them from Lot 89. In other words, the loss of profit to their business suffered as a result of his being disturbed in possession or by reason of their having to vacate Lot 89.

57. PW3 Sushil Kumar, unemployed, said he worked for the plaintiffs for some nineteen years from 1985 as a clerk. He said the average income of the plaintiff's factory was $40 - $42,000 per month.

58. In my view, the plaintiffs' claim under this head would be maintainable only if they were able to first establish that they were entitled to Lot 89. For reasons I have discussed above, I am not convinced that they were so entitled.

59. In any event, even if the plaintiffs were able to establish a legal or equitable entitlement to Lot 89, which they have not, they would still have to adduce reliable evidence of their alleged loss of business profit.

60. The evidence which the plaintiffs rely upon is based on what Mr. Saheed himself recalls, purportedly, out of memory. I cannot accept this in the circumstances of this case.

61. Ideally, an estimate of the loss of business income based on the report of a certified accountant and/or financial consultant should have been adduced. Such a report, to assist the court, should set out a valuation of the loss of income based on financial statements of past years.

62. If the plaintiff had been paying business income tax with the Fiji Islands Revenue Authority, his tax records would throw light on the kind of taxable income he was earning. No such evidence has been placed before me. The Statement of Tax Account, Income Tax that is placed before me merely records various assessed amounts, payments made, late payment penalties, Provisional Tax Assessments and so on for various years from 1986 to 2012. They are of Saheed personally. These documents do not tell me anything about what the business was earning or the kind of profit it was making, or in fact, whether they pertain to the business solely or to other sources of income that Saheed might have.

63. I reproduce below a portion of the relevant cross-examination of Saheed:

Q: You stated in chief that you were making $40 - $60k per month which year?
A: After coup – 1987.
Q: Income Tax Return
A: In process
We ..... sub-contract work.
No records.
That's provisional tax.
Q: Yes not filed. And Tax Return.
A: No records of Provisional Tax.
Q: You have tax issues going back to 1987.
A: I can't recall.
Q: Have you disclosed your .....

A: Like I said, I ..... accounts.
Q: Any bank account to pay
A: Yes. Not here with me. I have to look for it.
After flood all gone.
No accounts.
Q: 1985
A: .....
Q: Bank details
A: $200,000 per year.
Sub-contract – distribute between employees.
I was getting my cut 10% or 15%.
Q: Have a look at Bundle of Documents. You were collecting commission from Hirdesh.
A: Yes.
Q: No tax
A: No tax
Q: No disclosed.
A: Not disclosed.

64. I do note, in any event, that Saheed himself had conceded under cross examination that he had since re-established his business elsewhere and has built another factory from where he has been operating. As I have said above, the factory itself was an illegal structure on Lot 89. It is difficult for me to make a finding that, because of their having to vacate Lot 89, the plaintiffs' business was extinguished or destroyed or materially damaged as a consequence so as to make the defendants liable for all consequential losses.

65. I refuse to make any award under this head.

DAMAGE TO MACHINERIES

66. If the plaintiffs did suffer loss as a result of the mishandling of their machineries by the defendants, perhaps, due to the rough and forcible manner by which the defendant's agents might have executed the eviction process, I would accept that the plaintiffs would deserve some compensation.

67. The compensation would have to be with regards to the costs of repairs or replacement of the machineries, but also to any consequential loss to the business as a result of any machinery (ies) damaged by the defendant.

68. However, having said that, I would add that any necessary repair or replacement of any damaged machinery should take only one to two months.

69. The question I ask next is: whether the plaintiffs have proved their claim that the defendant's agents were responsible for damaging their machineries and if so, what was the cost of repairs or replacement and finally, whether their business production suffered as a result and if so, whether that was quantified in terms of a loss in production and consequentially, a loss of income and profit.

70. No reliable evidence has been placed before me regarding any loss of business consequential upon the alleged damage to the machines.

71. There is also no document placed before me to set out in detail any alleged damage to any machine, the likely or probable cause of the damage, whether they can be repaired, if so, the cost of repairs, if not, the cost of replacement.

72. In any event, under cross examination, Saheed had admitted that he had sold the machines to Hirdesh Chand for $60,000. He conceded to this after he was shown an affidavit he swore in July 2007 wherein he had admitted this:

> Q: You had affidavit filed 18 or 13 July 2007 in this case.
> Paragraph 3.3 you state you sold him joinery machinery for $60K.
> A: Yes.

73. I refuse to make any award under this head.

MONIES PAID

74. If what Saheed and Nisha had with Said was a valid enforceable agreement for the sale and purchase of land, and the said agreement had been breached by Said, Saheed and Nisha would have the option of rescinding the agreement and seeking to have all monies paid pursuant to that agreement refunded to them, in addition to seeking damages.

75. If they did not have a valid enforceable agreement, then all monies paid would be spent anyway as rental on Lot 89.

76. As I have said above, if, assuming, Saheed and Nisha did have an agreement with Said, the said agreement was unenforceable in contract because of the lack of prior consent of the Director of Lands and also because it was an agreement concerning land which was not recorded in writing and therefore did not comply with Fiji's statute of frauds provision under section 59(d) of the Indemnity Guarantee and Bailment Act.

77. Obviously, if the agreement is null and void on that account, the agreement cannot form the basis for seeking recovery of all monies paid.

78. The general principal of *ex-turpi causa non orituractio* is founded on the public policy that any transaction tainted by illegality in which both parties are equally involved, is beyond the pale of law and as such – no person can claim any right or remedy whatsoever from such contract.

79. Equity however has developed an exception to the above rule.

80. In **Sakashita v Concave Investment Ltd** [1999] FJHC 3; Hbc0121j.1998s (5 February 1999), Mr. Justice Fatiaki discussed and reviewed some case law

concerning the jurisprudential dilemma involved and which led to the intervention of equity.

81. On the one hand, a defendant would be unjustly enriched if the deposit was not returned. On the other hand, if returned, the court might be seen to be lending assistance to a party to an illegal contract.

82. In the end, Fatiaki J resolved the dilemma by categorising the plaintiff's claim as one which is either for *"money had and received"* or for restitution based on the judgments of the House of Lords in **Fibrosa Spolka Akcyjna v . Fairbairn Lawson Combe Barbour Ltd** (1943) A.C. 32[4].

83. In this case, the plaintiffs have not claimed under the head: *money had and received* or for restitution. In any event, as I have said, if all the monies paid were to be returned, then it would be the plaintiffs who would be unjustly enriched in having lived all those years in Lot 89 without any rent payment whatsoever. I think all the monies they paid is, justifiably, spent as rent.

CONCLUSION

84. The onus is on the plaintiffs to prove their claim for damages. They have not done so. Costs follow the event. I award costs to the defendant which I summarily assess at $1,500 only.

HIGH COURT OF FIJI LAUTOKA

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Anare Tuilevuka

JUDGE

LAUTOKA

02 March 2018