

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC Civil Action No. 174 of 2018

BETWEEN : **AJAY PRATAP** of Lot 40, Wainibokasi Road, Vunimono, Nausori,
Operating Manager

PLAINTIFF

AND : **RAJNESH SEN** of Lot 8 Tirikula Road, Davuilevu Housing, Graphic
Designer

1st DEFENDANT

AND : **RAJNEETA DEVI SEN** of Lot 28 Cakacaka Road, Caubati, Nasinu,
Domestic Duties

2nd DEFENDANT

Counsel : Plaintiff: Mr Lajendra, N
Defendants: In-Person

Date of Hearing : 6th November, 2018

Date of Judgment : 13th December, 2018

JUDGMENT

INTRODUCTION

1. The Plaintiff filed originating summons against two defendants who are siblings and also beneficiaries of the estate of deceased Malti Devi. The Plaintiff is seeking orders compelling the Defendants to purchase his one third share of the property co-owned by Plaintiff and Defendant. In the alternate the Plaintiff is seeking sale of the property. The application is brought in terms of Section 119(2), (3) and (4). He is also seeking reimbursement of expenses for the improvement to property.

ANALYSIS

2. The Plaintiff and Defendants are siblings and they are co owners of the property comprised in Memorandum of Lease (Methodist Church Lease No 36933) (The Property). The lessee was late Malti Devi, who was the mother of all the parties. The Plaintiff being the eldest of the family had obtained the letters of administration in 2017 their late mother. He had duly distributed the shares in the Property to all the beneficiaries of the estate of late Malti Devi. Upon the said distribution all the parties to this action became undivided 1/3 share holder of the Property. The Plaintiff is seeking orders compelling the Defendant to purchase his 1/3 share of the Property. Alternately, he is seeking sale of the Property and distribution of the sale proceeds after deduction of estate expenses. The Defendants object to the sale of the property and they are refusing to purchase the 1/3 share of the Property belonging to the Plaintiff.
3. This is an originating summons filed by the Plaintiff seeking following orders of the court
 - a. Compelling the Defendants either jointly or severally purchase undivided 1/3 share of the Property, upon a valuation agreed mutually by the parties.
 - b. Alternately, the Property be put on the market for sale on terms and conditions seem just.
 - c. Apportionment of estate expenses and deduction of 2/3 of the expensences from the sale proceeds of the Property
 - d. After deduction of the expenses in (c) above , equal distribution of the sale proceeds
4. The Plaintiff had filed affidavit in support. The Defendants were granted opportunity to seek legal assistance but they did not file affidavit in opposition, but both of them appeared at hearing and objected to the application.
5. Section 119 of the Property Law Act 1971 states
 - "119. (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.*
 - (2) The court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the court that, by reason of the nature of the land, or of the number of parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstances, a sale of the land would be for the benefit of the parties interested.*

(3) The court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.

(4) On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.

(5) Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations:

Provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.

(6) On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters."

6. The Plaintiff's counsel submitted Fiji High Court case of Thomas v Estate of Eliza Miller [1996] FJHC 168 decided on 12 December 1996 where it was stated,

"I agree with Mr. Gago's submission that in s. 119(1), (2) and (3) provision is made for three separate kinds of action which can be maintained in relation to any property. I reject the defendants' contention that land can only be sold on a court order if there is "an action for partition and not otherwise", and therefore that an application under s. 119(2) must be based on an "action for partition".

In England under the old law the Court had no power to decree sale instead of partition until the Partition Act, 1868 when the court was given power to order a sale. The views of the holders of the greater share prevailed, unless the minority could prove to the Court that their view was the most beneficial. Rules were laid down for the guidance of the Court which are similar to the provisions under our section 119(1), (2) & (3). In all these cases the Court had a discretion.

Where a large estate had to be divided among a few people, the expense was not heavy; but many cases have occurred where a small estate has been given (generally by Will), as in the case before me, to a very large number of persons, some of whom cannot be found, and in these cases the expenses were out of all proportion to the value of the estate. This produced numerous inconveniences and absurdities such as for example a house which was partitioned by actually building a wall up the middle (TURNER v MORGAN (1803) 8 ves 143, **LORD ELDON LC**). This led to the passing of the Partition Act 1868 (31 & 32 Vict. C.40) and the Partition Act 1876 under which the Court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition. But since the Law of Property Act, 1925 the necessity for sale by the Court no longer exists in England, since, whenever several persons share land beneficially, it is now vested in trustees on trust for sale. Hence the Partition Acts no longer enable the Court to order a sale in a partition action but an action for partition can apparently still be brought, if occasion arises.

Further held,

The application here is under s 119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be "for the benefit of the parties interested" for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that "the sale would be for the benefit of the parties concerned". In the definition of "land" is included "all estate and interests in land" (section 2 of the Act).....

BROOKE JA in his judgment in Re DIBATTISTA et al. and MENEOLA et al. (Ontario Court of Appeal 74 D.L.R. (4th) p.569). There he refers to COOK v JOHNSTON (1970) 2 O.R. 1 (H.C.J.) where GRANT J considered the question of when and in what circumstances the court may order a sale. I quote below what GRANT J said in his judgment at pp. 1-2:

In Morris v. Morris (1917), 12 O.W.N. 80 Middleton, J., in dealing with a similar matter stated at p.81:

"Sale as an alternative for partition is quite appropriate when a partition cannot be made."

In Gilbert v. Smith (1879), 11 Ch.D. 78, Jessel, M.R., at p.81 stated:

"The meaning of the Legislature was that when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties."

In Lalor v. Lalor (1883), 9 P.R. (Ont.) 455, Proudfoot, J., who was deciding whether partition or sale should be ordered, stated:

"I do not think any party has a right to insist on a sale; and it will not necessarily be ordered, unless the Court thinks it more advantageous for the parties interested."

In Ontario Power Co. v. Whittler (1904), 7 O.L.R. 198, Meredith C.J. reviewed the legislation in the Province giving jurisdiction to the Court to order a sale instead of partition. In reference to the form of such remedies then adopted by the Consolidated Rules, he stated at p. 203:

"That form must be read in the light of the legislation by which jurisdiction has been conferred on the Court to order a sale instead of a partition; and the provision as to proceedings being taken for partition or sale is, I think, a compendious mode of saying that proceedings are to be taken to partition unless it appears "that partition cannot be made without prejudice to the owners of, or parties interested in, the estate," but that if that is made to appear proceedings are then to be taken for the sale of the lands."

7. In *Hinde McMorland & Sim Land Law in New Zealand/Commentary/* in Chapter 13 under Concurrent Interests in Land in CONCURRENT INTERESTS IN LAND: ORDERS OF DIVISION OR SALE **Compulsory division states**

"At common law the courts had no jurisdiction to physically divide the land between joint tenants or tenants in common.¹ It was not until the Partition Acts 1539² and 1540³ that a statutory jurisdiction to divide was given. One joint tenant or tenant in common was then entitled to insist on division,⁴ and the court had no jurisdiction to refuse however

¹ See the historical summaries given in the judgment of the Privy Council in *Fair v. Premabhai* [1954] A.C. 35 (P.C.) at 41-43 per Lord Porter, and in the judgment of the Court of Appeal of New Zealand in *Fleming v. Hargreaves* [1976] 1 NZLR 123 at 127 (C.A.) per Richmond J.

² 31 Hen 8, c 1. These Acts were passed in the reign of Henry VIII during the period of the dissolution of the monasteries.

³ 32 Hen 8, c 32.

⁴ *Parker v. Gervaud* (1754) Amb 23, 627 ER 157, *Robson v. Sizerston* (1984) 2 NZCPR 259 at 261-262 where Henry J discusses the principles which the Court should take into account in deciding how the land should be partitioned. For the application of this jurisdiction to direct the partition of a cross-lease development between the five sets of owners, see *Ko v. Chamberlain* (2007) 8 NZCPR 261, (2007) 5 NZ ConvC 194, 417, noted (2007) 12 BCB 210 (Gibbons).

inconvenient and undesirable the results of the partition might be.⁵ It was only in 1868 in England⁶ and 1870 in New Zealand⁷ that the Court was empowered to order a sale and division of the proceeds instead of physical division of the land. Thus, during the period the Property Law Act 1952 was in force,⁸⁸ physical division remained available as of right under the Partition Acts, and the Court also had a discretion under s 140 of the Property Law Act 1952 to order sale of the land instead of division. If an application was brought under the Partition Acts, an order of partition still had to be made regardless of inconvenience, but usually in such cases an application was made not for division of the land but for sale and division of the proceeds. The Court had no jurisdiction to order co-owners to buy out the share of an owner wishing to sell, or to order a co-owner wishing to sell to do so to the other co-owners; such arrangements could be made only by agreement between the parties. The Partition Acts 1539 and 1540 are now repealed,⁹ and the jurisdiction of the Court to order division of the land, sale to a third party, or sale between co-owners, is replaced by ss 339 to 343 of the Property Law Act 2007."

8. The Plaintiff is relying on Section 119(2) of the Property Law Act 1971 that gives the discretion of the court to direct a sale, on request of any party interested. After considering the judgment submitted by the Plaintiff's counsel and legal text, I accept that a Plaintiff could seek a sale of co-owned property without seeking partition.
9. There is a wide discretion given to the court in such an application. The consent for sale of all or majority of co-owners is not an essential requirement.
10. The factors to be considered in such an exercise of discretion are numerous and in Section 119(2) of the Property Law Act 1971 specifically states
 - a. Nature of the land
 - b. Number of the parties interested or presumptively interested.
 - c. Absence of disability of any of those parties or

⁵ *Warner v Baynes* (1750) Amb 389, 27 ER 384, *Barnes v Nash* (1813) 1 V & B 551 at 554, 35 ER 214 at 215 per Plumer V.C. In *Turner v Morgan* (1803) 8 Ves Jun 143, 32 ER 307 one tenant in common filed a bill praying partition of a house at Portsmouth which was of great value to both parties. Lord Eldon LC pointed out that partition would be "the worst thing" for the defendant, gave him time to come to terms, and suggested a fair course of action. The parties still failed to agree, and the partition had to proceed as the Court at that time had no power to order a sale. When the partition was made the plaintiff had all the chimneys and fireplaces, the only staircase in the house, and all the conveniences in the yard. The defendant objected to this partition, but the Court declined to interfere as the parties ought to have agreed to buy and sell. In the course of argument a case was cited in which a house had been partitioned by actually building up a wall in the middle.

⁶ Partition Act 1868 (UK).

⁷ The jurisdiction was originally found in the Partition Act 1870, which was later replaced by the Property Law Act 1952, ss 140-142.

⁸⁸ 1 January 1953 (Property Law Act 1952, s 1) to 31 December 2007 (Property Law Act 2007, s 2).

⁹ Property Law Act 2007, s 365.

d. Other circumstances

11. The area of the land in the Methodist Church Lease 369333 is 554 square meters. This is a small area of land it is impossible to think of subdividing the land for residential purpose. Already there is a structure and parties have lived in it. So I am convinced on the evidence before me that it would be futile exercise to even to attempt division of such a small premises for residential purpose.
12. The nature of the land, also include the nature of the right of the parties. Late mother of the Plaintiff was only a lessee of the Property. So the intended sale is the lease hold rights to the Property.
13. There are conditions attached to the said lease and clause 3 and 4 are relevant in that regard. The interest of the parties to this action derives from that Methodist Church Lease 369333
14. Clause 3 of the said lease states
'(3) the lessee shall not alienate or deal with the land hereby leased or any part thereof whether by sale, transfer or sub-lease or any other manner whatsoever without the consent in writing of the lessor fist had and obtained.'
15. So the nature of the Property was such if the Plaintiff desired to sell the leasehold interest that had derived from the said lease, he needs first obtain the written consent of the lessor.
16. There is no evidence of such prior written consent obtained to deal with the land. Since it is a sale of the land this is a prerequisite. Apart from that, the Plaintiff is also seeking to end the co-ownership rights the lease of the Property through sale.
17. In the circumstances this action needs to be dismissed in limine for want of written consent, of the lessor to deal with the land. If not the sale would be an unlawful act.
18. Some other factors that can be considered before a sale in the exercise of discretion¹⁰ are
 - 1) The extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application is made;
 - 2) The nature and location of the property;
 - 3) The number of other co-owners and the extent of their shares;

¹⁰ See Section 343 of NZ Law of Property Act, 2007

- 4) The hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order;
 - 5) The value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property;
 - 6) Nature of the parties and their interests and any practical impossibility of continuation of the same.
 - 7) The above list is not an exhaustive one,
19. The orders 3, 4, of the originating summons are relating to deduction of expenses he had incurred relating to the Property.
 20. Section 119(4) of the Property Law Act, 1971 allows the court to make consequential orders. Since the co-ownership ends with the sale such a provision is needed for the determination of all the issues relating to the said property in the same action. There are costs involved in the sale, valuation and improvements to the property by the parties etc. All these issues need determination in partition as well as in sale as in both cases co-ownership ends.
 21. From the evidence submitted by the Plaintiff in his supporting affidavit it is evident that this is contested between the parties.
 22. The Defendants not only disputed the amounts that were spend but also alleging such expenditure was illegal as some of the alleged improvements to the Property were done illegally.
 23. So the facts regarding the amount of reimbursement are disputed and not suitable for originating summons.
 24. If the facts are disputed the matter can be converted to a writ of summons, but in this case since the action needs to be dismissed *in limine* it will be futile exercise.

CONCLUSION


25. The Plaintiff had not obtained prior consent of the lessor in terms clause 3 of the Methodist Church Lease 369333. Without such consent the Plaintiff who had only 1/3 lease interest in the said undivided cannot institute action for sale. The action is dismissed *in limine*. Without prejudice to that the subsequent orders of the reimbursement of expenditure on property are disputed that needs determination and originating summons is not suitable. The matter is dismissed but considering the circumstances of the case no cost is ordered.

FINAL ORDERS

- a. Originating summons is dismissed.
- b. No costs.

Dated at Suva this 13th day of December, 2018




Justice Deepthi Amaratunga
High Court, Suva