

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 028 of 2020
(Suva High Court Action No. HBC 47 of 2019)

BETWEEN : (1) **MAHENJIT PRASAD**
(2) **INDAR JIT PRASAD**

Plaintiffs / Appellants

AND : (1) **VIJAY NAND SHARMA**
(2) **REGISTRAR OF TITLES**

Defendants / Respondents

Coram : Jitoko VP
Basnayake JA
Mansoor JA

Counsel : Mr. J. Fa for the Appellant
Ms. K. Singh for the 1st Respondent
Ms. M. Motafaga for the 2nd Respondent

Date of Hearing : 12 May 2023

Date of Judgment : 26 May 2023

JUDGMENT

Jitoko, VP

- [1] I have had the advantage of reading the draft judgment of Basnayake JA in this appeal. I am in full agreement with his reasoning and conclusion and the Orders proposed.

Basnayake, JA

- [2] This is an appeal filed by the 1st and 2nd Defendants/Appellants (hereinafter referred to as the Defendants) to have the judgment dated 24 March 2020 of the learned High Court Judge set aside (pgs. 5-14 of the Record of the High Court (RHC)). By this judgment the Registrar of Titles (3rd Defendant/2nd Respondent) was directed to remove and/or cancel caveat No. 861595 lodged by the Defendants affecting the land described in CT 6739 containing lots 1 and 3 in DP 1312 an extent of 2 acres 3 roods and 36 perches.
- [3] The Plaintiff/1st Respondent (hereinafter referred to as the Plaintiff) instituted civil action No. 276 of 2007 (as per the affidavit of the Plaintiff at pgs. 21-24 RHC) against the joint trustees of the Estate of Ram Prasad claiming *inter alia* specific performance of a sale and purchase agreement dated 29 April 2004. The trustees were Suruj Kuar and Raj Mati, defendants in the Civil Action No. 276 of 2007. They are the mother and sister of Mahenjit Prasad and Indar Jit Prasad (Appellants/Defendants in this appeal). After trial in No. 276 of 2007, judgment was pronounced in favour of the Plaintiff on 22 April 2014 ordering specific performance.

The orders of the court (pg. 26 RHC) are as follows:-

1. *That the Plaintiff is entitled to specific performance of the Sale and Purchase Agreement dated 29th April, 2004, upon payment of the sum of \$391,500.00.*
2. *That the First Defendant (Suruj Kuar) shall pay the Plaintiff costs summarily assessed in a sum of \$3,000.00.*

[4] The Plaintiff states that despite the judgment having been served on Suraj Kuar who was the Defendant in that case she failed to effect the transfer. However the Plaintiff does not mention anything about making any payment or being ready and willing to make payment as ordered by court. The Plaintiff having applied for enforcement of the judgment, obtained an order to execute the transfer by the Chief Registrar of the High Court (29-30). The orders are as follows:-

- (a) *The Chief Registrar of the High Court of Fiji shall convey to the plaintiff, the property described as Lot 1 and 3 on DP No. 1312 in CT No. 6739 known as Waibola (part a), having an area of 2 acres, 3 roods and 35 perches presently and comprised in the sale and purchase agreement, upon the payment by the plaintiff to the credit of this action, the balance sum of \$391,500.00;*
- (b) *The Registrar of Titles shall dispense with the requirement of the production of the duplicate instrument of title for CT No.6739 for the purpose of registering the instrument of transfer in the Register of Titles;*
- (c) *The plaintiff's costs of \$3,000.00 shall be deducted from the balance purchase price of \$391,500.00 and paid to him;*
- (d) *Any applicable capital gains tax, charges, or outgoings in respect of the property such as outstanding city rates payable by the first defendant as 'Vendor' to be deducted from the balance purchase price of \$391,500.00 and to be paid to the relevant authorities with the balance sum (if any) to be held by the High Court of Fiji.*
- (e) *Each party shall bear their own costs.*

[5] The Plaintiff states that he had arranged to finance the balance purchase price from Westpac Bank Corporation. However the Plaintiff failed to produce any documents in proof of payment or arrangements made thereof. The property was conveyed by the Chief Registrar on 9 March 2018 (pgs. 33-34). The Registrar certifies that, "Pursuant to Court Order made on 7th day of November 2017 in Civil Action No. HBC 276 of 2007 and in consideration of the sum of FJ\$ 435,000.00 (Four hundred and thirty five thousand dollars) agreed to be paid to the transferor by Sharma Design Group Limited...(Transferee) the Transferor Doth Hereby transfer to the Transferee etc. (emphasis added) thus completing the conveyance.

- [6] It is to be noted that the order of court dated 7 November 2017 and sealed on 23 November 2017 is, “for the Chief Registrar to convey the property upon the payment by the Plaintiff to the credit of this action the balance sum of \$391,500.00”. However, the Certificate does not state anywhere of a payment being made. It states instead, “agreed to be paid” a sum of FJ\$ 435,000.00. The Certificate does not carry the name of the Registrar who had certified it. There is no mention of any money being transacted or credited in the memorandum.
- [7] The Plaintiff states that on 15 June 2018 the Plaintiff learnt that a caveat had been registered by the Defendants on 21 May 2018. As per the caveat (pg. 37) this was registered on 22 December 2017 against Suruj Kuar as caveatee. The caveat was filed on the basis of an interest the Caveator has on the land by virtue of being sons and beneficiaries of the proprietor. The Plaintiff had made an application on 12 September 2018 to have the caveat removed under section 110 of the Land Transfer Act to no avail. Thereafter the Plaintiff had filed originating summons (pgs. 18-19) on 14 February 2019 against the Defendants and the Registrar of Titles (Third Defendant/2nd Respondent) under section 168 of the Land Transfer Act for the removal of the caveat and to have the transfer registered.
- [8] The Defendant in an affidavit (pgs. 111-113) filed on 28 August 2019 stated that Suruj Kuar has filed a leave to appeal enlargement of time application on 19 August 2019 (pg. 115) with an affidavit by Mahen Jit Prasad (Defendant) (pgs. 117-120) against the judgment of 22 April 2014 on fresh new grounds. The Defendant states that Suruj Kuar filed another leave to appeal enlargement of time application on 19 August 2019 (pg. 132) with an affidavit (pgs. 134-137) to vacate the order delivered on 7 November 2017. The Defendant states that in the event the appeal is successful, the Plaintiff will have no rights to the property of which the Defendants have a beneficial interest. The Defendant states that the Defendants are beneficiaries of the Will of Suruj Kuar. However no such “Will” has been produced nor the details given. The Defendant also found fault with the procedure adopted by the Plaintiff in the removal of the caveat. The Defendant said that the Plaintiff should have invoked the provisions of section 109 of the LTA. The Plaintiff resorted to section 168 of the LTA.

- [9] The Plaintiff in reply (pgs. 151-154) stated that Suruj Kuar had originally applied for enlargement of time to appeal which was dismissed on 9 August 2016. The Notice for Leave to extend time filed on 19 August 2019 is the second application and is complained of as an abuse of the process of court.

Judgment under review

- [10] The learned Judge (5-14) stated that the Plaintiff was not the caveatee nor a person who had a registered estate or interest in the property. The learned Judge states that the main objection of the caveators (Defendants) relates to the procedure adopted for removal of caveat. *"For removal of caveats there are specific provisions contained in Sections 109 and 110 of the Land Transfer Act 1971. There are special procedure laid out in those provisions, but these are not exclusive"* (pg. 6). The learned Judge held that the Plaintiff could not invoke these provisions as the Plaintiff was neither caveatee nor had a registered estate or interest in the property.
- [11] The learned Judge said that in order to prevent abuse of process or frustration of judgment court can make additional orders in terms of section 168 of the LTA. The Plaintiff filed an action under section 168 to remove/cancel caveat No. 861595. The learned Judge stated that section 109 allows the registered proprietor or any other person having a registered estate or interest or interest protected by caveat to seek by way of summons to call upon the caveator to show cause as to why the caveat should not be removed. The learned Judge said that this is not an exclusive provision.
- [12] The learned Judge said that no prejudice was caused to the caveators when the Plaintiff invoked the provisions of section 168 of the LTA to have the caveat removed. Where there is a doubt with regard to the Plaintiff's right to invoke section 109 (2) the Plaintiff could apply under Section 168. The learned Judge stated that *"Section 109(2) is not the sole method in requesting removal of caveat as word 'may' was used. It was an alternative method of seeking speedy relief for removal of the caveat than through originating summons. Caveat is an interim measure till the action is concluded to prevent any dealings*

to maintain status quo and it can be removed at the end of hearing by orders of the court without specific application in terms of Section 109(2) if caveators and caveatees were parties to such an action”(pg. 10 of the RHC).

- [13] The learned Judge stated, that, *“The scope of Section 168 of Land Transfer Act 1971 is wide and it allows a court to make any ancillary orders to give effect to a judgment or orders of the court. There is no dispute that this court had already made judgment against the registered proprietor of the property to transfer the property in issue. These orders were quoted previously. In order to transfer the property the removal of caveat is essential. The removal of caveats lodged by Defendants is necessary to give effect to the judgment and or orders made by this court previously. So when there is a proceeding or concluded proceeding where additional orders are needed to give directions to the Registrar Section 168 of the Land Transfer Act 1971 can be invoked. This provision is meant to give effect to judgment or orders as human ingenuity can take various forms in order to delay or frustrate fruits of a judgment. Since there is an impediment to execute said judgment and orders due to lodgment of caveat by Defendants on 21.5.2018 again Section 168 of the Land Transfer Act 1971 is used. This can be made in the same proceedings or in a separate proceeding as all the Defendants in this proceedings were not parties to the previous action HBC 276 of 2007”* (pgs. 10-11 of the RHC).

Section 168 of the Land Transfer Act

In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court.

- [14] The learned Judge with the following paragraph justified the Plaintiff not resorting to section 109. The learned Judge said that the Plaintiff does not fall into the category of persons mentioned in section 109. The learned Judge states, *“Plaintiff who had obtained a*

judgment for specific performance against the registered proprietor, was not a person having a registered estate or interest or interest protected by caveat when this originating summons was filed in terms of Section 168 of the Land Transfer Act 1971, hence not a person who could seek removal of caveat in terms of Section 109(2) of Land Transfer Act 1971, at that time".

[15] Section 109

109 (1). Upon the receipt of any caveat, the Registrar shall give notice thereof to the person against whose application to be registered as proprietor of, or, as the case may be, to the registered proprietor against whose title to deal with, the land, estate or interest, the caveat has been lodged (emphasis added).

(2) Any such applicant or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, and the court on proof of service of the summons on the caveator or upon the person on whose behalf the caveat has been lodged and upon such evidence as the court may require, may make such order in the premises, either ex parte or otherwise as to the court seems just, and, where any question of right or title requires to be determined, the proceedings shall be followed as nearly as may be in conformity with the rules of court in relation to civil causes."

- [16] The caveat is at pages 37 and 38 of the RHC. As per the caveat the caveatee is the proprietor of the Estate namely Suruj Kaur, who is the Defendant in the Civil Action No. 276 of 2007, against whom a judgment for specific performance was obtained. The Plaintiff has not been named in the caveat. Therefore there is no way that the Plaintiff can be noticed by the Registrar of Titles (2nd Respondent) regarding the caveat. Otherwise on receipt of caveat the Registrar shall give notice as per section 109 of the LTA to the person against whose application to be registered as proprietor of or etc. In this case it is the Plaintiff who applies to be registered as proprietor on the strength of the conveyance by the Registrar of the High Court. The Plaintiff belongs to the category of "*the person against whose application to be registered as proprietor of*" stated in section 109. At the time of lodging the caveat the

Plaintiff had not made such an application and therefore the Registrar of Titles could not have issued notice on the Plaintiff. To that extent I think the learned Judge has erred in disentitling the Plaintiff from resorting to section 109.

[17] Once the property is transferred the transferee needs to have the transfer registered as new proprietor. To that extent the Plaintiff is a person eligible to invoke section 109 to get the caveators to show cause as to why the caveat should not be vacated. If the Plaintiff made an application to the Registrar of Titles under section 109 of the LTA to have the caveat vacated, the Registrar of Titles (2nd Respondent) should have entertained that application as the Plaintiff could make an application under section 109 (2) of the LTA by summons to call upon the caveator to attend before court to show cause why the caveat should not be removed. However the application of the Plaintiff (pg. 48) was made under section 110. Section 110 is for the caveatee to apply to remove the caveat. The plaintiff was not the caveatee and therefore could not have made an application under section 110 and the Registrar of Titles was correct in rejecting the Plaintiff's application filed on 12 September 2018.

[18] Sections 106 to 117 of the LTA related to the procedure involving caveats. However section 168 is of general application. Therefore there is no bar for the Plaintiff to invoke the provisions of section 168 instead of section 109. For that reason I am of the view that the procedure adopted by the Plaintiff is not flawed.

[19] The learned Judge said that the defendants failed to show any caveatable interests. The interests of the Defendants depended on the registered proprietor against whom judgment was obtained by the Plaintiff. The Defendants are claiming beneficial interest from Suruj Kuar. Therefore the Defendants do not have a caveatable interest.

[20] **Grounds of Appeal**

1. *That the learned Judge erred in law and in fact in cancelling and removing Caveat No. 861595 over CT No. 6739 pursuant to section 168 of the Land Transfer Act as at all material times the 1st Respondent had not paid for the*

consideration for the sale of land as per the Orders of Court dated 7 November 2017 in Vijay Nand Sharma v Suruj Kuar and Raji Mati; Civil Action No. HBC 276 of 2007.

2. *That the learned Judge erred in law and in fact in ordering the removal/cancellation of Caveat No. 861595 over CT No. 6739 pursuant to section 168 of the Land Transfer Act when the appropriate section for removal of the caveat, which protected the interests of the 1st-2nd Appellants, was section 109 (2) of the Land Transfer Act.*
3. *That the learned Judge erred in law and in fact in holding that section 109 (2) of the Land Transfer Act was inappropriate for the application for removal of caveat by the 1st Respondent as in the present case.*
4. *That the 1st Respondent failed to declare to the Court that it had, at all material times, it had failed to make payment for CT No. 6739 in accordance with the orders of the Court dated 7th November 2017 in Vijay Nand Sharma v Suruj Kuar and Raji Mati; Civil action No. HBC 276 of 2007 and the learned Judge turned a blind eye to this by failing to inquire of this from the 1st Respondent, and to the defect in the 1st Respondent's Application and the relevant facts of the case before him, and as such failed to exercise his discretion judicially by ordering the removal/cancellation of Caveat No. 861595 and allowing the 1st Respondent's transfer to be registered, pursuant to section 168 of the Land Transfer Act, without due regard to the fairness and justice to the 1st and 2nd Appellants and their lawful interests.*

- [21] Of the four grounds, the second and third grounds relate to the procedure adopted by the learned Judge in removing the caveat. The learned Judge made order to remove the caveat in terms of section 168 of the LTA. The learned counsel for the Defendants (Appellants) submitted that the proper section for the removal of caveat is section 109 (2) of the LTA.
- [22] The bone of contention in this case is not whether it was section 109 (2) or section 168 of the LTA which was appropriate for the removal of the caveat. As far as this case is concerned it is only of academic interest. The learned Judge considered the *locus standi* of the Defendants in this case. The Defendants were not parties to the sale and purchase agreement and the eventual civil suit No. 276 of 2007. The parties to this action were the Plaintiff and the Defendants' mother and sister. This case was decided in favour of the Plaintiff. There is no appeal filed to date. As per the objections filed by the Defendants before the High Court and the reply to those objections, the Defendants' mother (Suruj

Kaur) has filed a leave to appeal out of time application which was rejected by the Court of Appeal. The Defendant in No. 276 of 2007 case appears to have filed another notice of appeal out of time application which the Plaintiff claims is an abuse of the power of court.

- [23] The judgment in civil action No. 276 of 2007 was pronounced on 22 April 2014. As far as this court is concerned this judgment is in force. The Defendants' claim is based on the rights of the unsuccessful party in No. 276 of 2007. The learned Judge has correctly disregarded and dismissed the Defendants' claim on the basis that the Defendants have no right to lodge a caveat to prevent the Plaintiff from registering the transfer of the property. Therefore grounds 2 and 3 are without merit and have to be declined.
- [24] Grounds 1 and 4 are concerning the payment. The Defendants strongly urged court to consider the injustice that would be caused if the Plaintiff is allowed to own the property free. The price agreed was \$435,000.00. Of this sum a payment of 10% was deposited on 29 April 2004. The balance amount was a sum of \$391,500.00 which the Plaintiff stated he was ready with. The court on 22 April 2014 ordered that the Plaintiff was entitled to specific performance of the sale and purchase agreement dated 29 April 2004 upon the payment of the sum of \$391,500. Again on 7 November 2017 on the application of the Plaintiff made on 28 August 2017 made order *inter alia* to the Chief Registrar of the High Court to convey the property to the Plaintiff upon the payment by the Plaintiff to the credit of this action, the balance sum of \$391,500.00.
- [25] The transfer was executed by the Chief Registrar of the High Court on 9 March 2018. There was no mention of any sum being deposited to the credit of this case. The Registrar of the High Court states in the certificate (pgs. 33-34) that a sum of FJ\$435,000.00 was agreed to be paid to the transferor by Sharma Design Group Limited.
- [26] The Plaintiff in his original summons (pgs. 18-19) moved court under section 168 of the LTA to remove and/or cancel caveat No. 861595. In the affidavit sworn to on 14 February 2019 (pgs. 21-24) in paragraph 9 the Plaintiff states that, "finance from Westpack Bank

Corporation to finance the balance purchase price was arranged. Even by 14 February 2019 nowhere is it stated by the Plaintiff that this money has been either paid or deposited.

- [27] This case was taken up for argument on 12 May 2023. The learned counsel appearing for the Defendant/Appellant and the Plaintiff/1st Respondent tendered in open court a set of written submissions. If the written submissions were filed in court, it would have had the date stamp of court. Even in these written submissions there was no mention of the balance payment of \$391,500 having been paid. This amount should have been paid prior to the execution of the transfer on 9 March 2019 by the Registrar of the High Court. In paragraph 4.5.5 of the written submissions it states, "At all material times, the Appellants' then Solicitor were fully aware that consideration sum is available". Reference is made to pages 43-44 of the HCR.
- [28] This contains a letter from the Plaintiff's lawyers to Messrs. Sherani & Co. dated 10 August 2018. It states (pg. 44), that, "Our client has obtained a loan of \$388,500.00 for the balance purchase price payable under the relevant sale and purchase agreement" etc. The learned counsel appearing in court when inquired by court with regard to the balance payment was unable to give an answer to the satisfaction of court. Ms. Singh said that she has no proof of such payment. Hence the court re-fixed this case for 22 May 2023 at 9.30 a.m. to enable the counsel to bring proof of payment to court.
- [29] The Plaintiff has submitted a payment of \$338,314.60 to High Court of Fiji from Westpac Banking Corporation and Bred Bank Trust Account on 2 April 2020. Payment to Fiji Revenue and Customs for Income Tax and Capital Gain Tax and payments to Lami Town Council were paid on 3 April 2020. The Plaintiff obtained Judgment for specific performance on 22 April 2014. The Plaintiff applied for enforcement of the said judgment and obtained an order on 7 November 2017 on the Registrar of High Court to effect a transfer. On 9 March 2018 the Registrar made a conveyance of the property to the Plaintiff. On 22 December 2017 the Defendants lodged a caveat against the registration of this property and the Plaintiff has filed summons in High Court to remove the caveat. It was on 24 March 2020 that the learned High Court Judge pronounced his judgment with an order

to vacate the caveat to enable the Registrar to register the property in favour of the Plaintiff. The Plaintiff got all these orders in his favour without having made any part of the payment ordered by court to pay on 22 April 2014. The deposit of \$338,314.60 was made to court on 2 April 2020.

- [30] Specific performance will not be granted except to a plaintiff who has performed his obligations under the contract or is ready and willing to perform them (Weeramantry, Law of Contracts para 989, pg. 969, Chitty 22nd Ed s. 1457, Anson 22nd ed. s. 515, Cheshire & Fifoot 6th ed. Pg. 582, also **Crispetle and Candy Co .Ltd. v Michaelis**, N.O. [1947 (4) S.A. 521 (A.D.) at 537. Even repudiation by the defendant does not excuse the plaintiff from showing performance or readiness to perform (Halsbury 3rd ed. Vol 86 pg. 309: **Elis v Ragers** (1884) 50 L.T. 660.

- [31] In **U.N. Krishnamurthy v A.M. Krishnamurthy** 2022 SC 840 (12.7.2022) the Indian Supreme Court held, that, *"Making a subsequent deposit of balance consideration after lapse of seven years would not establish the Respondent Plaintiff's readiness to discharge his part of the contract."* In a suit for specific performance the Divisional Bench of Indira Banerjee and Hrishikesh Roy, JJ., explained the terms willingness and readiness to pay.

- [32] Reversing the concurrent orders of the Courts below. the Court held that the Respondent Plaintiff may have been willing to perform his part of the contract, it however appears that he was not ready with funds and was possibly trying to buy time to discharge his part of the contract. The Court noted, *"Making a subsequent deposit of balance consideration after lapse of seven years would not establish the Respondent Plaintiff's readiness to discharge his part of the contract."*

- [33] *The Respondent Plaintiff alleged that there was an agreement between him and the appellant to sell the disputed property for a consideration of Rs.15,10,000 out of which he had paid a sum of Rs.10,001 in advance. It was further agreed between the parties, that the Respondent Plaintiff would get the sale deed registered on or before 15-03-2003 upon payment of the full sale consideration. The genesis of the case was that though the Respondent Plaintiff had approached the appellant with the balance consideration several*

times and requested to execute the sale deed in his favour, the appellant kept postponing the execution of the sale deed on one pretext or the other.

- [34] On the contrary, the appellant contended that the Respondent Plaintiff was never ready or willing to perform his part of the contract. In the impugned decision the trial court found that the Respondent Plaintiff was ready and willing to perform his part of the contract, and thus entitled to the relief of specific performance. Therefore, the trial court decreed the suit and directed the appellant to receive the balance sale consideration of Rs.15 lakhs and execute the sale deed in favour of the Respondent Plaintiff. The trial court's decision was affirmed by the Madras High Court in appeal.
- [35] Willingness and Readiness to Pay Section 16 (c) of the Specific Relief Act, 1963 (prior to amendment w.e.f. 01-10-2018) bars the relief of specific performance of a contract in favour of a person, who fails to aver and prove his readiness and willingness to perform his part of the contract. **The Court noted that to aver and prove readiness and willingness to perform an obligation to pay money, in terms of a contract, the plaintiff would have to make specific statements in the plaint and adduce evidence to show availability of funds to make payment in terms of the contract in time.** In other words, the plaintiff would have to plead that he has sufficient funds or is in a position to raise funds in time to discharge his obligation under the contract.
- [36] Relying on Acharya Swami Ganesh Dassji v. Sita Ram Thapar, (1996) 4 SCC 526, the Court opined that there is a distinction between readiness and willingness to perform the contract and both ingredients are necessary for the relief of Specific Performance. While readiness means the capacity of the Plaintiff to perform the contract which would include his financial position, willingness relates to the conduct of the Plaintiff. Considering that no evidence was adduced on behalf of the Respondent Plaintiff as to how he was in a position to pay or make arrangements for payment of the balance sale consideration within time; as his balance sheet dated 31-03-2003 revealed that he did not have sufficient funds to discharge his part of the contract, the Court held that the Courts below have erred in not adjudicating upon this vital issue except to make a sweeping observation that, given that the Respondent Plaintiff was a businessman he had sources to arrange the balance funds.

- [37] *Limitation period following the findings in Saradamani Kandappan v. S. Rajalakshmi, (2011) 12 SCC 18, the Court opined that while exercising discretion in suits for Specific Performance, the Courts should bear in mind that when the parties prescribed a time for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored. Similarly, every suit for Specific Performance need not be decreed merely because it is filed within the period of limitation, by ignoring time limits stipulated in the agreement. Hence, the Court opined that the fact that the limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain Specific Performance. The Court observed that the three-year period is intended to assist the purchaser in special cases, i.e., where the major part of the consideration has been paid and possession has been delivered in part performance, where equity shifts in favour of the purchaser. "The courts will also frown upon suits which are not filed immediately after the breach/refusal." Accordingly, the Court held that the fact that the suit had been filed after three years, just before expiry of the period of limitation, was also a ground to decline the Respondent Plaintiff the equitable relief of Specific Performance for purchase of the immovable property.*
- [38] Additionally, the Court noted that the Court could not overlook the fact that the suit property is located in the industrial town of Hosur located about 30/40 kms. from Bengaluru and there is a phenomenal rise in the price of real estate in Hosur. In view of the foregoing, the Court held that the Respondent Plaintiff was not entitled to the relief of specific performance. The appeal was allowed and the impugned judgment of the High Court, as well as the judgment and decree of the Trial Court, were set aside. The appellant was directed to return the earnest money to the Respondent Plaintiff, within 4 weeks with interest at the rate of 7% per annum from the date of deposit of the same, till the date of refund.
- [39] The 1st and the 4th grounds of appeal are concerning the non-payment of the sale price. Even at the time of transferring the property to the Plaintiff by the Registrar of the High Court on 9 March 2018 there was no payment made by the Plaintiff. The conveyance was executed on the basis of an agreement to pay. That was in violation of the court orders made on 22 April 2014 and 7 November 2017 which required the Plaintiff to make the

payment. Therefore I am of the view that the Plaintiff has been blatantly violating the court orders and attempted to get the property free as complained by the Defendants' counsel. Grounds of appeal Nos. 1 and 4 are decided in favour of the Defendant/Appellants.

[40] It appears that the learned Judge has overlooked the fact that the Plaintiff has filed this case under section 168 of the LTA without depositing in court the payment ordered by court on 22 April 2014 and on 7 November 2017. Therefore I am of the view that the learned Judge has erred in ordering to vacate caveat which prevented the Plaintiff from registering the property in his name. It is the caveat that prevented the Plaintiff from getting the property free of charge. I am of the view that the judgment of the learned Judge should be set aside. I am also of the view that the Registrar of the High Court should be directed to cancel the transfer and return the deposit made by the Plaintiff in court on 2 April 2020 to the Plaintiff. The Registrar of Titles the 3rd Defendant/2nd Respondent is also directed to cancel the registration made on 2nd April 2020 bearing No. 889026. Thus this appeal is allowed with costs in a sum of \$5000.00 payable by the Plaintiff/Respondent to the Defendant/Appellant within 21 days from the date of this judgment. The Plaintiff is also ordered to vacate the property within 28 days from the date of this judgment. In case of any failure to do so, the Registrar of the High Court is ordered to evict the Plaintiff and hand over possession to the registered owner of the property and to recover the costs of such eviction from the Plaintiff/Respondent from the monies deposited in court.

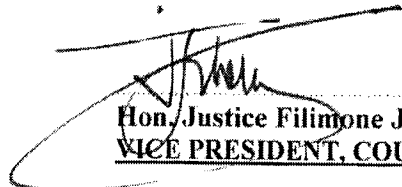
Mansoor JA

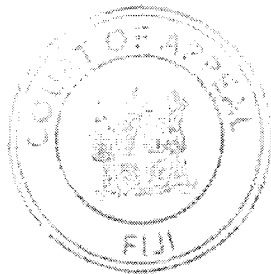
[41] I agree with the reasons and conclusion and the proposed orders of Basnayake JA.

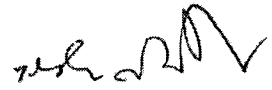
Orders of Court are:


1. The appeal is allowed.
2. The Judgment of the learned High Court Judge dated 24th March 2020 is set aside.
3. The Registrar of the High Court is directed to cancel the transfer of the property made on 9 March 2018 to the Plaintiff/Respondent.

4. The Registrar of Titles the 3rd Defendant/2nd Respondent is also directed to cancel the registration of the transfer made on 2nd April 2020 bearing No. 889026.
5. The Plaintiff/Respondent is entitled to have the money reimbursed on making an application to court and the monies paid to Revenue & Customs on account of Capital Gain Tax.
6. The Plaintiff/Respondent is also ordered to vacate the land within 28 days from the date of this judgment.
7. In the event of failure to vacate the Registrar is ordered to evict the Plaintiff/Respondent and recover the cost of eviction from the Plaintiff/Respondent from the monies deposited and to hand over the property to the registered owner.
8. The Plaintiff/Respondent is ordered to pay \$5000.00 to the Defendant/Appellants as costs within 21 days from the date of this judgment.


Hon. Justice Filimone Jitotko
VICE PRESIDENT, COURT OF APPEAL




Hon. Justice Eric Basnayake
JUSTICE OF APPEAL


Hon. Justice M. J. Mansoor
JUSTICE OF APPEAL