

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBM 10 of 2009L

IN THE MATTER of Committal Proceedings under order 52 of the High Court Rules 1988 against **SURESH VERMA** for contempt of Court

AND

IN THE MATTER of an application by **SADANAND SHARMA**

APPLICANT

AND

SURESH VERMA and **EQUITY REALTORS AND LAND DEVELOPERS (FIJI) LIMITED**

RESPONDENTS

IN THE MATTER of High Court Action No. 36 of 1996L between **SADANAND SHARMA**

PLAINTIFF

AND

EQUITY REALTORS AND LAND DEVELOPERS (FIJI) LIMITED

FIRST DEFENDANT

AND

MADHURI SHARMA, PRASHANT KUMAR SHARMA and **JYOTI KUMAR SHARMA**

SECOND DEFENDANTS

INTERLOCUTORY JUDGMENT

Of: Inoke J.

Counsel Appearing: Dr. Sahu Khan for the Applicant
Mr. Suresh Maharaj for the Respondents

Solicitors: Sahu Khan & Sahu Khan for the Applicant
Suresh Maharaj & Associates for the Respondents

Date of Hearing: 17 September 2009
Date of Judgment: 24 September 2009

INTRODUCTION

[1] This application arises out of a consent order made on 17 October 2005 by Finnigan J pursuant to terms of settlement of Civil Action HBC 36 of 1996L between the parties. It demonstrates the difficulties that can arise if the terms of settlement are not precise.

THE PROBLEM

[2] Paragraph 1 of the consent order required the First Defendant, Equity Realtors, to subdivide and transfer to the Plaintiff, at no cost to the Plaintiff, a piece of land comprising an area of 1260 sq.m. out of the freehold land described in Certificate of Title No 30144.

[3] No time was set in the terms of settlement or the consent order for Equity Realtors to do that. Dr Sahu Khan, Counsel for the Plaintiff, by motion filed on 10 July 2009, asks that this Court set the time at 2 months.

THE APPLICATION

[4] The matter began as an application for committal pursuant to Order 52 r 2 of the **High Court Rules 1988** filed on 3 March 2009. The ex-parte application for leave for committal came before Phillips J on 20 March 2009 who gave leave for the application to be withdrawn and struck out on the grounds that the consent order set no time for the Defendant to complete the subdivision.

[5] Dr Sahu Khan then filed an ex-parte motion on 10 July 2009. I directed that it be heard inter-parte. One of the reasons for so directing was my concern that I might make orders contrary to the terms of settlement without hearing

from the Defendants. The motion states that the application is made pursuant to the High Court Rules, without specifying which particular rule, and the Court's inherent jurisdiction. This is the application now under consideration.

THE AFFIDAVITS

[6] The Plaintiff, Sadanand Sharma, filed his affidavit in support on 10 July 2009 and Suresh Verma swore an affidavit in reply on behalf of Equity Realtors, filed on 19 August 2009. The application was eventually heard by me on 17 September 2009.

[7] Mr Sharma is a farmer. He is 73 years old. He has been waiting since the day of the consent order to get his land. His solicitors wrote to Suresh Verma, the Managing Director of Equity Realtors, who is also a solicitor, on February and September 2006 complaining that the terms of the consent order have not been complied with. Mr Verma replied on 25 September 2006 that the land has been surveyed and the boundary pegs would be put in by the weekend. As for the subdivision of the land, all subdivision of the company had been "shelved" by Town and Country Planning and PWD had also put on hold water supply to the subdivision. The matter was then before the court and subdivision would resume after the matter is resolved. Mr Sharma's solicitors wrote back saying that the survey plan showed a new access way which would make it difficult for Mr Sharma and the boundary too close to the house. Mr Verma did not reply till 14 May 2007 in which he said that the survey was done according to the terms of settlement and that Mr Sharma was present when the boundary was pegged and did not complain and he understood Mr Sharma to be happy with it. Mr Sharma's solicitors wrote to Krishna & Co, solicitors now acting for Equity Realtors, on 22 September 2007 confirming that Mr Sharma wanted to finalise the matter as soon as possible and agreed to the survey as it stood. He alleges in his affidavit that the Defendants were deliberately delaying the issue of his title as they knew that he was getting old and that his family was worried that they would suffer if he died.

[8] Mr Verma complains that he was not a party in action HBC 36 of 1996L and that he has been joined in this action unnecessarily and in breach of the rules and an abuse of process. He denies that Equity Realtors have done nothing to comply with the Court order and referred to his letters which explained the delay. He says there was a pending Court action, HBC 101 of 2003, in which Equity Realtors has sued the Attorney General for unlawful installation of water pipes and encroachment on its land, and as a result of that action, all subdivision works and supply of water mains in the subdivision has been put on hold. As if that was not enough, there is also another court action, HBC 322 of 2003, brought against Equity Realtors by the previous owner of the land in respect of its sale. Mr Sharma's solicitors are also the solicitors for the plaintiff in that action. Mr Verma alleges that those solicitors should be well aware of the facts and have known since October 2003 that Town and Country Planning had put the subdivision on hold until that action is resolved. He says that the Plaintiff's current application is misconceived and an abuse of process and there is no legal basis to set aside or vary the consent order of 17 October 2005.

SURESH VERMA IS NOT A PROPER PARTY TO THIS ACTION

[9] Mr Suresh Verma, the Managing Director of Equity Realtors, has been joined as a party to this action. He was not a party in action HBC 36 of 1996L and is therefore not subject to the consent order. He is not a proper party in this action and I therefore order that his name be struck off as a defendant in this action.

THE LAW

[10] Dr Sahu Khan, Counsel for the Plaintiff, referred to **O 45 r 5** of the High Court Rules as giving the Court jurisdiction to hear his application. Order **45 r 5(2)** provides:

"Where, notwithstanding Order 42 rule 3(1), or by reason of Order 42 rule 3(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done, the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein."

[11] **Order 42 rules 3(1) and 3(2)** provide:

"(1) Subject to paragraph (2), a judgment or order which requires a person to do and act must specify the time after service of the judgment or order, or some other time, within which the act is to be done.

"(2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any land or deliver any goods, a time within which the acts is to be done need not be specified in the judgment or order by virtue of paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly."

[12] Mr Maharaj, Counsel for Equity Realtors, submitted that in the face of all these unresolved disputes it would not be wise to impose a time frame within which the Defendants are to complete the subdivision. He further submitted that the Plaintiff must bring a new action and such an action will be faced with the same defence. He submitted that I have no jurisdiction to interfere with the consent order. He referred me to paragraphs 555 to 562 of **Halsbury's Laws of England**, vol 26, 4th edn as supporting his submissions.

[13] Paragraph 556 states: "As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality, but it is subject to a number of exceptions."

[14] The general rule is cited in **Thynne v Thynne** [1955] 3 All E R 129, 142 by Hodson LJ, from the decision of Lindley LJ in **Preston Banking Co v William Allsup & Sons** [1895] 1 Ch at p 144:

"In my opinion, it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the judge who made it."

[15] In **Thynne v Thynne** [1955] 3 All E R 129, the parties were secretly married on 8 October 1926, and on 27 October 1927, they went through a second ceremony of marriage in the presence of their relations and friends. In a subsequent petition for divorce, the date of marriage was incorrectly stated as 27 October 1927 as well as the church in which the parties were married. The mistake was an honest mistake which the petitioner's lawyers were not aware of. The decree nisi and decree absolute bore the same mistakes. The petitioner applied to have the marriage date and place corrected in the petition and the decrees nisi and absolute. The Judge at first instance refused the amendment taking the view that the decree absolute was a nullity. That left the parties in a state of uncertainty. If it was assumed that the decree was a nullity and a new petition was filed it would be met by the rules which forbade the filing of a fresh petition whilst another petition on the same matter remained unresolved. And if it was sought to remove the decree, the answer might well have been that it was a perfectly good decree or that it was not void. On appeal, the English Court of Appeal allowed the correction to be made. Morris LJ at page 145 explained the principles in this way:

"In addition to powers resulting from rules of court, it is clear that there are necessary powers which are inherent in the jurisdiction of the court. It would, I think, be undesirable to limit the scope of those powers as a result of any words which describe them. I respectfully agree with what was indicated by Evershed, LJ, in Meier v Meier [1948] P at p 95:

'I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so.'

...If the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In Lawrie v Lees, Lord Penzance said (7 App Cas at p 34):

'I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court – to vary them in such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.'

To the same effect were the judgments in Re Swire (1885) 30 Ch D 239. Lindley LJ said at p 246:

'...if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right.... It appears to me, therefore, that, if it is once

made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'

...

If the court, in the circumstances I have postulated, is powerless to act, it would seem as though the court was enslaved by its own decree. Where a court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been made effective, then the court cannot re-open the matter and cannot substitute a different decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply. But if a case arises where in the interests of accuracy it seems desirable to amend some part of a judgment, other than its operative and substantive part, it would seem to be regrettable if the inherent powers of the court were limited or confined. The powers extend in my judgment to enable a court so to amend a judgment that it carries out the intention of the court. Particular words and particular forms (unless specified by the legislature) are the servants of the law and not its master."

CONSIDERATION OF THE APPLICATION

[16] It is clear in my mind, from these authorities, that I have jurisdiction both under the rules of Court and under the Court's inherent jurisdiction to entertain this application. That is a different matter altogether from whether I should grant the orders sought.

[17] The order that was made by this Court in this case is pursuant to and to give effect to terms of settlement. I do not think that the amendment sought is one of substance. It is in fact to bring some certainty to the settlement.

[18] I think the parties if they were asked, would have set a time. No one will agree with the suggestion that the agreement was to be open ended as to time. A reasonable time would have been set. Counsel for the Plaintiff says, 2 months is reasonable. Counsel for the Defendants says, we must wait until the court cases are completed. When that will happen it is not known but one can be sure that unless settled it could take years.

[19] As I have said at the outset, this case highlights the pitfalls in not having terms of settlement clearly and comprehensively set out. I am very conscious of the need to bring this case to an end and to do justice to the parties yet at the

same time not rewrite the terms of settlement. I do not think that setting a time for compliance is rewriting but rather making the terms more certain. I am also swayed by Mr Sharma's age and his plea of concern that if he dies his family will suffer.

[20] The Managing Director of Equity Realtors was best placed to know what the circumstances of the land were. He must have known full well what the circumstances were when he agreed to subdivide the land and the other terms of the settlement. I do not think he should be as easily let out of the settlement. I do not hear him saying that the terms were not fair. He only says that he cannot carry them out because of some other issues. I note that those issues are all within his and Equity Realtor's power to resolve and not Mr Sharma's. Considerable time has lapsed without much progress. This litigation need to come to finality and soon. At the same time Mr Verma and Equity Realtors should be given a reasonable time to comply with the terms. I do not think that 2 months is sufficiently long enough. Four months, bearing in mind that the end of the year is fast approaching, is I think a more reasonable time. It is up to Mr Verma to proceed with haste.

COSTS

[21] The Plaintiff has not asked for costs in his motion so I make no order as to costs.

ORDERS

[22] The Orders that I make are as follows:

1. Mr Suresh Verma is to be struck out as a defendant in this action.
2. Paragraphs 1 and 2 of the consent order dated 17 October 2005 is amended by inserting at the end of those paragraphs the words: "within 4 months from the date of this Order."

3. There is no order as to costs.

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Sosefo Inoke
Judge