2011 NO. 160/S DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

DAMODAR BASDEO

Plaintiff

-and-

SHADEEK MOHAMED

Defendant

Mr. S. Poonai for the plaintiff
Ms. C. Riehl for the defendant

DECISION

The plaintiff is the owner by transport No. 715/2011 fro the property described hereunder:-

"Lot numbered 132 (one hundred and thirty two) being a portion of Area 'X', Good Hope, situate on the east sea coast of the county of Demerara, Republic of Guyana, the said lot containing an area of 0.0771 (nought decimal nought seven seven one) of an acre as shown and defined on a plan No. 29877 by T.P. Lilboy Benny, Sworn Land Surveyor, dated 27th February 2000 and deposited in the Deeds Registry at Georgetown on the 1st day of October,

2002 with the building and erections thereon and more fully described in transport 715/2011."

The plaintiff claims that the defendant is in occupation as a licencee and despite sending a letter to the defendant terminating the licence, the defendant remains in occupation. The plaintiff is claiming possession of the aforementioned property.

In his Affidavit of Defence the defendant denies that he is a licencee and claims that he has a substantial interest in the property. The defendant states that in 1994 he began living in a common law union with the plaintiff's sister Bhagmania Basdeo. He said he and the plaintiff's sister made a joint application for land owned by Guysuco and he provided all the money for the transaction. He said, however, that Bhagmania did all the paper work through the Ministry of Housing since he was illiterate and she was literate. He said they erected a house on the land in 2000 and lived there until April 2005 when they separated. He said Bhagmania moved out and took all the documents. He said that in June 2005 they visited a probation officer, Mr. Rudder, where

they signed an agreement that the property would be shared half and half. The defendant states that Bhagmania has children who are the heirs to her estate and not the plaintiff. However the issue before this court is whether the defendant is entitled to a share of the property held by transport by the plaintiff, and not Bhagmania's children. They are not parties to this action and any interests they may have cannot be considered by this court.

As to whether the defendant is entitled to a share in the property it is apt to note that the defendant is not an heir to the estate of Bhagmania so any claim as an heir fails.

The defendant also cannot claim under the MPPA and its amendment since Bhagmania is deceased and also the parties were separated. Under the MPPA amendment the parties must be living together for 5 years or more and must be living together at the time of the claim. Besides the MPPA does not give an interest but only the right to apply for an interest.

In the first place the defendant has not legally acquired any interest in the property by virtue of having co-habited with Bhagmania. He merely has a right to make an application to the court under the Married Persons Property (Amendment) Act for an award on the basis of duration of co-habitation and the degree of contribution. The Act confers no interest in rem but a statutory right of action ad rem. The court does not make a declaration as to the existence or extent of a pre-existing interest in rem but makes an award which may or may not create an interest in the matrimonial property. In this case the defendant never applied to a court for an award under the Married Persons Property (Amendment) Act 1990 and no award was ever made.

Furthermore this case does not involve the resolution of any dispute over the interest in the matrimonial property. The defendant would have had to institute legal proceedings under the Married Persons Property Act as amended by 1990 Act against Bhagmania for a declaration as to his share if any and any such declaration would have had to be translated into his being entitled to a share in the property.

Likewise in this case I can hardly find that the plaintiff fraudently obtained the transport from Bhagmania's estate, when the defendant had not even acquired an interest in the property, no steps having been taken to obtain a declaration under the MPPA and its amendment.

The defendant has not shown how he is entitled to an interest in the property. He has not produced any evidence that he holds the property or a share therein, by transport , deed or any instrument whatsoever.

The defendant cannot also claim an equitable interest in respect of his alleged monetary contributions to the acquisition of the property.

In **Ramdass v Jairam** (2008) 72 WIR 270 the CCJ stated –

"equitable interests in immovable property were not recognized and could not be acquired in Guyana.

The defendant no doubt can bring an in personam claim against the estate of Bhagmania but he cannot do so against the plaintiff. The defendant may have a cause of action against the estate in his claim for an equity only in so far as his expenditure is concerned but the plaintiff has already acquired an indefeasible title against the defendant.

The defendant has not given any evidence of any fraud committed by the plaintiff in collusion with Bhagmania to divest him of any share in the property. At paragraph 15 of

his Affidavit the defendant merely states “I am of the opinion that the plaintiff conspired with Bhagmania to give the property to him as a gift, so as to deny me any share in this property.” He has not shown how the plaintiff conspired to do so.

In the circumstances the defendant has failed to show that he has any defence or any triable issue upon which he ought to be given leave to defend.

In **Commercial Litigation: pre-emptive remedies**, 3rd ed. 1997, it is stated that the test is that cited in **Banque de Paris**-

“ the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence”.

The defendant must show that he have a clear defence, or a serious issue of fact to be tried or that there is an arguable point of law.

I am not satisfied that the defendant has shown this court that there is a fair or reasonable probability of having a real or bona fide defence, or a serious issue to be tried.

In **Commercial Litigation** (supra) page 361 reference was made to **Lady Anne Tennant v. Assoc Newspapers Group Ltd** (1979) FSR 298 where Sir Robert Megarry V.C. said of the defendants' attempts to persuade him that there was a triable issue –

" Now under Order 14 Rule 3 (1) I must refuse to enter judgement for the plaintiff if the defendants satisfy me that there is "some issue or question in dispute which ought to be tried or that there ought for some reason to be a trial of the action. Counsel for the deft addressed me at some length, but from the first to the last he failed to make it clear to me what issue or question there was in dispute that ought to be tried".

Sir Megarry further said in the case cited above, at page 303 –

"the desire to investigate alleged obscurities and the hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgement for the plaintiff."

I find that on the facts the defendant's claim is bound to fail as against the plaintiff herein.

Also with reference to **Commercial Litigation** (supra) it is stated at p. 363 –

"if the legal point on behalf of the defendant is quite clearly unarguable, the court has precisely the same duty under O. 14 as it

has in any other case: reference to **Carol v Casey** (1949) 1 KB 474 Lord Greene MR said " when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule".

I find that the points of law raised by the defendant are clearly unarguable and would not differ if the matter were to be tried. I am of the view that exactly the same points would be raised in litigation were the defendant given leave to defend and the matter goes to trial. In this case the plaintiff's liability to the defendant is not dependant upon the view of the facts taken by the judge after he has heard all the evidence, nor is it dependant on observing the demeanour of witnesses. It is clearly evident from the affidavit evidence that the defendant does not have an arguable case.

Again referring to **Commercial Litigation** page 363 where the issue was whether " argument on law – Forum? In **Verall v Great Yarmouth Borough Council** (1981) QB 202 Roskill L.J. stated –

"We have often said in this court that where there is a clear issue raised in Order 14 proceedings, there is no reason why the judge in chambers – or, for that matter, this court – should not deal with the whole matter at once. Merely to order a trial so that the matters can be re-argued in open court is to encourage the law's delays which in this court we are always trying to prevent".

In **Coastal (Bermuda) Ltd v Esso Petroleum Ltd** (1984) 1 Lloyd's Rep. 11 the court held –

" the result is that if the defendant raises a point of law which the court feels able to consider without reference to contested facts simply on the submissions of the parties, it is now settled that in applications for summary judgement under Order 14 the court will do so in order to see whether there is any substance in the proposed defence. **If it concludes that the point, though arguable, is bad, it will give judgement for the plaintiff there and then.**

In my view the defendant has failed to show that he has an arguable case, and has sought to set up points of law which have no real substance to them.

Megarry J said in **Lady Anne Tennant** (supra) at p. 303 –

" you do not get leave to defend by putting forward a case that is all surmise…….".

In the local case of **Jeffrey Thomas and Pamela Thomas v Citizens Bank Guyana Ltd.**, Civil Apeal No. 51 of 2003, our Court of Appeal referred to the Trinidad case of **Trinidad Home Developers Ltd v IMH Investments Ltd.**, (1990) 39 WIR 355 where Sharma JA said –

" I would accordingly rule that when a matter of pure law is raised by a defendant in Order 14 proceedings in our jurisdiction no matter how complex the law or extended the argument, even if it includes

the citation of many authorities, the master or judge should should go on to deal with the matter finally and definitively"

and approved of this dicta and Mr Ian Chang Justice of Appeal delivered the unanimous judgement of the Court and said at pages 9-11 –

"Without doubt, the observations made by Sharma JA are as pertinent to the administration in Guyana as in T & T and the procedural approach of definitively and finally dealing with issues of law which arise in summary judgement proceedings can have only a salutary effect on the administration of civil justice here. This court endorses those observations and commends the approach advocated by him where questions of pure law arise in affidavits of defence in summary judgement proceedings…..this court does not disagree with but rather endorses the approach adopted by the bail court judge in proceedings to determine the issues of law which arose on the affidavit of defence ……there is nothing to prevnt the bail cout judge from making an informed and mature determination of any legal issue and no prejudice can enure to the detriment of a defendant by an early but mature determination of legal issues".

The court found that the affidavit of defence discloses no triable issue and is not a defence to the plaintiff's claim. In the circumstances the affidavit of defence is hereby struck out and judgment granted for the plaintiff in terms of

paragraph (a) of the statement of claim. Stay of execution for six weeks granted. Costs waived by the plaintiff.

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Diana F. Insanally

Date: 5th June 2012