

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 22 OF 1987

BETWEEN:

DARSHAN SINGH s/o Puran Singh

APPELLANT

- AND -

PURAN SINGH s/o Mohar Singh

RESPONDENT

Mr A K Narayan for the Appellant

Mr G P Shankar for the Respondent

Date of Hearing: 23rd September 1987

Date of Judgment: 25th September 1987

JUDGMENT OF THE COURT

MISHRA, J.A.

This is an appeal from an order of possession made by Dyke J against the appellant under sections 169 and 172 of the Land Transfer Act. Under section 169 a registered proprietor of land may summon any person in possession of that land to appear before a judge in chambers to show cause why he should not give up possession to the applicant.

The relevant part of section 172 of the Act reads:-

"172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, or he may make any order and impose any terms he may think fit:

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled."

The land in question is 1 acre 1 rood 30 perches of freehold in Ba with a house on it. A sale and purchase agreement was entered into between one Ram Dutt the vendor and the appellant's mother Prasin Kuar the purchaser on 6th March 1967. Ram Dutt's title and transfer to Prasin Kuar were both registered on 6th September 1968. The learned judge would appear to have expressed surprise at this but it is not at all uncommon under the Land Transfer Act for the title and the transfer to be registered on the same date where the property has changed hands under an agreement before the registry has been able to issue the certificate of title. Transfer from Prasin Kuar to her husband, the respondent was registered on 11th September 1981. At the time of the application he was the last registered proprietor without any encumbrance, interest or caveat appearing on the certificate of title. Except in the case of fraud, therefore, there could be no challenge to his ownership.

The appellant filed an affidavit in which, among other things, he claimed:-

- "5. THAT I had purchased Certificate of Title Number 12676 from one RAM DATT son of Kunjbehari Maharaj in or around 6th March, 1967. I had paid the total purchase price for the said land and subsequently also purchased the Sugar Cane Contract from one UMA DATT father's name Kunjbehari Maharaj to cover the said Certificate of Title.
- 6. THAT at the time I did not wish to take a transfer of the Certificate of Title Number 12676 and subsequently the Sugar Cane Contract over the said land in my name and on the 18th day of December, 1967 the transfer was executed in favour of my mother and duly registered on 6th September, 1968.
- 7. THAT for this reason I had nominated my mother PRASIN KUAR daughter of Nikka Singh of Yalalevu, Ba, with the full knowledge and concurrence of the Plaintiff, to take the transfer in her name with myself advancing all of the purchase price. It was expressly agreed between my mother, father and myself that when I desired the land would be transferred into my name.

- 8. THAT apart from the purchase price paid by me I have also carried out improvements to the house on the said Certificate of Title, having constructed a toilet, bathroom and another bedroom and have cultivated sugar cane on the remainder of the land and I treated the land as if the same was mine to which my mother and the Plaintiff acquiesced.
- 9. THAT I verily believe that my mother has transferred the land to my father in order to defeat my interest in the said land. "

In her affidavit in reply Prasin Kuar stated:-

- "4. THAT my husband the Plaintiff had paid all money for purchase of CT No. 12676, known as Valele and Nawaralailai, being Lot 2 on DP. 3032. The title was transferred by the vendor RAM DATT son of Kunjehari Maharaj in my name at the request of the Plaintiff. The defendant had nothing to do with it.
- 5. THAT because of my poor health I was going away to India indefinitely, I transferred the said title to the Plaintiff in 1981.
- 6. THAT the defendant was allowed to live with us merely because he is my and my husband's son but otherwise he has no right to the said land on other improvements thereon.
- 7. THAT the defendant is and has been a complete nuisance and causes intolerable annoyance and inconvenience to me and to my husband. "

The respondent also filed an affidavit in reply denying that the appellant had provided the purchase money.

There is no quarrel with the proposition put forward by the appellant's counsel that fraud, if established, would affect the indefeasibility of title (Sutton v O'Kane 1973 N.Z. L. R 304. Also section 40 Land Transfer Act). He, however, does not claim that fraud in this case has been established. He contends, as he did in the lower court, that where an allegation of fraud is made summary procedure provided by section 169 of the Land Transfer Act becomes inappropriate and the application should therefore have been dismissed without prejudice to the


respondent's right to institute proceedings by writ. In support of his submission he refers to *Shyam Lal v Eric Martin Schultz* (18 FLR 152 at 154) where dismissing the appeal Gould V P said:-

"I would only add, on the argument that the procedure authorised by section 169 of the Land Transfer Act, 1971, was not appropriate, that I am in sympathy with the proposition that complicated questions of fact (particularly where there are allegations of fraud) cannot adequately be investigated and dealt with on a summary proceeding in Chambers."

In that case, though numerous documents had been produced, the basic facts were not in dispute and section 169 procedure was held to have been appropriate. We do not consider Gould V.P.'s dictum to mean that a bare allegation of fraud would, by itself, amount to a complicated question of fact.

There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make section 169 procedure unsatisfactory. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both Prasin Kuar and the respondent. There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in establishing fraud at a full trial. He was therefore, correct in treating the case as falling within the scope of section 169 of the Land Transfer Act and making an order for possession in favour of the respondent.

The Appeal is dismissed with costs to be taxed in default of agreement.


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VICE-PRESIDENT


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JUDGE OF APPEAL


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JUDGE OF APPEAL