(29)

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

CIVIL APPEAL NO. ABU 0005 OF 2008
(High Court Civil Action No. HBC 44 of 2007S)

BETWEEN : **HARI NARAYAN** *Appellant*

AND: **SHIU NARAYAN** *Respondent*

Coram: Byrne, JA
Shameem, JA
Hickie, JA

Hearing: Friday, 20 June, 2008, Suva

Counsel: A. Singh for the Appellant
Applicant in person

Date of Judgment: Tuesday, 24 June, 2008

JUDGMENT

THE APPLICATION

[1] This is an Appeal by **HARI NARAYAN** in relation to a judgment in the High Court at Suva on 19 December 2007 whereby the Court dismissed an Application made pursuant to Section 169 of Part XXIV of the *Land Transfer Act*, Cap. 131, for an Order for immediate vacant possession of the land comorised in Crown Lease No. 1858, Lot 21, Wainibuku Subdivision in the Tikina of Duva and Province of Rewa situated in Wainibuku, Nasinu of which the Appellant is the Registered Proprietor.

[2] The Summons filed in the High Court on 8 February 2007 on behalf of the Appellant, sought that the Respondent (who is one of his siblings) show cause why an order for immediate vacant possession of the said property (which is the former family home) should not be made against him upon the grounds set forth in the Affidavit of Appellant RENNAN SUKHEDO sworn on 7 February 2007.

[3] The hearing of the Summons came before the Master on 28 February 2007 and was eventually heard on 21 November 2007 with the Appellant being represented by Mr V. Maharaj of Counsel and the Respondent appearing in person. Judgment was on notice and delivered on 19 December 2007 wherein His Lordship found:

(a) That "I am satisfied that this is not a proper matter for [a] Section 169 application";

(b) That "the allegations made by the defendant are serious", that is, "that the plaintiff had the property transferred to his name by fraud and undue influence over the mother";

(c) That "the result was the defendant [sic] [Plaintiff] got the entire property to himself and kept the other siblings in the dark to conceal his fraud";

(d) That "this is a proper case where oral evidence would be necessary to resolve the disputed facts".

[4] In view of the above, His Lordship dismissed the Application with costs noting that "the plaintiff is at liberty to pursue eviction proceedings by way of writ of summons".

BACKGROUND TO THE APPEAL

[5] Part of the "background" which follows, is taken from the Appeal Book as well as the Chronology tendered at the hearing before the Court of Appeal on 20 June 2008 (to which the Respondent did not dispute of object).

[6] The "original owner" (if he can be termed that) from the Appellant's Chronology was **BANARAS**, the parties maternal grandfather, who obtained a lease on 1 July 1948.

[7] On 14 May 1963, Banaras died, bequeathing the property to his daughter (the parties' mother) and the Appellant (as one of his grandchildren and apparently the eldest grandson) resulting in the mother and the Appellant becoming Registered Proprietors on 20 July 1964. That same year, the parties' father also passed away.

[8] Just under10 years later, on 3 July 1974, (after obtaining the consent of the Director of Lands), the mother transferred her half share in the property to the Appellant who thus became the sole Registered Proprietor of the said property.

[9] A further 15 years later, the mother migrated to Australia, eventually passing away on 27 November 1993.

[10] Meanwhile, sometime during 1990, the Respondent's marriage "broke down", he entered a new relationship and moved out of the former family home with his new spouse and he four children from a previous relationship. He made no claim at that time that he held an equitable interest in the property.

[11] Some two years later, in 1992, the Appellant was transferred to Tonga and permitted the Respondent to return to the said property as a caretaker living "rent free" but responsible for his own outgoings.

[12] The Appellant returned from Tonga in 2000 to allegedly find the said property in a bad state of repair and had to rent premises elsewhere for four months whilst he effect repairs to the said property. In addition, the Respondent had constructed an allegedly illegal structure on to the back of the house where he continues to reside with his second wife, her daughter and the daughter's child. Other children of the Respondent's second wife occupy part of the main house.

[13] On 29 August 2006, the Respondent placed a caveat on the said property which was apparently removed on 31 October 2006 by the Registrar.

[14] As relations began to deteriorate, the Appellant issued the Respondent with a Notice to Quit" on 30 October 2006 followed by the Appellant instructing his then Solicitors, Maharaj Chandra & Associates, to write a letter to the Respondent on 14 November 2006 .

[15] On 23 November 2006, the Respondent had his Solicitors, Eroni Veretawatini, respond to the Appellant's Solicitor:

> *"We have instructions to file an action in Court requesting that the property be sold or subdivided and given to our client and his brother Vijay Narayan."*

[16] On 15 December 2006, the Director of Lands and Surveyor General gave his consent to eviction proceedings.

[17] On 8 February 2007, the Appellant filed a Summons ion the High Court at Suva seeking that the Respondent show cause pursuant to Section 169 of the *Land Transfer Act* why an Order for immediate vacant possession of the said of which the Appellant is the Registered Proprietor should not be made against the Respondent.

[18] It was that Summons which was eventually heard on 21 November 2007 with judgment being delivered on 19 December 2007 dismissing the Application for immediate vacant possession.

[19] An Appeal in relation to the said judgment was filed in the Court of Appeal on 22 January 2008 and came before the Full Court for hearing on 20 June 2008.

THE GROUNDS OF APPEAL

[20] The Appellant has set out three grounds of Appeal as follows:

"1. That the Learned Judge erred in law and in fact in failing to take into account that the Defendant failed to show cause under section 170-172 of Land Transfer Act Cap 131.

2. That the Learned Judge erred in law and in fact in failing to take into consideration bare allegations of fraud by the Defendant which was not particularized [sic] and/or substantiated.

3. That the Learned Judge failed to have regard to the fact that the Plaintiff had established the requirements of his claim as the last registered proprietor under Section 169 of the Land Transfer Act Cap 131 and was therefore entitled to the orders as prayed."

THE LAND TRANSFER ACT

[21] The *Land Transfer Act* (Cap. 131) has provided a simple procedure for summarily obtaining possession of land as the Court of Appeal explained in ***Ram Chand & Others v Ram Chandar & Others*** [2003] FJCA 10 (Pacllii: http://www.paclii.org/fj/cases/FJCA/2003/10.html); (Unreported, ABU0021U of 2000, 28 February 2003, Reddy P, Kapi and Sheppard JJA):

> *"Section 169 of the Land Transfer Act (Cap.131) provides that the registered proprietor of land may summon any person in possession of land to appear before a Judge in Chambers to show cause why the person summoned should not give up possession of the land to the applicant. Section 170 provides that the summons shall contain a description of the land ...* ***By s.172, if the person summoned appears, he may show cause why he refuses to give up 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 or he may make any order or impose any terms he may think fit.*** *The dismissal of the summons is not to prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled."*

[22] In the present case, the Appellant as the Registered Proprietor of the former family home summoned the Respondent (who is also one of his brothers) and who had lived on the land also of his natural life (other than for a period from 1990-1992)

to show cause why he should not give up possession of the land to the Appellant in light of him being the sole Registered Proprietor for some, 33 years since the mother transferred her share to him on 3 July 1974.

[23] Thus once Counsel for the Appellant as the Registered Proprietor had satisfied the High Court as to his client's title and service of the Notice to Quit upon the Respondent, the onus was then on the Defendant to:

(a) Prove to the satisfaction of the Court ***"a right to the possession of the land"***; or

(b) **Seek an Order for compensation** to be paid by the Appellant to the Respondent for the alleged improvements to the land.

[24] At the hearing on 27 November 2007, the Respondent appeared on his own behalf and satisfied the High Court, as His Lordship noted, that he was "raising an equitable jurisdiction", in particular that somehow the property had been transferred to the Appellant "by fraud and undue influence over the mother". His Lordship did not look at the alternative question of compensation as he dismissed the Section 169 in a brief judgment asking rhetorically: "One wonders why [a] mother would feel natural love and affection only towards the plaintiff to the exclusion of the other siblings. No reasons has been advanced for it."

[25] Unfortunately, His Lordship was incorrect in his ponderings. The submissions made by Mr Maharaj in the hearing before His Lordship in the High Court satisfied the basis upon which to bring an Application pursuant to Section 169:

(a) That the Appellant holds indefeasible title;

(b) That no prima facie evidence of fraud has been disclosed;

(c) That the Appellant says that he was the main contributor to the house;

(d) That the Respondent has built another house elsewhere so he has somewhere to live.

[26] Thus, as the Registered Proprietor, the Appellant would normally be entitled to possession unless the Respondent could show some right to refuse possession

pursuant to Section 172. As Pathik J in ***Deo v Mati*** [2005] FJHC 136; (Paclii: http://www.paclii.org/fj/cases/FJHC/2005/136.html); (Unreported, HBC0248J of 2004, 16 June 2005), noted at page 3 (citing the Supreme Court in ***Morris Hedstrom Limited v Liaquat Ali*** (Action No.153/87 at page 2):

> *"Under Section 172 the person summoned may show cause why he [or she] refused to give possession of the land and if he [or she] proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his [or her] favour.* ***The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure****. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced.* ***What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."***

[27] This would seem to be the nub of the issue. Once the Appellant had satisfied the High Court as to his title, it was not for the Court to speculate further. Rather, the onus was upon the Respondent to "show cause" why he refused to give possession and as the Supreme Court held in ***Morris Hedstrom*** ***"some right to possession which would preclude the granting of an order for possession"*** in favour of the Appellant. That is, some tangible evidence. Wild accusations of fraud without more do not establish such a right.

[28] On this issue, Counsel for the Appellant was correct in his supplementary submissions tendered before this Court , in particular, the citation from Lord Selbourne LC in ***Wallingford v Mutual Society*** (1879-1880) 5 App.Cas. 685 at page 697 wherein His Lordship held:

> *"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice.* ***And here I find nothing but perfectly general and vague allegations of fraud.*** *No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded ...""*

[29] This Court strongly concurs with Lord Selbourne's statement. Indeed, as Lord Watson also said in ***Wallingford*** at page 709:

> *"My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of the common law, I think the terms of Order XIV would* ***require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud****, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the defendant to state facts entitling him to defend. The rule* ***must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed****, those facts being assumed to be true."*

[30] In relation to fraud, the Respondent's Affidavit sworn on 12 April 2007 alleges at paragraph 3 (b)

> *"The plaintiff exercised undue influence over my mother to transfer her share in[to] his name absolutely ion the 3rd of July 1974 without notice to me or my others siblings."*

And again at 3 (d):

> *"The plaintiff had the property transferred in his name by fraud, misrepresentation and undue influence."*

[31] Further, at paragraph 7 [iv], the Respondent questions the mother's state of mind alleging:

> *"That my mother was not in a state of mind to fully understand and comprehend the nature of the document, which she was made to sign."*

[32] Each of these paragraphs is just a bald statement without any specific particulars. The onus was on the Respondent to provide more than just accusations and speculation as to why a mother would transfer her title to only one of her children. Indeed, if the Respondent was sincere in his allegations then surely he would have "followed through", so to speak, with the statement contained in the letter of 23

November 2006, from his then Solicitor, Eroni Veretawatini, to the Appellant's Solicitor that he was about to commence proceedings **and filed an action in Court**. Despite some 18 months having passed, no such action has been forthcoming. Indeed, the Respondent appears to have been representing himself soon after the letter of 23 November 2006 following which he was served with the Notice to Quit on 2 January 2007 and then the Summons seeking an Order for immediate vacant possession was filed in the High Court on 8 February 2007.

FINDINGS

[33] In the Appeal before this Court, the Respondent conceded:

(a) Although he had not filed an action as threatened in the Solicitor's letter of 23 November 2006, he felt that "something funny" had occurred resulting in his mother transferring her share of the title in the said property to his brother, the Appellant;

(b) That what he was alleging was a mere allegation of fraud and he had no actual evidence of any fraud by the Appellant;

(c) That he felt that he should have been consulted at the time, back in 1974, when his mother transferred her share in the property to the Appellant;

(d) That he had a lot of emotion "tied up" with the house as (apart from an approximate absence of two years) it was where he had grown up and lived virtually his entire life;

(e) That if the Court orders him to vacate the property he seeks compensation for work he has done inside the house as well as for the "lean-to". He noted that he renovated the kitchen back in 1992 at a cost of approximately $2,000.

[34] On the issue of fraud, the case is similar to that of ***Pravin Kumar v Rajen Kumar*** [1996] FJCA 14; (ABU0058 of 1995S, 28 February 1996, Williams, Casey and Hillyer JJA) to which Counsel for the Appellant has referred the Court, which also involved "a contest between brothers" where the Registered Proprietor was the Appellant and the Respondent had raised allegations of fraud. As the Court of Appeal noted in ***Kumar*** at page 4:

> *"Mr. Maharaj then submitted that S. 39 and 40 of the Land Transfer Act in themselves were sufficient warrant for the learned judge to have made an order for possession ...*
>
> *As to S.39 (1), it is enough to say, that if there is no fraud and the case does not fall within the exceptions (a) (b) and (c), (and in our view there is clearly no evidence of fraud and nothing to bring it within the exceptions) then the registered proprietor holds the land subject only to such encumbrances as may be notified on the folium of the registered (and there were none).*
>
> *From S.39(2) it is clear that no equity such as is alleged can be acquired by possession or user adversely to or in derogation of the title of the registered proprietor.*
>
> *S.40 again excepts fraud, and protects an acquiring registered proprietor's interest as lessee which "shall (not) be affected by notice, direct or constructive, of any, trust or unregistered interest, any rule of law or equity to the contrary notwithstanding .....*
>
> *Mr Maharaj [for the Appellant/Plaintiff] referred us to a considered decision of this Court on these two Sections namely (**Raghupal Singh v. Chabildas Davidas** [1978] FLR 483) **which clearly puts an end to the case for the Defendant**."* (Our emphasis)

[35] Unfortunately, the citation for ***Raghupal Singh v. Chabildas Davidas*** is incorrect. There is only one volume of the *Fiji Law Reports* for 1978 and it notes at the cover page: *"This volume may be cited as '24 F.L.R.'"*. The volume also finishes at page 177 and there is no reference in the "Index of Cases Reported" to ***Raghupal Singh v. Chabildas Davidas.*** The case is, however, listed on Paclii. Its citation, until this Court is corrected to the contrary, is: ***Raghupal Singh v. Chabildas Davidas*** [1978] FJCA 4 (Online Pacllii report: http://www.paclii.org/fj/cases/FJCA/1978/4.html); (Unreported, Full Court of Appeal, No.42 of 1978, 30 November 1978, Henry JA, other judges not listed). In any event, at page 4 of the Paclii report, Henry JA who wrote the judgment on behalf of the Full Court said:

> *"Sections 39 and 40 are in terms similar to Sections 62 and 63 of the N.Z. Land Transfer Act 1952. They are, in general terms, similar to provisions made in statutes in other countries which have adopted the Torrens System of land title. The Judicial Committee of the Privy Council in **Frazer v.***

Walker *[1967] A.C. 569, 580 made this authoritative statement of the law as so enacted:-*

> *'As will appear from the following paragraphs, the inhibiting effect of certain sections (e.g. sections 62 and 63) and the probative effect of others (e.g. section 75) in no way depend on any fact other than actual registration and not its antecedents which vests and divests title.*
>
> *... Without attempting any comprehensive or exhaustive description of what these sections achieve, it may be said that while section 62 secures that a registered proprietor, and consequently anyone who deals with him, shall hold his estate or interest absolutely free from encumbrances, with three specified exceptions, section 63 protects him against any action for possession or recovery of land, with five specified exceptions. Subsection (2) of section 63 is particularly strong provision in his favour; it provides that the register is, in every court of law or equity, to be an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding. It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in the case of fraud," and section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expression[s] has been limited by judicial decision to actual fraud by the registered proprietor or his agent:* ***Assets Co. Ltd. v. Mere Roihi*** *(1905) A.C. 176, 210 P.C.*
>
> *It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Acts itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam.*
>
> *These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.'"*

In the light of this authoritative pronouncement of the law, it is clear that, in the absence of fraud, [the] appellant cannot assert the interest claimed as

against respondents who took a registered title which was free from any such interest. [The] Appellant does not come within any of the exceptions in Section 39 (1). Under section 40 respondents are not affected by notice, direct or constructive, of any unregistered interest, any rule of law or equity to the contrary notwithstanding. Any equitable interest which [the] appellant seeks to set up under Hunt v. Luck ...[[1902] 1 Ch. 428; (1900-03) All England Reports (Reprint) 295] *is clearly contrary to the expressed terms of Sections 39 and 40. Counsel for appellant did not refer to the law, as now set out in the decision of* ***Frazer v. Walker****, either in his submissions or in reply to the submissions of counsel for respondents. Counsel relied on such cases as* ***Barry v. Heider*** *[1914] 19 CLR 197 and* ***Premier Group Ltd. v. Lidgard*** *[1970] N.Z.L.R. 280, 283. These cases do not deal with indefeasibility and can take the matter no further than the concession made by counsel for respondents, namely, that the appeal should proceed on the basis that the interest claimed did in fact exist prior to the time when the Memorandum of Transfer of the fee simple to respondents was registered. In the admitted absence of fraud [the] respondents took an indefeasible title to the exclusion of any claim by [the] appellant that he had an equitable interest for a term of years created by [the] predecessor in title and binding upon [the] respondents who had notice of no more than the occupancy of [the] appellant as tenant and who were not a party to any fraud."*

[36] In view of the above, this is why the Court "***clearly puts an end to the case for the Defendant***". This Court can only strongly concur.

[37] Returning to the present case before us, in the Court's view, the Respondent has not shown on Affidavit evidence "***some right to possession which would preclude the granting of an order for possession under [the] Section 169 procedure***". Instead, he has shown a possible right to compensation against his brother for alleged improvements to the property some years ago. This was a similar finding to that made by Pathik J in ***Deo v Mati*** (supra).

[38] In view of the above, the Court makes the following findings:

1. That the Respondent has not shown that he has any right to remain on the said land over and above the rights of the Appellant as the Registered Proprietor.

2. That the Respondent has failed to show cause under Section 172 of the *Land Transfer Act* which would preclude the granting of an order for possession in favour of the Appellant.

3. That the Respondent has, however, shown cause as to why an Order should be made for compensation pursuant to Section 172 of the *Land Transfer Act* (that is, that a Court "may make any order and impose any terms [they] ... may think fit"). In this case, the Respondent has proved to the satisfaction of the Court a right for the Appellant to pay him a small amount of compensation for alleged improvements to the said property some years ago.

ORDERS

[39] Accordingly, the Court makes the following Orders:

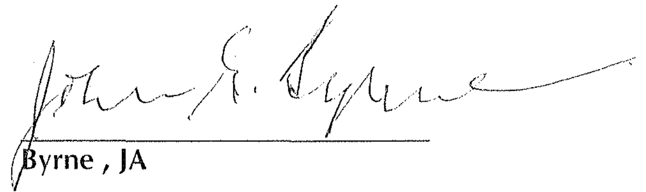
1. **That the Appeal is allowed.**

2. **That the Appellant is entitled to immediate vacant possession of the property situated which the Appellant is the Registered Proprietor subject to him paying to the Appellant within seven (7) days of the date of this judgment $2,000 as compensation for improvements to the property.**

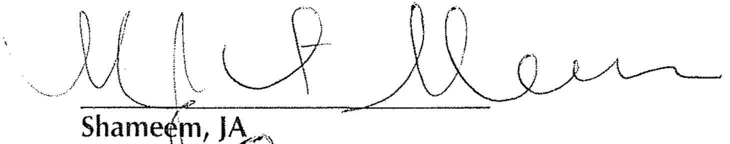
3. **That execution of this Order for vacant possession is delayed for 14 days from the date of this judgment so as to enable the Defendant to have received the $2,000 in compensation from the Appellant and to thereafter voluntarily remove himself, his family (including his extended family) and his possessions from the said land (including the 'Lean-to" structure erected at the rear of the house).**

4. That if after 14 days 14 days from the date of this judgment the Defendant has not voluntarily removed himself, his family (including his extended family) and his possessions from the said land (including the 'Lean-to" structure erected at the rear of the house), then he (and his said family and extended family) will automatically have forfeited their right to the said possessions (including the "lean-to" structure) and such possessions will automatically become the property of the Appellant.

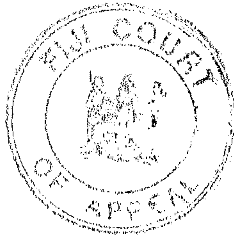
5. That each party is to pay their own costs of the Appeal.

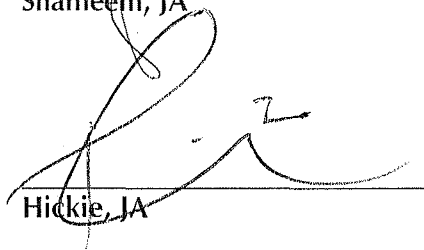


Byrne , JA



Shameem, JA





Hickie, JA

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Respondent in person