

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

CIVIL APPEAL NO. ABU 0006 OF 2016
(High Court No. HBC 129 of 2014)

BETWEEN : DAYA WATI
Appellant

AND : REGISTRAR OF TITLES
Respondent

Coram : Basnayake, JA
Almeida Guneratne, JA
Alfred, JA

Counsel : Mr. P. I. Knight for the Appellant
Ms. M. Lee for the Respondent

Date of Hearing : 22 August 2017
Date of Judgment : 14 September 2017

J U D G M E N T

Basnayake, JA

[1] I agree with the reasoning and conclusion of Almeida Guneratne JA.

Almeida Guneratne, JA

The Nature of this Appeal

[2] This appeal raises important questions in relation to whether a successor to a registered titled proprietor of a 1/5th share to a land could obtain a vesting order under Section 78 of the Land Transfer Act of 1971 to the balance 4/5th shares registered in the names of other proprietors in the facts and circumstances peculiar to the instant case.

Undisputed background history and facts impacting on the said question

- [3] (a) Initially, the land in question had been comprised in Certificate of Title 22672 being Lot 3 on DP2613 containing an area of 8 acres 0 roods 12 perches registered in the joint names of Ram Narayan, Jai Narayan, Kalika Prasad and Indar Narayan all sons of Bhirgu who died on 20th September 1975.
- (b) On 19th February 2001 a new title for the said land, namely Certificate of Title 33461 was issued for the said land.
- (c) The Appellant, the widow of the said Jai Narayan f/n Bhirgu who died on 26th August 2005 and on 2nd May 2006 his one undivided fifth share had been transmitted to her as administratrix of his estate.
- (d) The said Ram Narayan, Kalika Prasad, Indar Narayan and Shiu Narayan (deceased) were all brothers of the Appellant's late husband Jai Narayan.
- (e) Ram Narayan, Kalika Prasad and Indar Narayan all emigrated from Fiji in the 1960s. Ram Narayan emigrating to England, Kalika Prasad emigrating to USA and Indar Narayan emigrating to England. The said Shiu Narayan died before the Appellant's husband.
- (f) As far as the Appellant could ascertain, the said Ram Narayan, Kalika Prasad and Indar Narayan have all died.
- (g) Neither the Public Trustee as Administrator of the Estate of Shiu Narayan or any beneficiaries of his estate ever made any claim to the said land.
- (h) The Appellant had sent letters to the last addresses of the said Ram Narayan, Kalika Prasad and Indar Narayan but had never received any replies to those letters.
- (i) The Appellant had lived on the said land since about 1970, initially with her said husband until he died on 26th August 2005 and had remained in possession of the said land until the present day.
- [4] No documents or other evidence of title affecting the said land were found in the Appellant's possession or under her control other than the said Certificate of Title

33461 and moreover there were no leases, mortgages or any other encumbrance registered in respect of the said land or any estate of interest other than the original registered proprietors as referred to above. The names and addresses of the occupants of all land contiguous to the said land also being furnished the Appellant sought a vesting order under and in terms of Section 78(1)(b) of the Land Transfer Act of 1971 from the Registrar of Titles to the said 4/5th balance shares of the land in question contained in the said Certificate of Title 33461 jointly held initially by her deceased husband with his brothers referred to in paragraph [3](d) above.

- [5] It must be noted at this point that, the aforesaid factual matters were urged before the Registrar of Titles (the Respondent) in the Appellant's amended application for the said vesting Order (ST3) supported by her statutory declaration (ST4) and affidavits as well (ST5) and particularly the supporting affidavit dated 4th May, 2014 of Seini Tinaikoro (the Appellant's solicitor) to which the Registrar of Titles had responded in an affidavit dated 11th June, 2014 admitting to the main material content in the said affidavit while making "no comment" in regard to other averments contained therein.
- [6] Consequently, the matters urged by the Appellant in seeking the vesting order she sought stood undisputed in regard to the factual content.
- [7] Moreover, the Registrar of Titles had issued public notice in regard to the said application for a vesting order made by the appellant dated 13th March, 2013 in the following terms:

*"NOTICE IS HEREBY given in accordance with the provisions of the Land Transfer Act Cap. 131 that **DAYA WATI (f/n Basant Singh) of Wailekutu, Lami, Machinist**, claiming to have acquired title by possession have made application for order vesting in all those pieces or parcels of land comprising **Lot 1 on DP 8569, 824 square metres** situated in the District of **Suva** and Island of **Viti Levu** as contained in the **Certificate of Title No. 33461**.*

*ANY PERSON claiming an estate or interest in the said land in respect of which such application is made should lodge a CAVEAT with the undersigned on or before **13th April, 2013**.*

***DATED at Suva this 13th day of March, 2013.**"*

[8] No objection had been received to the said notice issued by the Registrar (reflected also in a Newspaper Advertisement and in the Government gazette as well, thus constituting Public notice to all and sundry including the Public Trustee which are all matters of Record and remained undisputed and established facts.

The decision of the Registrar of Titles

[9] Notwithstanding the aforesaid undisputed history and background facts, the Registrar declined to make the vesting order that was sought.

The High Court Judgment

[10] Thereafter, by originating summons, the Appellant having sought an order in her favour, the learned High Court Judge dismissed the same.

[11] In doing so, the learned Judge laid down three propositions, viz:

- “1. *The section under review contemplates adverse possession which involves an animus possidendi i.e. occupation with the intention of excluding the owner as well as other people.*
2. *... .. a co-owner of an undivided share of land does not occupy the land with the intention of excluding the other co-owner.*
3. *... .. the section contemplates a squatter who has been in possession of the land for the requisite period without the consent of the owner.”*
(at page 5 of the Judgment)

Section 78 of the Land Transfer Act

[12] The section under consideration states thus:

“78.(1) *Where –*

- (a) Any person is in possession of any land subject to the provisions of this Act, for which a certificate of title has been issued or a Crown grant registered under the provisions of this Act; and*
- (b) Such possession has been continuous for a period of not less than twenty years, and is such that he would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the provisions of this Act,*

he may apply to the Registrar in the manner hereinafter provided for an order vesting the land in him for an estate in fee simple or for such other estate or interest as may be claimed by him:

Provided that, unless such person has been in possession of such land for a continuous period if not less than thirty years, no such application may be made in respect of any land or any part thereof, if the registered proprietor of, or any person appearing by the register to be entitled to the benefit of, any estate or interest therein is under any disability.

(2) For the purposes of this Part, possession of any land by any other person through or under whom any person making application under the provisions of this section (hereinafter in this Part referred to as 'the applicant') claims, shall be deemed to be possession by the applicant."

The Concepts of “estate in fee simple” and “possession” referred to in Section 78(1)(b)

[13] “Fee” denotes an estate of inheritance and ‘simple’ denotes a fee which can pass to the general heirs of the tenant. “Possession” denotes an estate that is immediate i.e. neither in reversion nor in remainder. In effect it is equivalent to absolute ownership of land. (See in that regard, L.B. Curzon, Dictionary of Law (6th ed.) at page 175).

[14] Consequently, it is clear that, Section 78 envisages three elements viz:

- (a) continuous possession for a period of not less than twenty years and,
- (b) is such that, the applicant for a vesting order would have been entitled to an estate in fee simple in the land on the ground of such possession and,
- (c) an applicant could tag-on the period of possession of his or her predecessor.

Analysis of Section 78 of the Act

[15] On a reading of that section, the question to ask is whether a co-owner could come within that section.

Applicable principles in regard to a co-owner's claim to the entirety of a co-owned land and the concept of adverse possession

- [16] It is trite law that, each co-owner is deemed to be the owner of every inch of a co-owned land and a secret intention on the part of a co-owner to become full owner of a co-owned land will not suffice on the basis of mere long and continuous possession.
- [17] Although “adverse possession” does not feature in Section 78 it must be read with Section 77 of the Act which states as follows:

“77 (1). Subject to the provisions of this part, no person shall have or acquire any right, title or interest in any land subject to the provisions of this Act or to the possession thereof by virtue of possession adverse of the proprietor for any period prior to the commencement of this Act unless within one year from the commencement of this Act he has made application to the Registrar for a certificate of title pursuant to Part IX of the Land (Transfer and Registration) Ordinance as in force immediately prior to such commencement and within three years from that commencement he has obtained a certificate of title to that land.

(2) The provisions of this section shall apply notwithstanding any rights which but for this Act have accrued to any person by reason of possession of land adverse to the proprietor.

(3) For the purpose of any application under Part IX of the Land (Transfer and Registration) Ordinance in respect of part only of any land the subject of an existing instrument of title, the plan referred to in paragraph (e) of section 84 of that Ordinance shall not be accepted by the Registrar unless it has been approved by the city or town council in the case of land included within the boundaries of any city or town to which the provisions of the Local Government Act apply or in any other case by the Director of Town and Country Planning under the provisions of the subdivision of Land Act.”

- [18] Consequently, it is clear that, the concept of “adverse possession” is embodied in the Act.
- [19] Though not in regard to co-owner's claims based on adverse possession, the concept has featured in judicial decisions as well. (vide: **Bechani Golay v. North End Property Developments Ltd** (FLR) 35, 1989, p.89)
- [20] In so far as the present case is concerned, Section 77(1) cannot have any relevance in as much as, the Appellant's predecessor in title's possession could have commenced

only in 1970. The Respondent not having raised any objection, the requirements of Section 77(3) must be deemed to have been satisfied. Thus, the operative provision in the facts and circumstances of the present case is in Section 77(2)

Some reflections in regard to the historical background and comparative legislation in some other Pacific jurisdictions in the context of the Torrens system applicable in Fiji

- [21] Fiona Burns on Adverse Possession and Title by Registration Systems in Australia and England (2011, Melbourne University Law Review, 28) points out that, the Torrens statutes in several states in Australia (including Victoria and West Australia) expressly permitted a claim for adverse possession as an exception to indefeasibility of title. (For example, Section 42(2)(b) of the Transfer of Land Act, 1958 in Victoria and Section 68(1A) of the 1893 Transfer of Land Act of Western Australia).
- [22] In contrast, Section 45 of the Real Property Act, 1900 of New South Wales barred a person from acquiring title to a land by adverse possession. Rosemary Osborne in an informative thesis opines that, the operative act to transfer title is by the Registrar of Titles when he registers the instrument under Section 41 of the Real Property Act. (see: Adverse Possession and the Real Property Act (NSW) Rosemary Osborne, University of New South Wales, Law Journal (1995). The Land Transfer Act of Fiji in Section 37 reproduces verbatim that provision of the 1900 NSW Act.
- [23] Having given my mind to the aforementioned aspects it is my view that, while the LTA of 1971 in Fiji no doubt adapts the Torrens System, the concept of “adverse possession” has not been dispensed with.

What is the Torrens System and what is the legislative intent behind adapting the same in Fiji?

- [24] It is that, once a person acquires title to a property and registers it in his or her name and obtains a Certificate of Title the same becomes conclusive and absolute and indefeasible (Section 38 of the LTA Act subject to it being annulled on the ground of fraud (Section 41). This is the ratio of the Supreme Court decision in Star Amusement Limited v. Navin Prasad and 5 Others [2012] CBV 0005. The Supreme Court was not called upon to consider the circumstances in which a co-

owner of an undivided share of a land could or not seek a vesting order for the entirety of a co-owned land in the context of Section 78 of the Act.

'Fraud' not the only exception to the concept of "indefeasibility of title"

- [25] There are other exceptions to the concept of Torrens Title as well viz:
- (a) if any existing easement has been wrongly left off the title or misdescribed by the land titles registry (vide : Ram Nadan v. Shiu Dutt [1984] FCA1;
 - (b) wrong boundary descriptions (Section 131 of the Act).
- [26] In so far as the legislative intent behind adapting the Torrens System is concerned, it was to stamp title with certainty without a transferee or purchaser having to look behind the register as was the case in the age-old English legal practice and procedure.
- [27] It was with the objective of making land owners deal with their properties without fear of their registered title being impeached that the said system had been adapted.
- [28] But, is that legislative intent realised in a case such as the present one where it is undisputed that the other co-owners to a 4/5th share have abandoned the land since about 1960 and presumed to be dead? I think not.

The criterion of Peculiar Circumstances feeding the concept of adverse possession and a co-owner's claim to seek and obtain a vesting order for the entirety of the land

- [29] Lord Shaw of Dunfermine in Kirby v. Conderoy [1912] AC 599 delivering the opinion of the Privy Council had said thus:

"Possession must be considered in every case with reference to the peculiar circumstances the suitable and natural mode of using it, the course of conduct which the proprietor might be reasonably be expected to follow with due regard to his own interest, all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession."

The justification for invoking the principle – *vigilantibus et non dormietibus jura subveniunt* to the instant case

- [30] The criterion of “peculiar circumstances” and what feed that criterion, which Lord Shaw elaborated upon, are satisfied in the instant case justifying the application of the principle *vigilantibus et non dormietibus jura subveniunt* (that is, “the laws aid the vigilant, not those who sleep over their rights).

The Learned High Court Judge’s view in limiting the operation of Section 78 to a squatter

Who is a squatter?

- [31] A squatter is one who is wrongfully in occupation of land and claiming the right or title to it. (See: **Ellis v. Lambeth LBC** [1999] EGCS 101 and **Dve v. Granham** [2001] The Times, 13.
- [32] Obviously, a squatter is a person who is in possession of a land without the consent of the owner.
- [33] But, a co-owner is not one who is in wrongful occupation of a co-owned land.
- [34] If so, is a co-owner’s application for a vesting order for the entirety of a co-owned land to be denied in the “peculiar circumstances’ of this case where the other co-owners had migrated (inferentially abandoned their rights to the land) and in fact presumed to be dead (facts not challenged by the Respondent)? I think not.
- [35] If a co-owner occupies the land with the consent of the other co-owners, such co-owner can never claim ownership to the exclusion of the other co-owners.
- [36] Thus,” without the consent of the true (other) co-owners” had to be looked at in the context of the “peculiar circumstances” I have referred to earlier and it is established that, the Appellant (and her predecessor in title, her husband) had occupied the entirety of the land since 1970, without the other co-owners staking any claim to this date, not having entered even a Caveat in respect of the land to protect their interests.

[37] In those circumstances, to look for absence of consent of the true owner is something that could never have been found.

Some other matters that had to be considered

[38] As submitted by Mr. Knight for the Appellant, there is no logic or law which disallows an application for a vesting order from an applicant who already owns an undivided share in respect of the undivided shares he or she does not own. Otherwise a situation will arise, when ownership rests with people who had disappeared and have made no claim or shown any interest in their ownership and therefore prevents any dealings with the land indefinitely.

[39] I agree with Mr. Knight's said submission.

[40] For instance, it is unlikely that a bank would grant a loan to develop the entirety of the land when the Appellant would not be able to show title to the said entirety.

[41] Then, is the title to the entirety of the co-owned property to be left in a state of *vacuum* preventing it being dealt with indefinitely? Particularly, in a country such as Fiji that is committed to land development? I do not think so.

Some procedural matters that were of concern to this Court and the basis on which it dealt with them

[42] (a) whether the Appellant could have made the application in question without naming the other co-owners of the 4/5th share.

(b) whether the Appellant could have maintained the said application without joining the other parties (her sons) who had inherited to the 1/5th share of her deceased husband.

(c) whether the application for a vesting order sought by the appellant could have been sought in as much as Section 78 of the Land Transfer Act does not permit the same and;

(d) whether the Appellant could have made the application having regard to the possession of the land in question in her own right.

[43] **Re: (a) above**

(a) Ideally, the Appellant ought to have made the other co-owners of the said 4/5th share as party respondents but the material on record shows that, they had migrated and presumed to be dead and their whereabouts unknown. This has not been controverted and/or challenged by the Respondent. The Appellant had published paper advertisements to put them on notice and done her best in that regard. The application had been gazetted as well.

[44] **Re : (b)**

The other parties are the Appellant's sons. They have not objected to the application.

Bona fidei non congruit de apicibus juris disputare (It is incompatible with good faith to insist on the extreme subtleties of the law)

[45] The aforesaid matters, in my view, are in any event, subtleties of the law even assuming that they constituted procedural shortcomings. It is incompatible with good faith to insist on the extreme subtleties of the law. In the circumstances of this case in re: (a) and (b) above, they were not fatal to the Appellant's application in question.

[46] Indeed, the Respondent and the learned counsel for the Respondent must be commended in that regard in not having urged the said matters in resisting this appeal, the said matters, in any event, being matters this Court had raised *ex mere motu*.

[47] **Re : (c)**

In that context, I paid due regard to the principle that, what is not prohibited must be presumed to be permitted.

[48] Indeed, Section 78 of the Land Transfer Act does not prohibit a co-owner from making an application in the nature of what the Appellant sought in the "peculiar circumstances" of the present case. The learned High Court Judge himself took note of this when he observed that, "*Both counsel submit that Section 78 of the Land Transfer Act does not prohibit a co-owner who owns an undivided share in a property from applying for a vesting order for undivided shares in the property which he does not own.*" (vide: Paragraph 9 of the Judgment of the High Court)

[49] **Re: (d) above**

In that regard it is an unchallenged fact that, the Appellant had been in continuous possession of the entirety of the co-owned land since 1970 with her husband in whose name only an initial 1/5th share had been registered.

[50] Consequently, as at the year 2005 (being the year the Appellant's husband had become deceased), he would have been in a position, as the registered owner of a 1/5th share to have made an application for a vesting order in regard to the balance shares of the co-owned land in question in the "peculiar circumstances" that I have referred to earlier and for the reasons I have stated hereinbefore in as much as he would have satisfied the elements contemplated in Section 78 (1)(b) of the Land Transfer Act by the year 1990.

[51] Although when the present application was made by the Appellant in 2014 she did not have the 20 years possession contemplated by Section 78 of the Land Transfer Act by herself, upon her husband's death, whatever rights he had enured to her (and to her two sons). This is expressly provided for in Section 78(2) of the Land Transfer Act, 1971.

[52] To look at the matter from a practical point of view, should the Appellant become deceased now, would it then be possible to argue that the children of the Appellant must possess for another 20 years in order to make an application for a vesting order? I think not.

Conclusion

[53] For the aforesaid reasons, I hold that, the judgment dated 15th December 2015 of the High Court must be set aside and this appeal must be allowed.

Two matters that struck me as warranting some comment on

[54] Although the above determination in this appeal should conclude the matter I thought it would not be inappropriate to address two matters in passing. The first matter is in regard to the scope and application of the Torrens System and the second arises for reflection in the context of the amended (original) Certificate of Title.

Scope and application of the Torrens System

- [55] What about a situation as regards registration by reference to title of customary land? Would the system apply to adjudicated customary land? Would it be regarded as another exception to the Torrens System of title? (See: in that context the argument advanced by Ruiping Lee in an article entitled Torrens and Customary Land Tenure: A Case study of the Land Registration Act 2008 of Samoa (2009))
- [56] The original registered title bore No. 22672 later amended and issued under Certificate of Title No. 33461.
- [57] Under and by virtue of that Certificate of Title the Appellant's husband and his brothers became entitled to hold the land in question as free-hold land as joint-tenants.
- [58] Consequently, given the fact and circumstances of the present case, the said brothers' whereabouts being unknown since the year 1960 and not having entered even a caveat in respect of their registered title to the said 4/5th share and no information forthcoming as to their next of kin either, by operation of law, the Appellant's husband survived to his brother's rights on the application of the presumption of death, the principle being that, "a person who has not been heard of for a considerable period of time by those who, if he had been alive, would be likely to have heard of him is presumed to be dead." (See: Phipson on Evidence (16th ed.) 2005 at pp. 139 – 140.

The Jus Accrescendi

- [59] In the result, upon drawing the presumption of death in regard to the Appellants deceased husband's brothers, their rights or interests as joint-tenants in the land in question must be deemed to have passed to the Appellant's husband by the right of survivorship and this process was to continue until there is but one survivor, who then holds the land as sole owner. (See: Megarry and Wade, The Law of Real Property, (4th ed.) (1975) pp. 391-92.

[60] Thus, when the Appellant's husband died in the year 2005, who had by then been in continuous and exclusive possession of the entirety of the co-owned land, for well over the period of 20 years contemplated in section 78 of the Land Transfer Act investing him with the right to seek a vesting order that enured to the Appellant upon his death.

[61] However, that was not the basis on which the present appeal was heard but I only wished to say that that might have been another way to have looked at the matter, given the respondent's request to this Court in seeking guidance on the matter of a co-owner's claim for a vesting order to the entirety of a co-owned land and (being a matter of first instance) for which reason, in allowing this appeal I add the rider that, such a right in a co-owner must be taken and understood and limited in the "peculiar circumstances" of the present case.

Alfred, JA (dissenting)

[62] In the course of the arguments, I had to draw attention to the provisions of the law and the circumstances which had apparently gone unnoticed in the court below. This I shall expound, but first I shall consider the function of an appellate court.

[63] The duty of the Court of Appeal in the present case is to rehear the matter. However, unlike the primary judge who has heard the witnesses and considered the evidence, both oral and documentary provided, the rehearing before this Court is a rehearing on the record and the documents and thus it is open to this Court to reverse the decision, or to affirm it as it stands, or finally to affirm it for different reasons. It is the last that I shall be doing now.

[64] The basis, of the Appellant's contention in the court below that she was entitled to a vesting order, is the word "possession" in s.78 (1) (a) of the Land Transfer Act 1971 (LTA). Osborn's Concise Law Dictionary defines "possession" as having 2 elements:

- (1) The thing possessed
- (2) The intention to appropriate to oneself the exclusive use of the thing possessed (the animus possidendi)

- [65] A perusal of the Certificate of Title concerned (tab 6 of the Record) shows the transfer to the Appellant and two others “As to one undivided fourth share” of the property concerned, on 18 June 2008.
- [66] The lodestar of the Torrens system that applies in Fiji, in Australia, in Malaysia, amongst other countries, is title by registration and **NOT** registration of title. Thus it is crystal clear that the Appellant never had possession of the said land since about 1970 as she alleges in her declaration to her application for a vesting order. Prior to her husband’s death on 26 August 2005 she never had the 2 elements of possession. In her own words she was living on the land with her husband. In any event, even if for argument’ sake she had possession of the land since 26 August 2005, this is far short of the twenty years required by the LTA,(i) when she applied for a Vesting Order on 4 August 2010, (ii) when the trial judge made his decision on 12 September 2014 and (iii) when this appeal was heard on 22 August 2017.
- [67] The Appellant’s application collapses for the following two reasons::
- (1) Ownership/Possession of a one fifth share of the land was only vested in her and 2 others on 18 June 2008 (a mere 9 years ago) as shown on the Title.
 - (2) The two co-owners of that undivided share are not parties to the Application. They are not applying for a vesting order together with the Appellant. They have not been mentioned in the list of the other 3 co-owners that she says are now dead.
- [68] In the result, I shall dismiss the appeal, affirm the trial judge’s decision on a different ground and order the Appellant to pay costs summarily assessed at \$2,000 to the Respondent.



Hon. Justice D. Alfred
JUSTICE OF APPEAL

Orders of the Court (by majority decision)

1. *The appeal is allowed and the judgment dated 16th December, 2015 is set aside.*
2. *The Respondent is advised and directed to issue a fresh certificate of title to the entirety of the land in question in the name of the Appellant.*
3. *There shall be no order for costs.*



A handwritten signature in blue ink, appearing to read "E. Basnayake", written over a dotted line.

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to read "Almeida Guneratne", written over a dotted line.

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL