IN THE HIIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

HBC 102 of 2012.

BETWEEN : **KRISHNA NAICKER** of Rakiraki, Retired.

PLAINTIFF

AND : **BHARTI PRAVEENA SINGH** of Musunawai Street, Lautoka.

DEFENDANT

Appearances : Mr. Suresh Maharaj for the Plaintiff.
Mr. V. Sharma for the Defendant.

Date of Ruling : 01 August 2013.

R U L I N G

INTRODUCTION

[1]. This is the plaintiff's application for an Order for summary eviction against the defendant pursuant to section 169 of the Land Transfer Act (Cap 131). Section 169 states as follows:

> The following persons 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 to the applicant:-
>
> (a) the last registered proprietor of the land;
> (b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;
> (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.

[2]. The land in question is described as Housing Authority Sub-Lease No. 273846, Lot 35 DP 5894 (**"property"**). The plaintiff is the last registered proprietor of the property. He qualifies under the first limb of section 169. A copy of the lease is annexed to his affidavit confirming the same. Once it is shown that the plaintiff is the last registered proprietor, the onus shifts to the defendant to show cause as to why an Order for vacant possession should not be granted in this case (see **section 172** of the **Land Transfer Act**). In discharging that burden, the defendant must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under **section 169**. This does not mean that she has to prove conclusively a right to remain in possession. On the contrary, it is enough that she shows some tangible evidence establishing a right or at least supporting an arguable case for such a right (see **Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2**).

DEFENDANT'S CASE

[3]. The defendant deposes *inter alia* as follows to resist a summary eviction Order and to justify remaining in possession:

(i) she is the biological daughter of the plaintiff.

(ii) after she got married, her father, the plaintiff, approached her and her husband and asked them to move onto the land in question.

(iii) her father then promised her and husband that he would bequeath the land to them as a marriage gift in his last will and testament.

(iv) acting on that promise, she and husband then constructed a house on the land and moved in on or about April 1998. They paid for all improvements on the land as well as all ground and city rates from 1998 to date.

(v) sometime in 2011, her father told her and husband to pay the ground rent and city rates into his bank account from where he will pay them out to the relevant authorities because the accounts were under his name.

(vi) but the rates and ground rent were never in arrears and are not supposed to be in arrears because she and husband had made all the payments.

(vii) over the years, she occasionally confronted her father about his promise to transfer the land to her and husband. Her father would be evasive and would reply that he intended to do that by willing the property to them.

(viii) she has invested a lot of money and time on the land in reliance on her father's promise. Over the 14 years that she and husband had lived on the property, they had invested up to $50,000 on improvements.

(ix) there was never any agreement for rent regarding the property. The land was promised to her by her father as a gift in 1988.

(x) she has lodged a caveat with the Registrar of Titles to stop her father from transferring the property to a third party.

[4]. The defendant's mother, Sheryl Sakuntala, has also sworn an affidavit to support her. Sakuntala married the plaintiff in 1974 but divorced him in 1981.

[5]. She resumed cohabitation with the plaintiff sometime after divorce and remained so until the year 1998 when he asked her to vacate the house.

[6]. Notably, the plaintiff acquired the said property in 1997 when he was living with Sakuntala on a de facto basis.

[7]. Sakunatala deposes inter alia that:

(i). the plaintiff's promise to the defendant to gift the property to her and her husband was made *"during my daughter's marriage"*.

(ii). she was present *"when the arrangements regarding the said land were being made"* and that she *"clearly recall the plaintiff giving a verbal promise to our daughter and her husband that the said land would be transferred under the defendant's name after his death"*.

(iii). as defacto wife (at the time, having been his legal wife before), she also agreed to the arrangement. She also had a beneficial interest in the property in question by virtue of her being the defacto wife and by virtue of her contribution to its purchase from her FNPF funds.

(iv). the decision to gift the land to the defendant was made jointly by her and the plaintiff immediately upon the purchase of the land.

PLAINTIFF'S CASE

[8]. The plaintiff refutes all the allegations of mother and daughter. Firstly, he says that the defendant had "eloped with the current husband Munendra Singh". Although he does not explain the relevance of the "elopement", I suspect he is alluding that, the fact of the (alleged) elopement means he could not have pledged anything, let alone the property in question, as a marriage gift as is obligatory of a bride's father in a marriage done properly in accordance with Hindu customs. He says that the defendant had approached him and asked to move into the property with her family at a time when she was having difficulty paying the rent in a house that she was renting. He was then occupying quarters at FSC. When he decided to move out of FSC, he told the defendant to vacate the property. He says the alleged renovation by the defendant and her husband were done without his consent and in any event, the dealing alleged by the defendant was not in writing and is unenforceable. He insists that the defendant had allowed the ground rental with Housing Authority and rates with Lautoka City Council to fall into arrears and annexes documentation confirming arrears in accounts from the said two institutions. He says that there is no caveat on the property as the same was rejected by the Registrar of Titles.

[9]. I observe that the copy of title annexed to his affidavit contains a memorial noting a caveat (No. 752156) by the defendant but which is not formally endorsed with the Registrar of Titles stamp and/or signature.

OBSERVATIONS

[10]. I quote the following passage from Master Amaratunga's (as he then was) Ruling in **Prasad v Wati [2011] FJHC 442; HBC315.2010 (12 August 2011)** to set the tone for my reasoning in this case:

> 12. In opposition to this application the Defendant states that she has an **equitable interest** in the said property. In **Denny v Jessen [1977] 1 NZLR 635 at 639** Justice White summarized the proprietary estoppel as follows:
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> > *"In Snell's Principles of Equity (27th ed) 565 it is stated that proprietary estoppel is "... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary **interest** in the property. In Plaimmer v Wellington City Corporation (1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that "...the equity arising from expenditure on land need not fail merely on the ground that the **interest** to be secured has not been expressly indicated."(ibid, 713, 29). After referring to the cases, including Ramsden v Dyson (1866) LR 1 HL 129, the opinion of the Privy Council continued, "In fact the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699, 714; NZPCC 250, 260). In Chalmers v Pardoe [1963] 1WLR 677;[1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in **Inwards v Baker [1965] 2 QB 29; [1965] 1 All ER 446**. **There a son had built on land owned by his father who died leaving his estate to others.** Lord Denning MR, with whom Danckwerts and Salmon L JJ agreed, said that all that was necessary;*
> > *"... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."(ibid, 37,449).*
>
> The general rule, however, is that *"liabilities are not to be forced upon people behind their backs"* and four conditions must be satisfied before proprietary estoppel applies.
> There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity ..."*Conscious silence"* implies knowledge on the part of the defendant that the plaintiff was incurring the expenditure and in the mistaken belief that here was a contract to purchase and that here defendant *"stood by"* without enlightening the plaintiff. In short the plaintiff must establish fraud or unconscionable behaviour. The rule based on the cases cited, is stated in Snell (op cit) 566 as follows:
>
> > *"Knowledge of the mistake makes it dishonest for him to remain willfully passive in order afterwards to profit by the mistake he might have prevented. The knowledge must accordingly be proved by "strong and congent evidence"*
>
> This passage was adopted by Megarry J in Re Vandervell's Trusts (No 2)[1974] Ch 269,301[1974] 1 All ER 47, 74".
> 13. The above, was quoted in the case of HBC 40 of 2009 in the High Court Fiji at Labasa in the case of **Wilfred Thomas Peter V Hira Lal and Farasiko** by Justice Anjala Wati and stated:
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> > *'I must analyse whether the four conditions have been met for the defense of proprietary estoppel to apply. The four conditions are:*
> > *i. An expenditure;*
> > *ii. A mistaken belief*
> > *iii. Conscious silence on the part of the owner of the land; and*
> > *iv. No bar to the equity.*
>
> 14. Though the Defendant could not produce any evidence of expenditure on property, the issue of such evidence cannot be determined by affidavit evidence alone. A person who thinks that he owns the property would not keep receipts of expenses on it for over 30 years and in any event the Defendant has come to the property through a marriage and under the circumstances it is understandable that she could not produce any evidence of expenses on the property, which she claimed was done by her father in law, before she came to reside there, 30 years ago.

CONCLUSIONS

[11]. After considering all, I am of the view that the defendant has shown sufficient cause to remain in possession. My reasons follow:

(i) the defendant's case theory supports an arguable case for proprietary estoppel. She and her husband, allegedly, had moved on to the property in question encouraged by her father, the plaintiff, and on the promise that he would bequeath the property to her and husband.

(ii) such a promise is not unthinkable for a father to make so it is not an unthinkable and/or a far-fetched thing to say.

(iii) relying on that promise, she and her husband had expended money on improvements.

(iv) the allegations and cross-allegations of both parties are triable issues and cannot be determined on affidavit evidence.

Accordingly, I dismiss the plaintiff's summons. Costs follow the event and I award costs to the defendant which I summarily assess at $650-00 (six hundred and fifty dollars only).

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Master Tuilevuka

01 August 2013.