

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 126 of 2013

BETWEEN : **JAI CHAND PRASAD** of Koronivia, Nausori, retired as lawful attorney for **MAHENDRA PAL**, only surviving trustee of Ram Pal of 629 Lanny Avenue, Lapuent, California, Los Angeles vide Power of Attorney No. 53609 registered on the 24th February 2012 at 10.23am.

APPLICANT/PLAINTIFF

AND : **DHIRENDRA PAL** of Lot 1, Crown Lease No. 475366 on DP 6742 Known as Lot 23 on Plan R1669 Wainibuku, 9 ½ Miles, Nasinu.

RESPONDENT/ DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Sunil Kumar** for the Plaintiff
Mr. Sharma N. for the Defendant

Date of Hearing : **29th January, 2014**

Date of Judgment : **27th March, 2014**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by way of Originating Summons dated 6th of May 2013 seeking an order under section 169 of the Land Transfer Act that the Defendant do forthwith give vacant possession of all those premises being Lot 1, Crown Lease No 475366 in plan DP 6742 known as Lot 23 on plan R1669, Wainibuku 9 & ½ miles, Nasinu, consisting an area of 1337 sq. meters.

2. The Plaintiff was directed by the Hon. Master Amaratunga (as he then was) to file a supplementary affidavit which he filed accordingly. Subsequently directions were given to the parties to file their respective affidavit in opposition and affidavit in reply to the opposition, which were filed accordingly. The matter was then set down for hearing on the 29th of January 2014 where both counsel agreed to conduct this hearing by way of written submissions. I then invited them to file their respective written submissions which they filed accordingly. Having considered the summons, respective affidavits and written submissions of the parties, I now proceed to pronounce my judgment as follows.

B. BACKGROUND

Plaintiff's case.

3. The plaintiff claims that he is the surviving appointed trustee/proprietor of the estate of late Ram Pal. The property in question in this instance action is a part of the said estate of late Ram Pal. The Defendant has been occupying the property and obstructing the trustee to perform their duties under the last will of late Ram Pal, wherefore the Plaintiff seeks an order against the Defendant to give vacant possession of this property in order to perform his duties as the trustee.

Defendant's Case,

4. The Defendant in his affidavit in opposition admitted that the Plaintiff is the only surviving trustee of the estate of late Ram Pal who was the father of both Plaintiff and the Defendant, though he denied other allegation stated in the Plaintiff's affidavit in support. He deposed that this property was owned by his late father Mr. Ram Pal and gave this land to his four sons including the Plaintiff and the Defendant in his last will. He appointed the Plaintiff and their late mother as executor and trustees of his estate. Having outlined these factual backgrounds of this dispute, the Defendant contended that he has a beneficial interest to this property as one of the beneficiaries to the estate of late Ram Pal.

C. THE LAW

5. Section 169 of the Land Transfer Act states that ;

“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.”*

6. Accordingly, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrears of rent and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under section 169 of the Act to evict the person who is in possession of the land without a right to the possession.

7. Section 171 and 172 of the Act deal with the scope of the hearing and the burden of the parties. Section 171 states that ;

“On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is

necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.”

8. Section 172 states that

“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, mortgagee or lessor or he may make any order and impose any terms he may think fit;

9. The scope of the hearing of the application under section 169 constitutes with two main stages. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor described under the section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant’s burden of prove of a right to the possession of the land was discussed in **Morris Hedstrom Limited-v-Liaquat Ali** CA No: 153/87 , where it was held that

“Under Section 172 the person summonsed may show cause why he refused to give possession of the land and if he 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 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.”

Accordingly, the defendant is only required to present some tangible evidence to establish a right of possession or the existence of an arguable case for such right to defeat the Plaintiff’s claim.

D. ANALYSIS

10. Having reviewed the laws pertaining to the applications under section 169 of the Act, I now turn to analyse the evidences adduced before me with the relevant legal provisions and principles.
11. The Defendants' main contention is that he has a beneficial interest to this land, wherefore the Plaintiff is not entitled to obtain an order of eviction against him pursuant to section 169 of the Act. The Plaintiff, himself admitted the existence of Defendant's beneficial interest to this land in his reply affidavit.
12. In view of the findings set out above, the main issue to be determined in this case is that whether the beneficial interest of the Defendant constitutes a right of the possession of this land. The Defendant is one of the sons of late Mr. Ram Pal and one of the beneficiaries to the estate of late Mr. Ram Pal according to his last will. In view of these evidence, the Defendant has successfully established that he is entitle to a share of this property as one of the beneficiaries to the estate. This entitlement of a share of the estate property constitutes a right of the possession of the land pursuant to section 172 of the Land Transfer Act. The executor indeed has authority to sale the estate property; however he could exercise such authority only for the interest of the beneficiaries. If the Plaintiff has any question of administration of this estate as the executor, the proper cause would be to invoke the jurisdiction of the court pursuant to section 41 of the Succession, Probate and Administration Act.

E. CONCLUSION,

13. In view of the reasons set out above, I hold that the Defendant has successfully satisfied the court that he has a right of the possession of this land pursuant to section 172 of the Land Transfer Act. I accordingly make following orders that;

- i. The Originating Summons filed by the Plaintiff on the 6th of May 2013 is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 1000 assessed summarily,

Dated at Suva this 27th day of March, 2014.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva