

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 144 of 2015

IN THE MATTER of Part XXIV of
the Land Transfer Act [Cap 131].

BETWEEN : RAM GATTI aka RAMGATTI aka RAGATTI DARSHAN of 60 Princes
Road, Dilkusha Road, Nausori, Domestic Duties.

PLAINTIFF

AND : SANJAY CHETTY and SHEETAL CHETTY of 60 Princes Road, Dilkusha Road,
Nausori.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. V. Kumar for the Plaintiff.
Mr. E. Koroi for the Defendant.

Date of Hearing: 06th August, 2015

Date of Ruling: 30th March, 2016

RULING

[Application for vacant possession of land made pursuant to
Sections 169, 170 and 171 of the Land Transfer Act Cap 131]

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 8th April, 2015 and sought for the following orders-

- (a) That the Defendants and their family members do give vacant possession of that part of the Plaintiffs' property belonging to RAM GATTI comprised and described in Certificate of Title No. 11941 being Lot 5, DP 2089, situated at 60 Princess Road,

Davuilevu, Nausori, in the Republic of Fiji Islands AND that the costs of this application be paid by the Defendants to the Plaintiff.

2. This application is supported by an affidavit of Sunil Chand sworn in his capacity as the Plaintiff's Attorney and filed on 08th April, 2015.
3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
4. The Defendants were personally served with this application on 15th April, 2015 and an affidavit of service to this effect has been filed into court.
5. The Counsel representing the Defendants was granted 14 days time to file and serve affidavit in opposition on 06th May, 2015.
6. The case was adjourned for hearing on 06th August, 2015.
7. This case proceeded to hearing on a defended basis and both parties to the proceeding were represented by Counsels at the hearing.
8. This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss169, 171 and 172 of the Land Transfer Act [Cap 131]*.

Plaintiff's Case

- (i) *'That I am the Attorney for the Plaintiff by virtue of Power of Attorney No. 56371 'A' registered with the Registrar of Titles on 13th October, 2014 and duly authorised by the Plaintiff, Ram Gatti aka Ramgatti aka Ramgatti Darshan to make this affidavit on her behalf in the matter. Annexed hereto and marked as "SC 1" is a copy of the Power of Attorney.*
- (ii) *That the Plaintiff is the registered proprietor of all that land comprised and described in comprised and described in Certificate of Title No. 11941 being Lot 5, DP 2089, situated at 60 Princess Road, Davuilevu, Nausori. Annexed hereto and marked as "SC 2" is a true copy of the Certificate of Title No. 11941.*

- (iii) *That my Solicitors, Messrs Singh & Singh Lawyers gave a notice to the Defendants on the 9th May, 2013 to quit and deliver vacant possession of the said property. Annexed hereto and marked as SC 3" is copy of the Notice.*
- (iv) *That my Solicitors, Messrs Singh & Singh Lawyers gave a Distress Notice and was served on them on the 18th August, 2014. Annexed hereto and marked as "SC 4" is copy of the Distress Notice.*
- (v) *That despite the said Notices, the Defendants has failed and/or neglected to vacate the said property.*
- (vi) *I, therefore pray to this Honorable Court for an Order that the Defendants and their family members do forthwith vacate the said property.'*

Defendants Case

- (i) *'That we do not admit nor deny paragraph 1 of the said affidavit.*
- (ii) *That we do not admit nor deny paragraph 2 of the said affidavit.*
- (iii) *That we deny receiving any notice to quit and deliver vacant possession on 9th May, 2013 mentioned in paragraph 3 and puts the plaintiff to strict proof as we have valid reasons for not vacating the said property.*
- (iv) *That we deny paragraph 6 and have to show cause why we should not be evicted forthwith:*
 - (a) *That we were verbally instructed by the plaintiff in 2009 to reside at the property in question and maintain the same because the plaintiff resides overseas and there was no instruction given that we pay rent.*
 - (b) *That the plaintiff's daughter, Lalita Devi came later in 2009 after the plaintiff had left for overseas and directed us to pay rent in the sum of \$200.00 per month (\$50.00 per week) into her Westpac Bank Account.*
 - (c) *That on one occasion, Lalita Devi's son, Sunay Sharma had demanded rent in the sum of \$600.00 and the same was given to him and was not deposited to the Bank as it should.*
 - (d) *That the plaintiff and her other son, Shalesh Darshan called us from Australia in 2010 for the update and they were advised that we have been paying rent to Lalita Devi yet no repairs on the property had been done and the roof was leaking.*

- (e) That the plaintiff had then directed that we stopped paying rent to Lalita Devi and to use the money to repair and maintain the property.
- (f) That we had then stopped paying rent to Lalita Devi based on the plaintiff's advice and we used the rent money for repairs.
- (g) That the abrupt notice to quit and vacate the property through Court process came as a surprise and was quite humiliating as we had the above verbal arrangements in good faith.
- (h) That the first Defendant had donated blood toward an operation (amputation of one leg) of the Plaintiff's son, Shalesh Darshan and as a token of their gratitude we were told to stay on the property as long we like.
- (i) That the plaintiff had not personally advised or gave us instructions to vacate the premise.
- (j) That there had not been any discussion between us and the plaintiff to vacate the said property except for the second notice adduced in the affidavit of Sunil Chand which had actually caught us by surprise.
- (k) That the plaintiff's action taking this matter through the Court is a breach of our solemn agreement.
- (v) We therefore pray:
- (a) That the summons for eviction filed by the plaintiff be dismissed forthwith.
- (b) That the plaintiff comes back and formally instructs us to vacate the property or talk to us personally through telephone if travelling is cumbersome.
- (c) That the honourable Court grant us until the end of April, 2016 to vacate as we do not have place to go until then.'

Plaintiff's Response to Defendant's case

- (i) 'That the Defendants are incorrect in their assertion in paragraph 6 (i) they have to maintain the premises and no rental was payable. Annexed hereto and marked "LA1" is a copy of the initial tenancy agreement entered with the Defendants.
- (ii) That as to paragraph 6 (ii), the Plaintiff says that the Defendants were not directed to stop paying rent and say that the Defendants stopped paying rental on their own volition.
- (iii) That the Plaintiff denies paragraph 6 (iii) of the Defendants affidavit.'

THE LAW

9. The application is filed in terms of s 169 of the Land Transfer Act [Cap 131] which provides 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) *lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*
10. In the case of *Ram Narayan v Moti Ram* (Civ. App. No. 16/83) Gould J.P. said-
"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."
11. The procedure under s.169 is governed by sections 171 and 172 of the Land Transfer Act (Cap 131) respectively which stipulates as follows:-
"s.171. 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."

s.172. *If a 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."*

(Underlined is mine for emphasis)

12. As far as the requirements in terms of *section 172* are concerned, the Supreme Court in the case of *Morris Hedstrom Limited v. Liaquat Ali* (Action No. 153/87 at p2) said as follows and it is pertinent:

"Under Section 172 the person summoned 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."

13. The requirements of *section 172* have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif* (Action No. 44 of 1981 - judgment 2.4.82) where the court said:

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the

circumstances require. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown. (emphasis added)

14. In *Premji v Lal* [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975) the Court of Appeal said:

'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In Jannadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) this court said -

'Under Section 172 of the Act the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.'

15. It is for the defendants to 'show cause' why they refuse to give vacant possession of the residential leasehold property to the Plaintiff as sought for by the Plaintiff.
16. Reference is made to the case authorities of *Caldwell v. Mongston* (1907) 3 F.L.R. 58 and *Perrier Watson v. Venkat Swami* (Civil Action 9 of 1967 - unreported) wherein the Supreme Court held-

'that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.'

ANALYSIS and DETERMINATION

17. The question for this court to determine is whether the Plaintiff is entitled to the possession of the land Comprised and described in Certificate of Title No. 11941 being Lot 5, DP 2089, situated at 60 Princes Road, Davuilevu, Nausori, in the Republic of Fiji Islands in *terms of section 169 of the Land Transfer Act [Cap 169]*?
18. In this case, the Plaintiff must first comply with the requirements of section 169 of the Land Transfer Act cap 131, which are stated hereunder as follows-
- (a) The first requirement or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.
- (b) *The second is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and*
- (c) *The third is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.*
19. In this instance, the first limb of s169 applies; the plaintiff is the last registered proprietor of the land Comprised and described in Certificate of Title No. 11941 being Lot 5, DP 2089, situated at 60 Princes Road, Davuilevu, Nausori. The Title shows clearly that the land was transferred to the Plaintiff on 12th June, 2007 at 11:15am under transfer number 608127. The Plaintiff is for the purposes of *section 169* the last registered proprietor of the said property.
20. *Sections 39-42 of the Land Transfer Act*, and under the Torrens system of land registration which operates in Fiji, the title of the registered proprietor is indefeasible unless actual fraud is proved. (Case of Subramani v Sheela [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); Assets Company Ltd v Mere Roihi [1905] AC 176 at p. 210; Fels v Knowles 26 N.Z.L.R. 608, at p 620 refers).

21. In Subramani (supra) the Fiji Court of Appeal (per Gould V.P.' Marsack, J.A., and Spring J.A.) states as follows-

'The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v Knowles 26 N.Z.L.R. 608. At page 620 it is said;-

"The cardinal principle of the statute is that the register is everything, and that, except in case of the actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

22. Bearing the above in mind, I find that the Plaintiff has the locus standi to bring this action against the Defendant in this case. The affidavit in support on behalf of the Plaintiff 'Ram Gatti' is sworn and filed by Sunil Chand by virtue of *Power of Attorney* No. 56371. I find there is nothing wrong with the application filed before this court.
23. After the Plaintiffs have established the first limb test of *section 169*, that is that the Plaintiffs are the registered proprietor of the subject land in the Certificate of Title No. 11941 being Lot 5, DP 2089, situated at 60 Princes Road, Davuilevu, Nausori, then the Defendants bears the onus of showing cause as to why vacant possession should not be granted to the Plaintiff.
24. Pursuant to *section 172 of the Land Transfer Act Cap 131*, the Defendants need to satisfy this court on affidavit evidence that they have a right to possession. (Case of *Muthusami v Nausori Town Council F.C.A. 23/86* refers).
25. There is no need to prove conclusively a right to possession and it is sufficient for the Defendants to prove that there is some tangible evidence establishing the existence of a right or of an arguable defence. (Case No. 152 of 1987- *Morris Hedstrom Ltd v Liaquat Ali* refers).

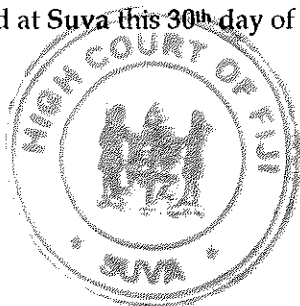
26. The Defendants were served with the Plaintiff's application seeking vacant possession on 15th April, 2015 and filed their affidavit in opposition on 19th May, 2015.
27. I have very carefully perused all the affidavits filed in the within action by the Plaintiff and the Defendants.
28. There is evidence of a **Tenancy Agreement** executed between the Plaintiff *Ram Gatti* and the Defendants- *Mr. & Mrs Chetty* on 25th April, 2010, before this court within the Affidavit in Reply of Sunil Chand, filed on 25th June, 2015 and marked as annexure 'SC 1". The general terms and conditions are clearly set out within this agreement and paragraph 4 provides '*that a deposit of \$200 bond together with an advance rent payment for the first month of \$200 to be payable prior to occupying the house.*' Further, paragraph 5 states '*That the tenancy agreement is for a period of 12 months and thereafter renewable with the permission of the Landlord.*' Whilst paragraph 6 states '*that the tenancy may be terminated at the will of the Landlord or the Tenant by 30 days notice given in writing.*'
29. Upon the entire perusal of the **Tenancy Agreement**, what can clearly be confirmed is that the parties to the proceedings had in fact entered into a **Tenancy Agreement** on terms and conditions as set out and agreed upon and thereafter was accordingly executed.
30. For one reason or the other, a **Notice to quit** was issued by the Plaintiff's Solicitors on 24th April, 2013, and served on the second Defendant on 29th April, 2013. Also a **Notice of Distress** pursuant to Distress for Rent Act 1961 was issued to the Defendants dated 08th July, 2014, in lieu of rental arrears from January 2011 to July, 2014, amounting to \$8100.
31. For the aforesaid rational, the defendants have failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right that must be adduced in terms of section 172 of the Land Transfer Act Cap 131.*

32. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
33. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendants to give vacant possession of the land Comprised and described in Certificate of Title No. 11941 being Lot 5, DP 2089, situated at 60 Princes Road, Davuilevu, Nausori to the Plaintiff of which the Plaintiff is the registered proprietor of.
- B. The Defendants to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 30 April, 2016.
- C. Cost is summarily assessed at \$500 against the Defendants.

Dated at Suva this 30th day of March, 2016



.....
MR VISHWA DATT SHARMA
Master of High Court, Suva

- cc. *Mr. Kumar, Singh & Singh Lawyers, Suva.*
Mr. Koroi, Koroi Law, Suva.