IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 350 of 2017

On appeal from the judgment of Acting Master Vandhana Lal dated 5th December 2018 in Suva High court Civil Sction No. HBC 350 of 2017.

BETWEEN

ANAND PRIYA MAHARAJ as sole executor and trustee of the Estate of Sadsnsnd Maharaj of 8 Bolden Street, Heildeberg 3084, Australia, Retired.

APPELANT

AND

CHAVI LAL of Wairuku, Rakiraki, Fiji.

RESPONDENT

Counsel	:	Mr F. Haniff with Mr C. Yee for the Appellant Mr M. Nand for the Respondent
Date of hearing	:	25th February, 2019
Date of Judgment	:	29th March, 2019

JUDGMENT

[1] This is in an appeal from the judgment of the learned Master of the High Court dated 05th December, 2018.

[2] The appellant made an application pursuant to section 169 of the Land Transfer Act to evict the respondent from the property described in Certificate of Title 32670 being Lot 1 of DP No. 7601 situated at Wairuku, Rakiraki. This property is vested in the Estate of Sadanand Maharaj of which the appellant is the executor and Trustee.

[3] The learned Master of the High Court dismissed the appellant's claim on the following grounds:

(i). Affidavit evidence does not show that after the demise of Sadanand Maharaj, the Defendant's family continued to be in occupation of the land and no action was taken by the appellant until 2014.

(ii). This is not a case of mere occupation of the property on yearly tenancy where this court can on the affidavit evidence hold that there is no form of estoppel.

(iii). I do not fine this is a matter where court should make an order on affidavit evidence.

[4] The grounds of appeal relied on by the appellant are as follows:

1. The learned Master erred in law and in fact in holding that the Respondent had provided sufficient affidavit evidence that would preclude the immediate vacant possession of Property on Certificate of Title number 32670 being Lot 1 on Deposited Plan 7601 ("Property")for possession under Section 169 of the Land Transfer Act.
2. The learned Master erred in law and in fat in holding that the Appellant's application was not a matter where the Court could make an order on affidavit evidence when the Respondent had failed to provide any cogent reason and/or affidavit evidence to show cause as to why an order for possession under Section 169 of the Land Transfer Act should not be granted.

3. The learned Master erred in law and in fact in not giving any or due consideration to the contradictions contained in the Respondent's affidavit in opposition dated 14 March 2018. Whereby, at paragraph 6 (b) to (f) the Respondent claims and/or relies on purported representations made relating to the Property by the late Appellant's Father, however, annexure C5 of the same affidavit contradicts these mere assertions by stating otherwise.
4. The learned Master erred in law and in fact in not giving any or due consideration to the contradictions contained in the Respondent's affidavit in opposition dated 14 March 2018. Whereby, at paragraph 6 (j) the Respondent refers to discussions held with the Appellant relating to the Property, however, annexure C5 of the same affidavit contradicts this mere assertion by stating otherwise.
5. The learned Master erred in law and in fact in not giving any or due consideration to the contradictions contained in the Respondent's affidavit I opposition dated 14 March 2018. Whereby, the Respondent refers to the representations made with respect to the purported transfer of the Property by the Appellant, however, annexure C3 and C5 of the same affidavit contradicts the mere assertions by the stating otherwise.
6. The learned Master erred in law and in fact in not giving any weight to the fact that the Respondent had not submitted any affidavit evidence to show cause as to why an order for possession under Section 169 OF THE Land Transfer Act should not be granted.
7. The learned Master erred in law and in fact in not giving any weight to the fact that the Respondent admitted at annexure C5 of its affidavit in opposition dated 14 March 2018 to never receiving and/or seeking consent from the Appellant to reside on the Property. Rather the Respondent had admitted that consent was only sought from the caretaker of the Property.
8. The learned Master erred in law and in fact in not giving any weight to the fact that the Respondent admitted at annexure C3 of its affidavit in opposition dated 14 March 2018 to stating that they would never challenge for entitlement to the Property against the Appellant.

9. The learned Master erred in law and in fact in holding that the Respondent had relied on representations from the Appellant with respect to the Property when no affidavit evidence was submitted by the Respondent to substantiate this mere assertion.

10. The learned Master erred in law and In fact in holding that the Court could not hold that there was no form of estopple when the Respondent had not provided any affidavit evidence and/or cogent reason to satisfy the test for equitable interest in the Property and neither had the Appellant deposed to the facts to satisfy all four limbs of the test.

[5] Section 169 of the Land Transfer Act provides:

> 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:-
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> (a) the last registered proprietor of the land;
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> (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;
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> (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.

Section 172 of the Land Transfer Act Provides:

> 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;

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

[6] In an application for eviction made pursuant to section 169 of the Land Transfer Act the initial burden of satisfying the court that he has a right to possession is on the respondent. There is no provision in law to institute such proceedings by filing a writ of summons. The court has to decide the matter on affidavit evidence.

[7] In the case of **Attorney General of Fiji v Premium Plastics Ltd** [2014] FJHC 159; HBC297.2013 (14 March 2014) it was held:

> The scope of the hearing of the application under section 169 constitutes with two main limbs. 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.

[8] In the case of **Morris Headstrom Limited v Liaquat Ali** C.A. No.153/87 the following observations were made by the Court of Appeal:

> "Under Section 172 the person summoned may show cause why he refused to give possession of the land 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 Defendant 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." (Emphasis is mine).

The learned Master, in my view erred in dismissing the action on the ground that the court cannot make a finding only on the affidavit evidence. If a party fails to disclose sufficient facts to satisfy his claim the court will have no alternative but to reject his claim. It is important to note that affidavit evidence also has the same evidentiary value as oral testimony of witnesses.

[9] The court will now consider whether the respondent is entitled rely on the defence of proprietary estoppel in his favour.

[10] In the case of **Denny v Jensen** [1977] 1 NZLR 635 at 639 the principle of proprietary estopple was discussed as follows:

> In Snell's Principles of Equity 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 persons who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. In Plimmer v Wellington City Corporation (1884) 9 App Cas 699; NZPCC 250 it was started by the Privy Council that "...the equity arising from expenditure on land need not fail merely on the ground that 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] 1 WLR 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 LJJ agreed, said that all that was necessary:
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> "...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 equity... "Conscious silence" implies knowledge on the part of the defendant that the plaintiff was incurring the expenditure and in the mistaken belief that there was a contract to purchase and that the defendant "stood by" without enlightening the plaintiff. In short the plaintiff must establish fraud or unconscionable behaviour.

[11] The respondent's position is that the owner of this property Sadanand Maharaj made representations to his father and told him that he was not utilizing the entire land and if the respondent's father was willing he could move in and occupy a portion of the property and one acre of land would be gifted to him. The appellant's response to this statement is that his family was not aware of such a promise.

[12] The learned counsel for the appellant submitted at length on certain contradictions between the averments in the respondent's affidavit and the contents of the letters attached to the affidavit. These are letters written by the respondent. In the affidavit he has averred that he discussed about the understanding his late father had with the appellant's late father but in the letters he has stated that he discussed with the caretaker. However, the fact that the respondent's father came into occupation of the land in 1960 on the invitation of the appellant's father has not been successfully challenged by the appellant. In his affidavit in response he says that he was not aware of any assurance given by his father. It is evidence that the respondent's father came into occupation 1n 1960 and he constructed a house on the land and was living there. The appellant and his predecessor in title has not taken steps to evict the respondent from the land until these proceedings were instituted in 2017. Evidence available on record does not show that the respondent's possession is illegal. If the respondent's father entered upon the land without license of the appellant's father, the appellant must explain why his father or after his demise the appellant did not take action to evict the respondent for about fifty six years. This shows that that respondent's father came

into occupation with leave and licence of the appellant's father. Even if the court disregards the contradictory statement of the respondents, it has sufficient evidence to apply the proprietary estoppel in favour of the respondent.

[13] The learned Master's decision to strike out the originating summons on the ground that there was no sufficient evidence is not correct. However, for the reasons I have set out above the originating summons is liable to be dismissed on its merits.

[14] Accordingly, the court makes the following orders:

1. The appeal of the appellant is dismissed.
2. The appellant is ordered to pay the respondent $2000.00 as costs of this appeal.

Lyone Seneviratne

JUDGE

29th march, 2019