IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 160 of 2018

IN THE MATTER of application under section 169 of the Land Transfer Act (Cap 131)

BETWEEN	:	**RAKESH CHAND** and **PARVINA KUMAR CHAND** both of Saweni, Lautoka, Retired and engaged in domestic duties respectively .
		Plaintiff
AND	:	**JOSEVATA BULICOKOCOKO, PENI SAMANI RAQOQO** and **PECELI TIKO** all of Natokowaqa, Lautoka.
		Defendants

Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. R. Chaudhary for the plaintiffs Mr. K. Tunidau for the Defendants
Date of Judgment	:	19th June 2019

JUDGMENT

01. Both plaintiffs are the joint holders of Housing Authority Sub- Lease No 273848 being Lot 12 DP 6531 in the Province of Ba and Tikina of Ba containing 866 meters squared at 12 Topline Place, Natokowaqa, Banaras, Lautoka and registered on 08.05. 2018 at the office of Registrar of Titles. They took out summons from this court pursuant to section 169 of the Land Transfer Act (Cap 131) against all the defendants, to show cause why they should not give vacant possession to the plaintiffs, of the property occupied by them and described in the said Housing Authority Lease No. 273848. The summons is supported by an affidavit sworn by the first plaintiff and contains 8 attachments marked as **"A"** to **"H"**. The annexure **"A"** is the certified copy of the Housing Authority Lease. The annexures **"B"** to **"F"** are the notices sent to all the defendants to vacate the subject property and to deliver the vacant possession to the plaintiffs. The annexure **"G"** is the copy of the letter sent by the solicitors of the defendants to the first plaintiff and the annexure **"H"** is the reply sent by the solicitors of the plaintiff to the solicitors of the defendants.

02. Upon service of the summons, the defendants appeared through their solicitors and it was informed that the second defendant had already vacated the property and only the first and third defendants were opposing the summons for ejectment. Accordingly, having heard both the counsels an order was made against the second defendant and the others were granted time to file their affidavits, on the application of their counsel. The counsel for the first and third defendants then filed one affidavit sworn by the first defendant setting out the defence of both first and third defendant. The only attachment with that affidavit is the letter of the third defendant authorizing the first to swear an affidavit in this matter.

03. The plaintiff thereafter filed his affidavit in reply together with two more annexures marked as **"A"** and **"B"**. The annexure **"A"** is the copy of the Probate issued to one Krishna in respect of Estate of late Subarmani Chetty and the copy of the Last Will of late Subarmani Chetty appointing Krishna as his Sole Executor/Trustee. The annexure **"B"** is the copy of the Transfer by which the said Housing Authority Sub-Lease was transferred by Krishna, being sole executor/trustee of the Estate of late Subarmani Chetty, to the plaintiffs. At the hearing of the summons, the counsel for the plaintiffs made a brief oral submission and tendered his written submission with some useful authorities and on the other hand, the counsel for the first and second defendants tendered a brief written submission and highlighted that, the tangible evidence of the first and third defendants were reflected in paragraphs 3 to 16 of the first defendant's affidavit.

04. The procedure under the section 169 of the Land Transfer Act Cap 131 is a summary procedure to promptly and speedily restore the registered proprietor to the possession of the subject property. This section provides a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (**Mishra JA** in **Jamnadas v Honson Ltd** [1985] 31 FLR 62 at page 65). This is the procedure to provide a quick and relatively inexpensive summary method of finding out whether a person who is in possession had any legal right to be there. (**Stuart J.**, in **Vivek Prasad v. Ram Sundar Lautoka** C.A. 788/76 (unreported)).

05. The rationale for this speedy remedy available for the registered proprietors stems from the cardinal principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. The Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) held that:

> *The indefeasibility of title under the Land Transfer Act is well recognised; 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:*
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> *"The cardinal principle of the statute is that the register is everything, and that, except in case of 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."*

06. The relevant provisions of the Land Transfer Act Cap 131 are as follows;

169. 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.

Particulars to be stated in summons

170. The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.

Order for possession

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.

Dismissal of summons

172. 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.

07. Concisely, the sections 169 and 170 set out the requirements for the applicant or the plaintiff and the application respectively. The *Locus Standi* of the person who may seek an order for eviction is set out in section 169. The particulars to be stated in the summons, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land or the property in dispute.

08. The exercise of court's power either to grant the possession to the plaintiff or to dismiss the summons depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of the summons shall not prejudice the right of a plaintiff to take any other proceedings, against any person so summoned, to which he or she may be otherwise entitled. Likewise, 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 summons shall be dismissed by the court. I now turn to discuss how the parties have discharged the burden on them in this case.

09. The plaintiffs invoked the jurisdiction of this court under the section 169 (a) of the Land Transfer Act, being the joint holders of Housing Authority Sub-Lease as mentioned above. The annexure **"A",** which is the certified true copy of the plaintiffs' lease, is registered at the office of the Registrar of Titles on 08.05.2018. It is a transfer by the sole executor/trustee of late Subarmani Chetty to the plaintiffs. The definition in section 2 of the Land Transfer Act clearly indicates that, a sub-lease is an instrument of title. In addition, the section 18 of the Land Transfer Act provides that, the duly authenticated Instrument of title to be conclusive proof of the particulars contained in or endorsed upon such instrument unless the contrary is proved. The said section is as follows:

Instrument of title to be evidence of proprietorship

> ***18.*** *Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seised of or as taking an estate or interest in the land described in such instrument is seised or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.*

10. Accordingly, both the plaintiffs are the registered proprietors for the purpose of section 169 (a) of the Land Transfer Act (Cap 131). In fact, this is not disputed by the first and third defendants in the affidavit filed on their behalf. Thus, the plaintiffs have passed the first threshold under section 169 (a) of the Land Transfer Act.

11. The other requirement is the particulars to be stated in the summons as per section 170 of the Land Transfer Act, namely the description of the land and mandatory time period to be given to the persons so summoned to show cause. The Land Transfer Act however does not provide what particulars to be stated in the summons. This led the courts to have two different views, one being strict and narrow and the other is flexible. In **Atunaisa Tavuto v Sumeshwar Singh** HBC 332/97L the court held that, in application such as under section 169 of Land Transfer Act, the technicalities are strictly construed, because of the drastic consequences that follow for one of the parties upon the relief sought being granted. That was a case where an application for vacant possession was sought; however, the applicant failed to give the particulars such as Crown Lease number, lot number and the situation of land, though the Housing Authority Lease number was correctly mentioned. The court dismissed the summons stating that, it behooved the plaintiff and his counsel to have exercised more diligence in that regard.

12. However, Prakash J, in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000) distinguished the above decision and held that:

> *"The Court has not been provided nor able to locate any authorities to suggest that "a description" as per section 170 means a full description of the land. The Act itself does not specify what a. description of the land entails. What is adequate or full description? What is a sufficient description? The purpose is clearly for the parties to be informed as to what land the application relates to. This is clear from the supporting affidavit. In this regard I cannot concur with the sentiments of my brother Justice Madraiwiwi in **Atunaisa Tavuto v Sumeshwar Singh** (Civil Action No. HBC0332 of 1997L) submitted by the Defence Counsel in support of his argument on s.170. It is not clear what Justice Madraiwiwi had meant in stating that "The Summons is defective in not properly describing the subject property" (emphasis added). It is not clear whether "a description means full or proper description. Further, the Supreme Court in the case of **Ponsami v Dharam Lingam Reddy** (Appeal No. 1 of 1996) was dealing with the need for compliance with the Supreme Court Rules not a statutory provision such as Section 170. The statute does not clearly specify what "a description" requires. In **Vallabh Das Premiji v. Vinod Lal, Nanki and Koki** (Civil Appeal 70 of 1974) the Court of Appeal had accepted a description as in the present summons as sufficient".*

13. Seemingly, the view of Prakash J is based on the plain and unambiguous meaning of the statute which does not specify what description of land entails and what is adequate or full description of the land. It is not the duty of the court to impose more conditions and restrict the interpretation of a statute when the language is clear and unambiguous. What is actually required by the statute is the description that can give full knowledge to the person so summoned, without causing any misunderstanding of the land and premises from which he or she ought to be evicted. In the absence of any such misunderstanding, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This is the view that is supported by the Court of Appeal in **Premji v. Lal** [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975).

14. It is incumbent on the court to consider the property right of the person so summoned under this application. However, the more emphasis should not be given to such property rights, at the expense of a registered proprietor of a land, who has indefeasible title against the entire world by *Torrens system* of land registration. Accordingly, the reasoning of Prakash J in **Wati v Vinod** (supra) seems to be more rational than the view of Madraiwiwi J in **Atunaisa Tavuto v Sumeshwar Singh** (supra). These two judgments are from the Honourable Judges and are equally binding on this court. Therefore, for better reasoning I prefer the view of Prakash J over the other. Accordingly, if an applicant can give the description of a land or premises which can give clear understanding for the persons so summoned under this section, the former is deemed to have discharged his duty under this section. As far as the time period of 16 days that should be provided to such person is concerned, it should be interpreted strictly as the section is mandatory, because any person so summoned should be given sufficient time to prepare his or her defence.

15. In this case, the plaintiffs have given full description of the property in the summons served on the defendants, and the second defendant already vacated that property having understood the same. The first and third defendants did not raise any concern regarding the description, but filed their affidavit confirming the occupation of the property in dispute. Furthermore the defendants were given time more than what has been prescribed by the statute. Hence, all the requirements under section 170 are fulfilled by the plaintiffs.

16. The section 171 requires the proof and production of consent if any such consent is necessary. The question is therefore, whether any such consent is necessary for an application under 169. This matter has been settled by the Former Chief Justice His Lordship Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

> *"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J.'s approach in **Parvati Narayan v Suresh Prasad** (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:*
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> > *"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."*
>
> *This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent*

is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejectment of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejectment from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order".

17. The section reads as *'...if any consent is necessary...'* and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise in applications under section 169.

18. As discussed above, the plaintiffs submitted the true copy of the Housing Authority Sub-Lease certified by the Registrar of Titles which is the conclusive proof of the fact that, both of them are the registered proprietors of the property in dispute and the first and third defendants did not even dispute it. The description of the land and premises as per the summons is adequate to give full understanding of it to the defendants and they are well aware of it. In addition they were given time more than what is required by the statute. It now follows that, the plaintiffs have passed the threshold set out under sections 169 and 170 of the Land Transfer Act (Cap 131).

19. In consequence, the onus now shifts to the first and third defendants to show their right to possess the property in dispute in this application. The Supreme Court in the case of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 said that:

> *"Under Section 172 the person summonsed 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 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."* (Emphasis added)

20. The duty on the defendants is, not to produce any final or incontestable proof of their right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the property in dispute. Furthermore, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says *"he (judge) may make any order and impose any terms he may think fit"*. The Court held that:

"..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". (Emphasis added).

21. Accordingly, I now turn to consider the defences put forward by the first and third defendants in the affidavit sworn by the first defendant. It must be stated at the outset that, the first defendant who sworn the affidavit in reply has averred in the first paragraph that, he was authorized to make that affidavit on behalf of the third defendant and annexed a copy of the letter given by the third defendant for the proof of the authority. It is also stated in that affidavit that, it is 'affidavit in reply of first and third defendants'. However, there a no single averment in that affidavit which states any defence of the third defendant. Though the counsel for the first and third defendants submitted at the hearing that, the paragraphs 3 to 16 give tangible evidence, all those averments deal with purported defence of the first defendant that he purchased the said property. There is nothing to show in that affidavit as to how the third defendant would benefit from such defence. There is nothing to say whether the third defendant contributed to pay the alleged purchase price or he has beneficial interest derives from the alleged purchase of the first defendant, due to any relationship between them. It is therefore, obvious that, the third defendant has no defence or tangible evidence establishing a right or supporting an arguable case for such a right for him to remain in the disputed property. In any event I now turn to examine the affidavit of the first defendant.

22. The first defendant states in his affidavit that, he began occupation of the property in 1998 which has a main dwelling and two flats. The main dwelling was occupied by one Tulsi Chetty - the second wife of late Subarmani Chetty. The first defendant verbally agreed with Tulsi Chetty to buy the said property for sum of $ 30,000.00 and he started paying in monthly installment of $ 150.00 to the account number of Tulsi Chetty. He had the employment at Fiji Sugar Corporation and paid every month to the account of Tulsi Chetty. He took care and responsible for general up keeping of the property. He further states that, the total amount was paid in 2010 and Tulsi Chetty left for United States of America in early 2011 and the he moved to the main dwelling in 2012. Tulsi Chetty promised to transfer the property to him before she left for abroad and the major hurricane accompanied by heavy rain that struck Lautoka in 2012 destroyed all the documents including some documents sent by Tulsi Chetty on transfer of the property to him. Therefore, the first defendant claims that, he has valid cause, to remain in possession and not to be evicted from the disputed property. It should be noted that, the first defendant has not tendered any document whatsoever with his affidavit, though he claims to have paid substantial amount to said Tulsi Chetty who left the country one year after alleged full settlement of purchase price.

23. As a result, some pertinent questions arise out of the above averments of the first defendant. If he had paid the total amount of $ 30,000.00 in 2010, why he did not complete the transfer before Tulsi Chetty left the country? If Tulsi Chetty sent all the transfer documents to him even after leaving country, why he waited until all documents disappeared in hurricane that hit in 2012? Why he could not give any documentary proof that, the heavy rain damaged the main dwelling in 2012 as he moved to main dwelling in

2012 according to his assertion? If the payment was made to Tulsi Chetty's account, he could have obtained some reports from the respective bank. Why he could not even trace a single bank slip of payment for the proof of his monthly payment to Tulsi Chetty's account? According to his assertion, he believes that Tulsi Chetty died in 2015 in USA. Hence, she lived three more years after the hurricane in 2012, then why he could not get those transfer documents again from Tulsi if the documents sent by her were damaged in 2012? These questions remain unanswered as the affidavit of the first defendant contains mere, bold and bare assertions only and nothing there to substantiate them. Thus, it is hard to believe in those averments.

24. As per the authorities cited above it is well established that, the defendants' duty in applications under section 169 of the Land Transfer Act is to provide some *"tangible evidence"*. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10th Edition, page 678). Thus, duty of the defendant is to produce some real or demonstrative evidence and not bare assertions. A bare assertion is not sufficient for this purpose.

25. Conversely, the plaintiffs in their affidavit in reply assert the history of the title they obtained and state that the sub-lease was initially in the name of Subarmani who died on 24.07.1990. There was transmission by death in the name of the sole executor and trustee which was registered on 08.05.2015 and on the same day it was then transferred to the plaintiffs. In fact, the plaintiffs are not required to assert the history of the title under well-known Torrens System of Registration on which the Land Transfer Act is founded. The reason being that, it is the registration that gives title. It is the system of title by registration and not a system of registration of title. A title that a proprietor gets under that system of registration is neither historical nor derivative. What is meant by Torrens System is cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown. The registration is made the source of the title, rather than a retrospective approbation of it as a derivative right. This was well explained by Barwick C.J and Windeyer J in **Breskvar v. Wall** (1971-72) 126 CLR 376. His Lordship Chief Justice held at page 385 that:

> *The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.* (Emphasis added).

26. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

> *I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism, that the Torrens system is not a system of registration of title but a system of title by registration, accords with the way in which Torrens himself stated the basic idea of his scheme*

as it became law in South Australia in 1857. In 1862 he, as Registrar-General, published his booklet, A Handy book on the real Property Act of South Australia. It contains the statement, repeated from the South Australian Handbook, that:

"……any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations.

This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed'..."

Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new system, "cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right. (Emphasis added).

27. Hence, the plaintiffs in this case have the title by registration under the Land Transfer Act (Cap 131) which is indefeasible except in case of fraud. If the fraud is alleged, it should be on part of the registered proprietor whose title to be impeached or on his agent. It should be an actual fraud and not constructive. The **House of Lords** explained this in **Assets Co Ltd v. Mere Roihi** (Consolidated Appeals) [1905] AC 176 and held at page 210 that:

"Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects, 46, 119, 129 and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189 and 190) appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the persons whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly

ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud is he honestly believes it to be a genuine document which can be properly acted upon." (Emphasis added).

28. Justice Jiten Singh in **Jai Ram v. Gangamma** Civil Action No 020/05 (unreported) held that:

> *Granted fraud is an exception to the principle of indefeasibility of title, fraud is confined to* ***"actual fraud, that is dishonesty of some sort, not what is called constructive or equitable fraud":*** *Assets Co. Ltd v Mere Rohi – 1905 AC 176 at 210 or "personal dishonesty and moral turpitude": Butler v Fairclough – (1917) 23 CLR 78 at 90. The fraud must be the fraud in which the registered proprietor, in this case the plaintiff, must have participated.* (Emphasis is original).

29. The averments in the affidavit filed by the first defendant opposing plaintiffs' summons do not indicate any such actual fraud on part of the plaintiffs in obtaining the title to the property in dispute. The plaintiffs in their affidavit filed in reply to the first defendant's affidavit stated that, the name of Tulsi Chetty is not mentioned in anywhere in title and they do not know her. However, the copy of the Last Will of late Subarmani, which is marked as **"A"** and attached with the affidavit in reply of the plaintiffs, indicates that, late Subarmani devised and bequeathed all his property both real and personal to his de facto wife one 'Tulsiamma'. This de facto wife of late Subarmani might be the person whom the first defendant referred to in his affidavit as late Subarmani's second wife and who was claimed to have been dealing with the first defendant. Even though the defendants did not allege fraud, this court is under duty to consider the question whether this fact (Tulsiamma who allegedly dealt with the first defendant was the beneficiary under Last Will of late Subarmani) is sufficient to lead to fraud which can impeach the title of the plaintiffs. I answer this question in negative for several reasons. Firstly, as established by the authorities cited above, the fraud must be actual and not constructive. Secondly, it should be on part of the plaintiffs or their agent: however there is nothing to show the actual fraud on part of the plaintiffs and or their agents. Thirdly, the transmission by death was in the name of the Executor/ Trustee appointed by late Subarmani in his Last Will and then it was transferred to the plaintiffs. However, there is no single evidence at least to show any fraud on part of the Executor/Trustee, even though any such fraud on part of the Executor/Trustee will not affect the title of the plaintiffs, unless it is shown that the plaintiffs were part of such fraud. Hence, mere fact that one Tulsiamma, who might have been the person allegedly dealt with first defendant, happened to be a beneficiary of the estate of late Subarmani will not be sufficient to defeat the title of the plaintiffs on the ground of fraud, because the threshold is high in case of fraud.

30. Accordingly, this is a clear-cut and straightforward case where no complicated issues involved. Therefore, the plaintiffs are entitled to have their matter decided in their favour as Justice Gould V.P. stated in **Ram Narayan v. Moti Ram** (Civil Appeal. No. 16/83 FCA, decided on 28.07.1983) as follows:

> *"...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".

31. The first defendant further states in his affidavit that, he has been in occupation of the property since 1998 and took care and responsible for general up keeping of the property. However, being in occupation for long time or care and compassion for the land cannot supersede the clear principles on which the Land Transfer Act (Cap131) is founded. In **CPS Realty-Fiji Inc And David Simpson & Anne Simpson** Civil Action No. 178/90 (unreported) JAYARATNE J., held that:

> *"Section 169 of the Land Transfer Act is very strict in its application. It is very effective piece of legislation to obtain recovery of possession of land by Summary Judgment. No amount of compassion, unfairness or caring for the land as urged by the Defendant can be allowed to supersede the statutory legal effect of the Section".*

32. The above discussion reveals that, the plaintiffs are the registered proprietors of the land in dispute and they have complied with all requirements under sections 169 and 170 of the Land Transfer Act. However, the first and third defendants failed to provide any tangible evidence establishing their right or supporting an arguable case for such a right as required by the decision of the Supreme Court in **Morris Hedstrom Limited –v-Liaquat Ali** (Supra). The affidavit of the first defendant only contains some bare and unsubstantiated assertions, which cannot be relied upon. Further there is no evidence to show actual fraud which can only impeach the title of the plaintiffs. This is a straightforward case which does not need an open court hearing or trial proper. The title of the plaintiffs is indefeasible and unimpeachable. They are entitled for an order by this court on the defendants to immediately deliver the vacant possession of the property to the plaintiffs. The plaintiffs also must be reasonably compensated for defending their indefeasible title through this proceeding. Since the second defendant had already vacated the property on service of summons and an order was made on him, I now make orders on the remaining first and third defendants.

33. Accordingly, I make following final orders:

a. The first and third defendants are hereby ordered to immediately deliver the vacant possession of the property mentioned in the summons to the plaintiffs, and

b. The first and third defendants are further ordered to jointly pay a summarily assessed cost of $ 1,500.00 to the plaintiffs within 14 days from today.

HIGH COURT OF FIJI LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
19/06/2019