

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. 47 of 2019

**BETWEEN:** **VIJAY NAND SHARMA** of 15 Foster Street, Trading as **SHARMA ARCHITECT** a.k.a **SHARMA ARCHITECTS DESIGN GROUP**  
**PLAINTIFF**

**A N D:** **MAHENJIT PRASAD** a.k.a **MAHEN JEET PRASAD** a.k.a **MAHEND JEET PRASAD**, Machine Operator of 8237, 152<sup>nd</sup> Street, Surrey, British Columbia, Canada, V3S 3M6.  
**FIRST DEFENDANT**

**A N D:** **INDAR JIT PRASAD** a.k.a **INDAR JEET PRASAD** of 7730 Splendid Way, Elk Grove, CA 95758, United States of America.  
**SECOND DEFENDANT**

**A N D:** **THE REGISTRAR OF TITLES** a statutory body established pursuant to the Land Transfer Act of Fiji, 1<sup>st</sup> Floor Suvavou House, Victoria Parade, Suva  
**THIRD DEFENDANT**

**Counsel** : **Plaintiff: Ms. Devan. S**  
: **1<sup>st</sup> & 2<sup>nd</sup> Defendants: Mr Fa. I**  
: **3<sup>rd</sup> Defendant: Ms Pranjivan. R**

**Date of Hearing** : **26.02.2020**

**Date of Judgment** : **24.3.2020**

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff had obtained judgment for specific performance against registered proprietor of CT No 6739, but the order of the court was not complied. It was not pragmatic to proceed with contempt hence additional orders were also made by the same judge directing the Chief Registrar to convey land comprised in CT No 6739 (Property in issue) and also directing third Defendant to dispense with requirement of production of duplicate of CT

No 6739 for registration and transfer. This order was made on 7.11.2017. This order could not be executed again as Defendants who were calcimining as beneficiaries of registered proprietor had lodged caveat on 21.5.2018. Plaintiff was not the caveatee or who had a registered estate or interest in the property in issue or registered caveat on the Property in issue. So Plaintiff filed this action by way of originating summons seeking *inter alia* removal of caveat in terms of Section 168 of Land Transfer Act 1971. This was to enable execution of judgment and or orders of this court made on 7.11.2017. Caveators were represented by counsel and filed their affidavit in opposition and, their main objection was regarding procedure adopted for removal of caveat. For removal of caveats there are specific provisions contained in Sections 109 and 110 of Land Transfer Act 1971. There are special procedure laid in those provisions, but these are not exclusive. Plaintiff's contention is these provisions could not be invoked as Plaintiff was neither caveatee nor had registered estate or interest in the property. First and second Defendant had failed to show cause any caveatable interest. The interest they are claiming in terms of the caveat are depended on registered proprietor, against whom judgment was obtained by Plaintiff. First and second Defendants are acting hand in glove with registered proprietor against whom judgment was pronounced for specific performance. In the affidavit in opposition filed by first and second Defendants rely on pending applications of that person. In order to prevent an abuse of process or frustration of judgment obtained a court can make additional orders in terms of Section 168 of Land Transport Act 1971. Plaintiff is yet to enjoy benefits of judgment obtained on 29.4.2014, and also subsequent order delivered on 7.11.2017. Subsequent order was needed as registered proprietor Suruj Kuar who was the first defendant in HBC 276 of 2007, was no longer resident of Fiji, hence it was difficult to institute contempt proceedings against him. First and second Defendants are claiming beneficial interest from said Suruj Kuar who had not complied with orders of the court. First and second Defendants do not have caveatable interest in the Property in issue.

## ANALYSIS

2. Plaintiff had obtained judgment for specific performance against registered proprietor of Property in issue, in HBC 276 of 2007 after a hearing. This judgment for specific performance was delivered on 11.3.2014 but specific performance was not complied with. So Plaintiff had obtained following additional orders on 7.11.2018.

*"a) The Chief Registrar of the High Court of Fiji shall convey to the Plaintiff, the property described as Lot 1 and 3 on DP No. 1312 in CT No. 6739 known as Waibola (part a), having an area of 2 acres, 3 roads and 35 perches presently and comprised in the sale and purchase agreement, upon the payment by the Plaintiff to the credit of this action, the balance sum of \$391,500.00;*

- b) *The Registrar of Tittles shall dispense with the requirement of the production of the duplication instrument of title for CT No. 6739 for the purpose of registering the instrument of transfer in the Registrar of Tittles;*
- c) *The Plaintiff's costs of \$3,000.00 shall be deducted from the balance purchase price of \$391,500.00 and paid to him;*
- d) *Any applicable capital gains tax, charges, or outgoing in respect of the property such as outstanding city rates payable by the First Defendant as 'Vendor' be deducted from the balance purchase price of \$391,500.00 and paid to the relevant authorities with the balance sum (if any) held by the High Court of Fiji.*
- e) *Each party shall bear their own costs."*
3. At the time of execution of the above orders, it was revealed that that there was a caveat lodged by first and second Defendants to this action who were not parties to pervious action. This caveat was lodged on 21.5.2018.
4. So the orders granted by this court cannot be executed without removal of the caveat filed by first and second Defendant.
5. Third Defendant is the Registrar of Title who was not a party to previous action and was not served with previous orders of the court by solicitors of the Plaintiff.
6. Except Plaintiff, all the parties to present originating summons were not parties to previous action HBC 276 of 2007, where Plaintiff obtained judgment against registered proprietor for specific performance.
7. Plaintiffs filed this originating summons in terms of Section 168 of Land Transfer Act 1971 seeking following orders:

*"1. An Order under Section 168 of the Land Transfer Act of Fiji, Cap 131 that the Third Defendant **remove and /or cancel Caveat No.861595** lodged by the First and Second Defendants affecting the land, legal description of which is Certificate of Title No. 6739 being Lots 1 and 3 on Deposit Plan No.1312 and having an area of 2 acres, 3 roods and 35 perches.*

*2. An Order under Section 168 of the Land Transfer Act of Fiji, Cap 131 that the Third Defendant register the instrument of Transfer made between Suruj Kuar, Raj Mati and Sharma Design Group Limited in the Register of Titles to land, affecting the land, legal description of which is Certificate of Title No. 6739 being Lots 1 and 3*

on Deposit Plan No.1312 and having an area of 2 acres, 3 roods and 35 perches in the name of Sharma Design Group Limited.

3. An Order under Section 168 and Section 21(1) and Section 24 of (the Land Transfer Act of Fiji, Cap 131 that the Third Defendant make and enter all such memorials of instrument being the cancellation of Caveat No.861595 and the Transfer dated 9 March 2018 affecting the land, legal description of which is Certificate of Title No.6739 being Lots 1 and 3 on Deposit Plan No.1312 and having an area of 2 acres, 3 roods and 35 perches.”
8. Plaintiff is seeking removal of caveat lodged by Defendants, in the said order.
9. The second order sought in the above originating summons deals with previous orders for specific performance and third order is direction as to enter memorials in the title by third registrar which is superfluous. In my judgment second order sought in the originating summons deals with previous orders hence superfluous. Third order deals with statutory requirements, and obligations of third Respondent.
10. So this originating summons mainly deals with removal of caveat by first and second Defendants, hearing and submissions and authorities filed by first and second Defendants only deals with removal of caveat.
11. Third Defendant had also filed affidavit in response and stated that she will abide by the orders, but submissions on behalf of third Defendant had taken a position which is not helpful to clarify the legal situation. I will deal with that later.
12. First and second Defendants raised a preliminary objection that the procedure followed in this originating summons is flawed. They argue that procedure for removal of caveat contained in Section 109(2) of Land Transfer Act 1971, is exclusive hence a caveat cannot be removed in terms of Section 168 of the same Act, through an originating summons.
13. Plaintiff's contention is that he cannot apply for removal of caveat in terms of Section 109(2) of Land Transfer Act 1971 as it only allowed caveatee or a person having a registered estate or interest to make such an application. Plaintiff had previously made an application for removal of the caveat in terms of Section 110 of Land Transfer act 1971 which was rejected by third Defendant on the basis that he was not the registered proprietor of the land.
14. There is no dispute as to the facts of this case. Plaintiff had obtained judgment against registered proprietor for specific performance relating to transfer of the Property in issue after a hearing.

15. Defendants who were not parties to said action had lodged caveats after Plaintiff obtained judgment for specific performance as beneficiaries of the registered proprietor.

16. Section 109 of Land Transfer Act 1971 states

*“Notice and opposition to caveat*

*109.-(1) Upon the receipt of any caveat, the Registrar shall give notice thereof to the person against whose application to be registered as proprietor of, or, as the case may be, to the registered proprietor against whose title to deal with, the land, estate or interest, the caveat has been lodged.*

*(2) Any such applicant or **registered proprietor**, or **any other person** having any **registered estate or interest** in the estate or interest protected by the caveat, **may**, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, and the court on proof of service of the summons on the caveator or upon the person on whose behalf the caveat has been lodged and upon such evidence as the court may require, may make such order in the premises, either ex parte or otherwise as to the court seems just, and, where any question of right or title requires to be determined, **the proceedings shall be followed as nearly as may be in conformity with the rules of court in relation to civil causes.**”(emphasis added)*

17. Section 109 of Land Transfer Act 1971 allows registered proprietor or any other person having a registered estate or interest or interest protected by caveat to seek by way of summons to call upon the caveator to attend to court to show cause as to why the caveat should not be removed. This provision used word ‘may’ which denotes that it is not exclusive provision to remove a caveat.

18. In re Nichols v Baker 59 Ch 661 at p663 (Per Cotton L.J)

*“ ‘May’ can never mean must, so long as the English language retains its meaning; but it gives a power.....”*

19. Procedure laid down in Sections 110 and 109 of Land Transfer Act 1971 meant for interim measures till conclusion of an action and not to exclusive as removal of caveat can be sought as final measure in the conclusion of an action.

20. Proceeding under Section 109(2) of Land Transfer Act 1971 requires the court to follow rules relating to civil cases. So there is no prejudice to caveators for an application by way of originating summons when there is doubt as to Plaintiff’s right to make an application for removal of caveat under Section 109(2) of Land Transfer Act 1971. Even in the submissions of third Defendant was not certain as to whether Plaintiff could make such an application.



21. First and second Defendants are using caveat after conclusion of the action in order to frustrate the execution of the said judgment.
22. First and second Defendants preliminary objection is flawed in two aspects
- a. Section 109(2) is not the sole method in requesting removal of caveat as word 'may' was used. It was an alternative method of seeking speedy relief for removal of caveat than through originating summons. Caveat is an interim measure till the action is concluded to prevent any dealings to maintain *staus quo* and it can be removed at the end of hearing by orders of the court without specific application in terms of Section 109(2) if caveators and caveatees were parties to such an action.
  - b. Plaintiff who had obtained a judgment for specific performance against registered proprietor, was not a person having registered estate or interest or interest protected by caveat **when this originating summons was filed** in terms of Section 168 of Land Transfer Act 1971, hence not a person who could seek removal of caveat in terms of Section 109(2) of Land Transfer Act 1971, at that time.
23. Plaintiff who had obtained judgment for specific performance against defendants in Civil Action No HBC 276 of 2007 is restrained from execution of the judgment through a caveat lodged by Defendants on 21.5.2018.
24. So the present application was filed by way of originating summons in terms of Section 168 of Land Transfer Act 1971 for removal of caveat. It should be noted that Section 168 can be invoked in order to obtain directions to third Defendant in order to *give effect to judgment*. This is what this originating summons seeks from court.
25. The scope of Section 168 of Land *Transfer* Act 1971 is wide and it allows a court to make any ancillary orders to give effect to a judgment or orders of the court. There is no dispute that this court had already made judgment against registered proprietor of the Property in issue for transfer of Property in issue. These orders were quoted previously. In order to transfer the Property in issue removal of caveat is essential. So removal of caveats lodged by Defendant is necessary to give effect to the judgment and or orders made by this court previously.
26. So when there is pending proceeding or concluded proceeding where additional orders are needed to give directions to Registrar Section 168 of Land Transfer Act 1971 can be invoked. This provision is meant to give effect to judgment or orders as human ingenuity can take various forms in order to delay or frustrate fruits of a judgment.

27. Since there is impediment to execute said judgment and orders due to lodgment of caveat by Defendants on 21.5.2018 again Section 168 of Land Transfer Act 1971 is used. This can be made in the same proceedings or in a separate proceeding as all the Defendants in this proceedings were not parties to previous action HBC 276 of 2007.
28. Section 168 of Land Transfer Act 1971 states:  
*“Power of court to direct Registrar*  
*168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court”*(emphasis is mine)
29. Plaintiff who had already obtained judgment for specific performance against the defendants (i.e registered proprietor of property in issue) in HBC 276 of 2007 is restrained from execution of the same through caveat lodged by first and second Defendants who allegedly obtained beneficial rights from the registered proprietor, who was the judgment debtor.
30. So Plaintiff had sought separate action by way of originating summons seeking removal of caveat in terms of Section 168 of Land Transfer Act 1971. This is necessary to give effect oth the judgment delivered on 22.4.2014 and orders made by the same court ,on 7.11.2017.
31. In my judgment procedure stated in Section 109(2) of Land Transfer Act 1971 is not an exclusive procedure for removal of caveat, though that is most preferred method, by choice due to convenience. It allows much quicker method for removal of caveat to the category of persons stated in the said provision
32. Plaintiff and any other person not stated in Section 109(2) of Land Transfer Act 1971 can also make an application for removal of caveat as in this case. It can be by way of originating summons when facts are not disputed.
33. Plaintiff is not precluded from invoking Section 168 of Land Transfer Act 1971 for removal of caveat.

34. It should also be noted Section 109(2) of Land Transfer Act 1971 states rules relating civil causes should be adopted in dealing with removal of caveat. Even under said provision general rules relating civil cause is applied and first and second defendants are not prejudiced by this application and or the application of procedure in civil causes through originating summons.
35. Defendants cannot state that they were prejudiced by Plaintiff's application by way of originating summons as such procedure under civil causes recommended in Section 109(2) of Land Transfer Act 1971.
36. Defendant could not demonstrate any reason as to prejudice by Plaintiff adopting Originating Summons for removal of caveat. In fact they had the benefit of exercising rights under any civil cause to show cause their caveatable right.
37. At the hearing and or in the written submission counsel for first and second Defendant failed to state any prejudice to them due to originating summons.

#### **Caveatable Right**

38. In the affidavit in response of first and second Defendants who are caveators state
- a. *Suruj Kaur the registered proprietor of the land in issue had applied for leave to file and serve Notice of Appeal out of time of decision of judgment delivered on 22.4.2014.*
  - b. *Suruj Kaur had applied and serve a Notice of Appeal out of time against the decision made on 7.11.2017.*
  - c. *There is no reason for Suruj Kaur to show good or strong appeal grounds.*
  - d. *First and second Defendants are beneficiaries of last will of Suruj Kaur who is living and was.*
39. So Defendants in the affidavit in opposition relies on pending applications seeking leave to file and serve Notice of Appeal against a judgment delivered on 22.4.2014. This is a misconceived, and cannot be considered as a caveatable right.
40. In the caveat No 861595, first and second Defendants stated caveatable right as "claiming interest as by virtue of being the sons and beneficiaries of the proprietor on land described". When the said caveat was lodged, court had made judgment against said proprietor and additional orders were also made due to non compliance of the judgment, by registered proprietor of property in issue.
41. Accordingly Defendants caveatable interest derived from proprietor against whom judgment was pronounced on 22.4.2014. Such a caveatable right did not exist at the time of judgment of caveat to the first and second Defendants due to judgment of 22.4.2014



and orders made on 7.11.2017. Lodgment of the caveat by first and second Defendant was on 21.5.2018.

42. There was no appeal filed against that judgment, but only an application seeking leave to extend time to file notice of appeal. Even if such leave is granted that is not a caveatable interest to the first and second Defendants.
43. First and second Defendant's claim based on the last will of a living person is misconceived too. A last will cannot come in to operation till a person is dead as it can be revoked at any time by destruction of said last will or through a subsequent last will.
44. At the same time the maker of last will can bequeath only things belonging to his estate at the time of death. The maker of alleged last will against whom there is a judgment cannot bequeath same property that was subject to judgment where specific performance was ordered.
45. Third Defendant who is nominal in this action in the affidavit in opposition had stated in paragraph 16 that she will abide by orders of the court. Third defendant had also informed that she was not served with additional orders made on 7.11.2017 where some orders were directed at third Defendant who was not a party to that action.
46. If the said orders were promptly served third Defendant would not have allowed a caveat being filed by first and second Defendant on 21.5.2018 as 'beneficiaries of proprietor'.
47. At the hearing third Defendant associated partly with the preliminary objection which I overruled previously. Hence there is no need to consider their objection separately. Third Defendant in written submission stated Plaintiff should first make an application for removal under Section 109(2) of Land Transfer Act 1971 .
48. Third Defendant in the written submission had not taken a clear position as to the application of Section 109(2) of Land Transfer Act 1971. In the conclusion of written submission of Plaintiff it was stated that Plaintiff should first make an application in terms of Section 109(2) of Land Transfer Act 1971 and if unsuccessful can make an application in terms of Section 168 of the same Act.
49. Law should be certain and third Defendant should know under which provision the Plaintiff should make the application for removal of caveat in this situation. Third Defendant admits that Plaintiff could make an application for removal of caveat in terms of Section 168 of Land Transfer Act 1971. To that extent third Defendant disassociate with the preliminary objection.

50. Since I held that Plaintiff was not a person who could seek removal of caveat through summons in terms of Section 109(2) of Land Transfer Act 1971, there cannot be any objection by third Defendant.
51. Third Defendant had admitted that Plaintiff could make an application for removal of caveat in terms of Section 168 of Land Transfer Act 1971.

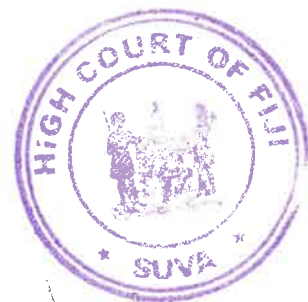
### CONCLUSION

Plaintiff had sought several orders in the originating summons. The second order relates to earlier judgment delivered and also subsequent orders made by the same judge. Said judgment and orders could not be executed due to caveat No 861595 lodged by first and second Defendants on 21.5.2018. So my order should confine only to giving directions to third Defendant to remove the said caveat and making necessary memorials to that effect as Defendants to originating summons are different from HBC 276 of 2007. First and second Defendants had failed to show cause that they have a caveatable interest to the Property in issue. They are claiming rights under judgment debtor as beneficiaries to a last will of said judgment debtor, who is alive. Accordingly third Defendant is directed to remove Caveat No 861595 forthwith. Plaintiff in the originating summons had not sought costs. Parties to bear their costs.

### FINAL ORDERS

- a. Third Defendant is directed to remove and cancel caveat No 861595 lodged by first and second Defendants affecting land described in CT 6739 being Lots 1 and 3 in DP 1312 comprising 2A 3R 36P. This will include all necessary power under Land Transfer Act 1971 for entering such memorials relating to removal of caveat.
- b. No costs.

Dated at Suva this 24<sup>th</sup> day of March, 2020.



*Deepthi Amaratunga*  
Justice Deepthi Amaratunga  
High Court, Suva