

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Action No. HBC 168 of 2021

BETWEEN: **RAJENDRA RAM** of Lot 8 Kinoya Road, Nasinu in the Republic of
Fiji, Administrative Advance Officer.

PLAINTIFF

AND: **BEN SARITA** of Lot 8, Kinoya Road, Nasinu in the Republic of Fiji,
Domestic Duties.

DEFENDANT

Counsel : **Plaintiff: Mr Singh. K**

 : **Defendant: *In Person***

Date of Hearing : **26.4.2022**

Date of Judgment : **02.6.2022**

JUDGMENT

INTRODUCTION

1. Applicant filed this action in terms of Section 169 of Land Transfer Act 1971(LTA) seeking vacant possession. Defendant is the widow of late Prabhwa Nand, who was a joint tenant with Plaintiff to Crown Lease No 337994(the Land). Prabhwa Nand died and Plaintiff became sole proprietor of the Land, in terms of Section 34(1) of LTA. Late Prabhwa Nand's estate, does not include the interest of late Prabhwa Nand, as joint tenant due to right of survivorship of Plaintiff to the Land. Defendant state that she had made improvements to property but had not stated what they were. Vacant possession is granted to Plaintiff but having considered facts and circumstances the execution is stayed till 30.11.2022.

ANALYSIS

2. The facts of this case are not in dispute.
3. Plaintiff and Defendant's late husband were joint tenant to the Land.

4. Joint Tenancy is defined in Hinde McMorland & Sim Land Law in New Zealand as

“A joint tenancy arises whenever land is transferred inter vivos or devised by will to two or more persons without any words to show that they are to take distinct and separate shares or, to use the technical term, without “words of severance”.¹ Thus, if a parcel of land is transferred “to A and B” without the addition of any explanatory words, a joint tenancy is created.² By contrast, if a transfer “to A and B equally” or “to A and B in equal shares” is registered, the result is the creation of a tenancy in common, not a joint tenancy.

There are two essential attributes of a joint tenancy, namely:

- (1) The right of survivorship, or jus accrescendi;⁴ and
- (2) The existence of “the four unities” (foot notes deleted)

5. The Right of Survivorship in Hinde McMorland & Sim Land Law in New Zealand state

“The right of survivorship is the most important feature of a joint tenancy. **On the death of one joint tenant his or her interest is extinguished and accrues to the surviving joint tenants by virtue of the right of survivorship.** This process goes on until there is only one survivor, who then holds the land as sole owner, or, to use the technical term, in severalty. For example, if A, B and C hold a parcel of land as joint tenants, and A dies, B and C then hold the land as joint tenants. When either B or C dies, the survivor holds the land as sole owner.

The death of a joint tenant does not sever the joint tenancy. Therefore a joint tenant cannot alienate, or devise, his or her interest in the land by will, and an interest under a joint tenancy cannot pass to the successors on intestacy if any joint tenant dies intestate.

.....

here one of two joint tenants is criminally responsible for the killing of the other, it has been held that the legal title to the jointly held property passes to the survivor, but that such property must be held by the survivor as to one half upon a constructive trust for the estate of the deceased joint tenant” (foot notes deleted)(emphasis added)

6. From the above characteristic of joint tenancy it is clear that Plaintiff has the right to survivorship as joint tenant and becomes the sole proprietor of the Land.

7. Section 172 of Land Transfer Act 1971 states,

“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.”

8. If Defendant or estate of her deceased husband has a claim for improvements on that that will not defeat the ‘right of survivorship’ of Plaintiff as a joint tenant to the property. So , Defendant or estate of her deceased husband had no right to the Land , upon death of her husband.
9. Defendant is required to prove ‘a right to possession’. This cannot be done by a statement that she and her husband had “contributed towards payment and maintenance of the property”.
10. Defendant and her late husband had matrimonial house in the Land. So, both were in possession on the basis of her late husband’s joint tenancy. So, they have enjoyed the property, while occupying and maintaining it.
11. Four unities of joint tenancy are unity of possession, unity of interest, unity of title, and unity of time and they are discussed in Hinde McMorland & Sim Land Law New Zealand as follows,

(a) Unity of possession

Unity of possession means that no joint tenant has an exclusive right to possession of any particular part of the land which is held on joint tenancy. Each joint tenant is just as much entitled to possession of all or any part of the land as the other or others. Where fewer than the total number of joint tenants is in possession of the land, it is possible for those in possession to be in adverse possession as against the remainder.

.....

(b) Unity of interest

In theory joint tenants own only one estate. Therefore the interest of each joint tenant must be the same in nature, extent, and duration. It follows that no joint tenancy can exist between persons who hold interests of a different nature (for example, a freeholder and a leaseholder, or a tenant with a vested interest and a tenant with a contingent interest), or between persons whose interests are similar but of a different duration (for example, a life tenant and a fee simple reversioner or remainderman).

If there is unity of interest in relation to the estate which is held jointly, it does not matter if one of the joint tenants is initially given a further and separate interest in the same parcel of land. Thus, if land were devised to A and B as joint tenants for lives, remainder to B in fee simple, A and B would hold a life estate as joint tenants notwithstanding the gift of the remainder to B.⁷

Where two persons take as purchasers as joint tenants under one instrument, one taking with notice of and being a party to fraud, unity of interest, as well as unity of title, requires that one cannot take more than the other. An innocent person purchasing property as a joint tenant with a fraudulent person is in an identical position to the fraudulent person as regards the rights of the defrauded third party. This principle would not, however, operate to determine the rights of the joint tenants as between themselves.

Personal incapacity, such as minority or mental disorder, is not inconsistent with a joint tenancy.

(c) Unity of title

All the joint tenants must have derived their interests from the same transfer instrument, will, or other instrument.

(d) Unity of time

In a joint tenancy arising from a common law conveyance, the estate of each joint tenant had to vest at the same time. The fact that there was unity of title did not necessarily mean that there was also unity of time. For example, if land was conveyed to A for life, remainder to the heirs of B and C, and B and C died at different times in A's lifetime, B's heir and C's heir took the fee simple remainder as tenants in common. Though the heirs of B could take as joint tenants as between themselves, as could the heirs of C, the heirs of B and of C could not take as joint tenants as between them because, although there was unity of title, there was no unity of time...."

12. Considering the above principles it is clear that Plaintiff and late Parbhwa Nand obtained right of survivorship as joint tenants and upon the death of one person, the surviving person became sole proprietor.
13. Unequal contribution, loan or mortgage contribution, and partnership properties were some examples, where equity had stepped in to consider joint tenancy as tenants in common
14. These were instances where joint tenancy was in operation not after death when there was no joint tenancy, and had become a sole proprietor.
15. Even if I am wrong, in the affidavit in opposition there was no evidence of unequal contribution or loan or mortgage or this property was subjected to partnership
16. In *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 549 Privy Council held that circumstances of each case can be considered to convert joint tenancy to tenancy in common in equity. There were no such evidence in affidavit in opposition.

CONCLUSION

17. Considering circumstances of this case though, vacant possession is granted to Plaintiff as sole proprietor of the property in issue, I am not inclined to grant eviction immediately. Plaintiff and Defendant's late husband were siblings and previously held the lease as joint tenants. Defendant and her husband had lived in the premises for more than three decades as matrimonial house. They have also paid and maintained the lease rentals and improvements on it. Considering all the circumstances the execution of this is stayed till 30.11.2022. This is in order for Defendant to find a suitable accommodation, for her matrimonial house.

FINAL ORDERS

- a. Plaintiff is granted vacant possession of Crown Lease No 337994, subject to following order (b).
- b. The execution of this order for eviction is stayed till 30.11.2022 allowing Defendant to find a suitable accommodation and vacate the premises on or before 30.11.2022.
- c. No cost.

Dated at Suva this 2nd day of June, 2022.



Justice Deepthi Amaratunga
High Court, Suva