

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

Civil Action No: HBC 47 of 2022

**BETWEEN** : **AKSHAY SHIVNEEL SINGH** of Vatumami, Rewasa Mead Road,  
Rakiraki, Fiji. Legal Practitioner.

**PLAINTIFF**

**AND** : **SERA SINGH** also known as **SERA BOLE** also known as **SERA**  
**MOSES SINGH** of Lot 6 Cunningham Street, Nausori, Fiji, Domestic  
Worker.

**DEFENDANT**

**Counsel:** Plaintiff: Mr Char g. K  
Defendant: Ms Naikawakawavesi. L

**Date of Hearing:** 02.11.22

**Date of Judgment:** 17.07.23

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff who holds one half of undivided share in a free hold property comprised in CT 17445 (the Property) had instituted this action in terms of Section 169 of Land Transfer Act 1971 for eviction of Defendant. Defendant is a relative of Plaintiff but had not derived any proprietorship to the Property. Defendant is required to show a right to remain in possession in terms of Section 172 of Land Transfer Act 1971 and why she refuses to give possession of the land to Plaintiff. In the affidavit in opposition Defendant had not shown a right to remain in possession, but contended that Plaintiff as the half undivided share holder cannot institute this action as 'proprietor' of the Property. This is an argument that cannot hold water in terms of Section 2 of Land Transfer Act 1971, which had exclusively interpreted words 'registered' and 'proprietor'. Plaintiff as the common tenant of the Property holding half share, which is registered on the title of the Property, can institute this action, but the burden is with the Defendant to show a right to remain in possession, derived though remaining co- owners or in any other manner. There is no requirement for Plaintiff to obtain consent of all the co-owners to institute an action in terms of Section 169 of Land Transfer Act 1971.

## LAW AND ANALYSIS

2. Section 169 of Land Transfer Act 1971 empowers a registered proprietor to institute an action for eviction from the premises and it states,

“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 exp red.”
3. Defendant in the affidavit in opposition at paragraph 8 had admitted that **Plaintiff is the last registered proprietor of one half share of the Property.**
4. Defendant had not stated any fact to be considered relevant to remain in the possession of the Property. (Section 172 of Land Transfer Act 1971 dealt later in the judgment).
5. The objections of the Defendant are
  - a. Plaintiff cannot institute this proceedings as co-owner of half share of the Property.
  - b. Plaintiff is not the ‘Proprietor’ in terms of the law , and needs the consent of all the remaining co-owners of the property to institute this action
6. Plaintiff can institute this action as the last registered proprietor of undivided half share of the Property.
7. The requirement in terms of Section 169 of Land Transfer Act 1971, is that the Plaintiff must be ‘last registered proprietor of the land’. In this instance there is no dispute as to the registration of the proprietorship on the memorial of the title. Plaintiff is the last or current registered proprietor for undivided half share of the Property. There is no dispute as to registration and or his half share which is yet to be demarcated.

8. The word proprietor is interpreted in Section 2 of Land Transfer Act 1971 as,
 

““proprietor” **means** the registered proprietor of land, or of any estate or interest therein;” (emphasis added)
9. As long as Plaintiff’s ‘interest’ of proprietorship, is registered he may institute an action for eviction in terms of Section 169 of Land Transfer Act 1971. Plaintiff is registered proprietor of half share of the Property. He is co-owner or hold common tenancy for half share.
10. The text Hinde McMorland & Sim Land Law in New Zealand had defined Tenancy in Common in following manner,

3 TENANCY IN COMMON

“A tenancy in common exists whenever two or more persons hold undivided shares in the same parcel of land. It has been said that:<sup>1</sup>

Each tenant in common is entitled to the possession of the whole of the land,<sup>2</sup> and yet, unlike a joint tenant, is entitled only to a distinct share thereof, a combination of concepts possible only because the physical boundaries of his share, called an undivided share, have not yet been determined.

The only factor which makes tenants in common co-owners is their unity of possession. “A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate”.<sup>3</sup>

11. So, as the registered owner of undivided share of the Property Plaintiff is entitle to possession of the Property in proportion to the share he holds, as there are no boundaries to demarcate his share, he is entitled to possess the Property, only subject to other half shareholder’s rights. If the other co-owners does not object he can evict any person who has no right to the Property, such as Defendant.
12. Plaintiff is not required to obtain consent of all the co-owners for the institution of an action in terms of Section 169 of Land Transfer Act 1971, which is based on Torrens System of Land Law where the central issue is the registration of the title. So there is no requirement Plaintiff to obtain consent of remaining half shareholders, but the Defendant should derive a right to possess from the said co-owners to show a right to possession of the property.

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<sup>1</sup> Mendes da Costa (1961) 3 MULR 137 at 167.

<sup>2</sup> See Bull v Bull [1955] 1 QB 234 CaseBase document for this case (CA), [1955] 1 All ER 253

<sup>3</sup> Williams *Principles of the Law of Real Property* 23rd ed, 1920, pp 148–149. This passage was cited in *Taunton Syndicate v Commissioner of Inland Revenue* (1982) 1 NZCPR 419 (CA).

13. If Defendant's contention is accepted that can undermine the Torrens System of registration and utility of Section 169 of Land Transfer Act 1971. Due to inheritance common tenancy or co-ownership can derive even is smaller fractions of a property. Due to time and other factors it would be impossible to find all the co-owners in such situation to obtain consent. So, not only such an interpretation is obviously a strained interpretation to the word 'proprietor' under Land Transfer Act 1971, but also illogical considering the object of the said provision.
14. Section 172 of the Land Transfer Act 1971 states the grounds for dismissal of the summons for eviction in terms of Section 169 of the same Act. It 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."(emphasis is mine)
15. Defendant must show cause as to why she 'refuses to give possession' and 'proves' a 'right to the possession' the Property. Defendant's grounds for refusal to give possession are legal grounds which were stated earlier.
16. Defendant had not stated when she came to the premises and how long she was there, but on the admitted facts it can be assumed that she had come to the premises upon her marriage to the late grand uncle of Plaintiff and had remained on the premises for more than five years. This is from the notices issued to Defendant to vacate the premises.
17. Plaintiff in the affidavit in support stated that she was married to late Pradeep Sing and the memorials show that he had lodge a caveat on or around 2009, but this memorial remains unsigned by Registrar of Title for unexplained reason. This shows that late husband of the Defendant had at least made an attempt to lodge a caveat to the Property as far back in 2009. Neither party had informed what was the alleged 'caveatable' interest that led to said lodgment in 2009.

18. Considering these facts it is reasonable to 'impose terms' while making an order for eviction of the Defendant from the Property, in terms of Section 172 of Land Transfer Act 1971.
19. Defendant is granted three months to find suitable accommodation considering the facts available to me from undisputed documents filed by Plaintiff. This is a residential property and parties are related through marriage. In such a situation it is prudent to allow some time to relocate Defendant.
20. As both parties were represented by different branches of Legal Aid, no cost ordered.

**FINAL ORDER**

- a. Defendant is ordered to give up possession of the Property Comprised in CT 17445.
- b. Defendant is granted time till 16.10.2023 to vacate the premises voluntarily.
- c. Execution of the order for eviction is stayed till 17.10.2023.
- d. No order for costs.

**DATED** this 17<sup>th</sup> day of July 2023.

  
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**Justice Deepthi Amaratunga**  
**Judge High Court, Suva**