

HAKIM MOHAMMED

v

MOHAMMED NASIR

[HIGH COURT 1994 (Pathik J), 16 September]

Civil Jurisdiction

B *Land-summary action for possession-whether expenditure on the property by the occupier not on the facts giving rise to a proprietary estoppel may amount to a defence to S169 proceedings-Land Transfer Act (Cap 131).*

C In answer to summary proceedings for possession the Defendant (the Plaintiff's son) relied on his contribution to the maintenance and improvement of the property. HELD: such expenditure which did not give rise to a proprietary estoppel could not avail the defendant in S169 proceedings.

Cases cited:

- Badal v Bhim Sen* (Civil Action 251/76)
CPS Realty - Fiji Inc v Simpson (Action No. 178/90)
D *Dillwyn v Llewelyn* (1862) 4 De G.F. & J 517
Inwards & Others v Baker [1965] 2 Q.B. 29
Rafaele v Rafaele (1962) W.A.R.
Ram Narayan v Latchman Singh (Sup. Ct Action No. 260/79)
Ram Narayan v Moti Ram (Civ. App. 16/83 FCA)
Ramsden v Dryson (1866) L.R. 1 H.L. 129
E *Unity Bank v King* 25 Beav. 72

Summary proceedings for possession of land in the High Court.

G. Prasad for the Plaintiff*A. Baledrokadroka* for the Defendant**F Pathik J:**

This is a summons by plaintiff under section 169 of the Land Transfer Act 1971 (hereafter referred to as the "Act") for an order for possession against the defendant.

G The plaintiff is the registered proprietor of all that property comprised and described in Certificate of Title No. 1104 being Lot 50 on DP 2412 with a dwelling-house erected thereon and located at 11 Batiki Street, Vatuwaqa, Suva (hereafter referred to as the "property").

In accordance with section 172 of the Act the onus is upon the defendant to satisfy the court that he has a right to the possession of the land.

The defendant Mohammed Nasir, the first defendant (the second defendant having already vacated the property) says, inter alia, that he was born in 1958 and is fifth in a family of 8; is married with 2 children. He says that he has spent a lot of money in improving the property, maintaining it, and in 1993 paying charges for electricity, water, city rates and telephone as well as paying for cooking gas. He said that he wanted to buy his own property but the Plaintiff who is his father persuaded him not to saying that one day the property in question will be his as under his Will the house would pass to him. After the defendant's mother died in 1992 the Plaintiff brought a woman and her son in the house to live with him. He said that he has spent all his savings on this house and if he has to vacate the property he will have nowhere to live.

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Mr. Prasad for the applicant says that the ownership of the property is not challenged; the defendant he says is at best a licensee; that although not required a proper notice to quit has been given and this is not denied by the defendant. The plaintiff denies most of the assertions in the defendant's affidavit sworn 11 July 1994 particularly regarding maintenance of the property and contributing towards the expenditure incurred in connection with it as more particularly set out in the plaintiff's Affidavit in Reply sworn 13 July 1994.

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Mr. Baledrokadroka argues that the defendant contributed substantially towards the upkeep of the house and the welfare of his parents. He submits that this creates an equitable interest in the property. This he says is ample cause as to why the defendant should not give up possession of the property. He says that the defendant's interest "stems from the doctrine of proprietary estoppel. Proprietary estoppel gives rise to an equitable right under which a non-owner may become entitled to land".

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Under S.169 of the Land Transfer Act certain persons which include the registered proprietor may summon a person in possession of land before a Judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the claimant.

Under Section 172 the person summoned may show cause why he refuses to give possession of the land and if he proves to the satisfaction of the Judge a right to the possession the application will be dismissed. The defendant must show on affidavit evidence some right to possession which would preclude the granting an order for possession under section 169 procedure.

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This case involves father and son. The father wants the son to give up possession of the property after he has lived there intermittently as a member of the plaintiff's family for some years.

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The plaintiff relies entirely on his proprietorship of the property for possession and denies, inter alia, the defendant's contribution to its upkeep and maintenance over the years as more particularly stated in the plaintiff's affidavit sworn 13

July 1994.

A In reply the defendant has not produced any documentary evidence of expenditure by him on the property or other expenditures referred to in his affidavit sworn 11 July 1974. He talks of having paid in 1993 charges for electricity, city rates, water rates and cooking gas etc. He says that he "cannot remember the exact expenditure" incurred over a period of 18 years that he says he has lived on the property. The evidence shows that he has lived on the property like any other member of the family and surely he must meet his own expenses and certain other expenses for living there.

B The bulk of the contents of the defendant's affidavit comprises of general statements unsupported by any documentary evidence. Nothing has been produced to prove how much has been spent on maintaining and improving the house, installation of burglar bars, painting, adding carport, bathroom and toilet, replacing wooden floor and laying a cement floor (paragraph 6 & 7 of his affidavit). There is nothing to prove that the plaintiff made the alleged promises (paragraph 9 of his affidavit).

C From the defendant's reply to plaintiff's affidavit and the plaintiff's reply thereto I am not satisfied that the defendant has shown cause to remain in possession. Wild statements of the nature referred to in his affidavit without any written evidence to support are insufficient to establish a cause for the purposes of this application under s.169.

D There are no complicated issues of fact or law in this case. The affidavits filed herein are sufficient to enable me to come to a finding.

E As Gould V.P. said in Ram Narayan v. Moti Ram s/o Ram Charan (Civ App. No. 16/83 FCA):

F "... 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".

G In CPS Realty - Fiji Inc v David Simpson & Anne Simpson (Suva Civ. No. 178/90) Jayaratne J. in a situation somewhat similar to this where certain expenditures were incurred by the defendant who was tenant of the plaintiff for 20 years and verbal arrangement was made for them to stay on the property said that:

"the company is the last registered proprietor of the land in question. There are no encumbrances legally valid to be enforced in favour of the Defendant."

“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”.

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However in certain circumstances equity would compel the Plaintiff to give right or title to the land to the defendant. In this case Mr. Baledrokadroka raised the doctrine of proprietary estoppel basing his argument on the contents of the defendant's affidavit. As I have stated earlier the affidavit does not satisfy me, for the reason I have given, that cause sufficient for the purpose of S.169 procedure has been shown for the defendant to remain in possession. The circumstances and the facts of this case I consider do not give rise to proprietary estoppel. Evidence is not strong enough to satisfy me that the plaintiff promised the house and land to the defendant to establish proprietary estoppel. In similar cases and also where proprietary estoppel is established Courts have inter alia awarded compensation for the value of the improvements (Rafaele v Rafaele (1962) W.A.R.) and also in Ram Narayan s/o Sahadeo Singh and Latchman Singh s/o Sobha Ram (Sup. Ct. Action No. 260/79 Western Division cyclostyled judgment) where Dyke J. after trial in a case under s.169 for possession and after stating “I am satisfied that the defendant's claim to have been given an acre of land as a wedding gift, or even the promise of a gift of land is not tenable and I reject it” awarded him compensation. As in Ram Narayan (supra) the defendant living on the property is no more than by way of a typical Indian family arrangement with the defendant not paying rent.

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The doctrine of proprietary estoppel is “applicable where one party knowingly encourages another to act, or acquiesce in the other's actions to his detriment and in infringement of the first party's rights” (Hanbury and Maudsley Modern Equity 11th Ed. p.736). That in my view is not the situation in this case on the affidavit evidence which might possibly give rise to the remedy of proprietary estoppel. Each case has to be looked at on its own facts; the facts in Inwards & Others v Baker [1965] 2 Q.B. 29. and Dillwyn v Llewelyn (1862) 4 De G.F & J 517 were different from this case; hence reference to these cases which deal with proprietary estoppel are not of assistance to the learned counsel for the defendant.

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In the defendant's situation, if he institutes proceedings he would perhaps be entitled to compensation for the expenditure etc incurred by him if he proves it. Here the defendant knows that the plaintiff is the registered proprietor of the land and never ceased to be so. In a similar situation on a Summons under s.169 for an order for possession after trial in Ram Narayan s/o Sahadeo Singh (supra) as already stated compensation was awarded. In that case the defendant married the plaintiff's daughter. He lived on the land in question for

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- A about twenty years. He spent time and money building the house in which he lived, in putting a fence round the area and planting fruit trees and growing vegetables. The dispute was between the plaintiff and defendant as to who contributed to the building and the extent of each's contribution. There evidence was adduced, full hearing took place and Dyke J made certain findings of fact and in his judgment stated and held as follows:-
- B "The question now is whether equity would compel the plaintiff to give right or title to the land to the defendant. This issue is not on all fours with Badal v Bhim Sen, Civil action 251/76 on which the defendant greatly relied. It is much closer to the case of Ramsden v Dryson (1866) L.R. 1 H.L. 129 and Unity Bank v King 25 Beav. 72.
- C In such case equity will not act to give the defendant a right or title that he never had, and was never made to believe that he had, but it may or may not act to give him the benefit of money he has expended in erecting buildings on the land.
- D In the circumstances of this case although the defendant has not satisfied me that he has any right to continue in occupation of the land the plaintiff is entitled to the order of possession sought; I will grant the order subject to the condition that the plaintiff pays to the defendant compensation for the money expended on building the house. I have not been given any idea of the cost of building the house or exactly how much of the cost may be attributable to the plaintiff and his sons.
- E The present valuation of \$11,250 is almost certainly on the high side, and it is not a very accurate guide to what the house cost to build. It is not practical to allow the defendant to remove the building because of the nature of the concrete foundations.
- F I would therefore assess the compensation to be paid to the defendant to be \$7,500 so that the order for possession of the land and the house will be made subject to the payment by the plaintiff to the defendant of the sum of \$7,500 in compensation for the money and effort spent on building the house."
- G I am in full agreement with his Lordship's approach to the issue before him and I adopt the same approach in this case.
- In the outcome, for the reasons given hereabove I find that the Defendant has not shown cause sufficient for the purposes of proceedings under s.169 as to why he refuses to give possession of the land. He has not proved to my satisfaction a right to possession.

HIGH COURT

The Plaintiff is therefore entitled to an order for immediate vacant possession of the property comprised and described in Certificate of Title No. 1104 known as Lot 50 in DP 2412 with costs under the provisions of the Land Transfer Act Cap. 131 and I do so order. The costs are to be taxed unless agreed.

(Judgment for the Plaintiff.)

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