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1. LILA WATI
 2. RAJ PAL
 3. MADAN PAL

v

ALITIA VAKARAUBULA

B [HIGH COURT, 1994 (Fatiaki J), 13 July]

Civil Jurisdiction

C *Land-summary proceedings for possession-promissory estoppel-wife's right to remain in the former matrimonial home-Land transfer Act (Cap 131) Section 169.*

The executors and trustees of the estate of the former owner of the land (one of whom was her husband) sought possession against his separated daughter in law. The High Court HELD: that in the circumstances of the case the wife had established an equitable right to remain in occupation.

D Cases cited:

Gurdial Singh v Shiu Raj Civ App 44/82*Inwards v Baker* [1965] 2 Q.B. 29*Maharaj v Chand* [1986] 1 A.C. 898*National Provincial Bank Ltd v Ainsworth* [1965] A.C. 1175*Taylor Fashions Ltd v Liverpool Trustee Co.* [1982] 1 Q.B. 133

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Summary action for possession in the High Court.

V. Kapadia for Plaintiffs*Ms. V. Narayan* for Defendant

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Fatiaki J:

This is an application brought under Section 169 of the Land Transfer Act (Cap. 131) requiring the defendant to show cause why she should not give up possession of the land occupied by her, to the applicants who are the registered proprietors of the land in their capacity as executors and trustees of the estate of Ram Pal s/o Jhagoo.

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In the affidavit in support of the summons deposed by only one of the trustees namely Lila Wati the application if I may say so appeared to be a deceptively straightforward one in which the trustees of the estate of a deceased person sought possession of real property comprised in the estate in order to carry out major renovation work.

On the face of the affidavit the parties were unrelated in any way, shape or form and any consent or licence given to the defendant to occupy the premises had been withdrawn and revoked by a legal Notice to Quit issued by solicitors acting on behalf of the trustees.

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I should point out however that no Power of Attorney has been annexed to the affidavit of Lila Wati from her co-trustees and although counsel claimed that such a power existed nothing is known about the donor of the power(s) or the nature of its terms.

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Needless to say in the absence of any such delegation and given the unusual circumstances of this case, this court is not bound to accept unhesitatingly the assertion of Lila Wati that she is duly authorised to make the affidavit on behalf of her co-trustees.

Indeed so perfunctory is her affidavit that it fails altogether to disclose any relationship between Lila Wati and the deceased and for that matter the defendant, or the means by which she came to be appointed an executor and trustee of the estate.

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Be that as it may the defendant's affidavit seeking to show cause in the matter is most revealing as to the relationship that exists between the parties. The defendant it appears is the legal wife of the third named trustee Madan Pal and after their marriage they lived on the property since 1974 until her husband deserted her in 1987. She continued however to occupy the property with their son taking care of and maintaining it all the while. She also deposed that "the First and Second-named Plaintiffs have for the last 20 years resided permanently in Canada". She has not heard from her husband nor have her in-laws assisted her with his address despite several requests.

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Learned counsel for the plaintiffs whilst sympathetic to the defendant's predicament nevertheless submits that the property in question is estate property and not a matrimonial home over which the defendant as a deserted wife may claim a right to occupy. Nor does the fact of her husband's registration on the lease entitle her to claim any interest in the land. Quite simply she is a bare licensee whose right to occupy the land has been terminated.

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Without in any way determining the issue I would iterate the words of Lord Upjohn when he said in National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1175 at p.1232 :

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"My Lords, I think a great deal of trouble that has arisen in this branch of the law is by reason of attaching to the wife the label of 'licensee'. But a wife does not remain lawfully in the matrimonial home by leave or licence of her husband ... She remains there because as a result of the status of marriage it is her right and duty to do so and if her husband fails in his

A duty to remain there that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is one sui generis. She may be described as a licensee if that word means no more than one who is lawfully present, but it is objectionable for the description of anyone, as a licensee at once conjures up the notion of a licensor, which her deserting husband most emphatically is not.”

B Learned counsel for the defendant submits however that her husband is more than a mere co-trustee of the estate of his late father, in addition, he is beneficially entitled to a third share in it under his late father’s will and consequently the defendant as his lawful wife has an interest in the estate. Furthermore the property in question comprises the principal asset in the estate. None of this however has been clearly deposed in the defendant’s affidavit as it should have been.

C In reply counsel for the plaintiffs whilst accepting that the defendant’s husband has a third share in the residuary estate nevertheless submits that such an interest does not relate to or entitle him (much less the defendant) to dictate the form or the particular asset of the estate to which it will attach.

D Then counsel further submits that there is no evidence that the premises is matrimonial property nor, it is submitted, has any expectation been induced in the defendant by the plaintiffs.

E But as was said by Oliver J. in Taylor Fashions Ltd. v. Liverpool Trustees Co. [1982] 1 Q.B. 133 at p.148 :

F “‘The fact is that acquiescence or encouragement may take the form of standing by in silence whilst one party unwittingly infringes another’s legal rights. It may take the form of passive or active encouragement of expenditure or alteration of legal position upon the footing of some unilateral or shared legal or factual supposition. Or it may, for example, take the form of stimulating, or not objecting to some change of legal position on the faith of a unilateral or shared assumption as to the future conduct of one or other party.’”

G In this latter regard it is clear that the defendant does not depose to any statements or representations by either her deceased father in law or the trustees (including her now estranged husband) but there can be no denying the following relevant and undisputed facts :

- (1) That the defendant and her husband were married in 1974 during her late father in law’s life time and remain legally married at this moment in time;

- (2) That the defendant and her husband occupied the premises for a couple of years during the father's life time and there is no suggestion that their occupation was not agreed to; A
- (3) That before, during and after the property was transferred to the executors and trustees of her later father in law's estate in 1977 the defendant and her husband (a co-trustee) continued to occupy the premises for a further 10 years until 1987 when her husband left for Australia; B
- (4) That even after her husband had left, the defendant continued to occupy the premises with their son for a further 5 years without any attempt to evict her; C
- (5) That the first occasion on which the occupation of the premises by the defendant was questioned by any of the trustees occurred sometime in 1993;
- (6) Thereafter the defendant continued to reside on the premises until a written notice to quit was served on her in early February 1994. D

From the above there can be no denying that the occupation by the defendant for close on 20 years of the land in question, without any attempt to evict her either by her late father-in-law or the trustees of his estate raises at the very least an inference that her entry onto and occupation of the land was made with the tacit approval of her late father-in-law and later the trustees of his estate themselves. E

In Inwards v. Baker [1965] 2 Q.B. 29 where a son had built a bungalow on his father's land at his father's suggestion and lived in it for 20 years before the trustees of the father's estate brought proceedings for possession of the bungalow. The Court of Appeal in reversing the lower court's order for possession : F

"Held : ... that where a person expended money on the land of another in the expectation, induced or encouraged by the owner of the land, that he would be allowed to remain in occupation, an equity was created such that the court would protect his occupation of the land, and the court had power to determine in what way the equity so arising could be satisfied." G

In Gurdial Singh v. Shiu Raj Civil Appeal No. 44 of 1982 (unreported) where a housegirl had for 22 years occupied a house erected by her on a small portion of her employer's land, and where the employer's son had issued summary

proceedings seeking vacant possession which the trial judge refused to grant at first instance, the Fiji Court of Appeal in upholding the trial judge's decision said at p.5 :

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"In our opinion all that the learned judge was required to do in these proceedings was either to make an order for possession or dismiss the summons ; on the evidence before him the learned judge dismissed the summons and in so doing concluded that the appellant was estopped from denying that the respondent had lived on the land for over 20 years to the knowledge of the appellant and without effort on his part to evict her."

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Finally in Maharaj v. Chand [1986] 1 A.C. 898 the Privy Council in rejecting the husband's application for vacant possession of the house occupied by the wife in that case :

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"Held ... as it would be inequitable ... for the plaintiff to evict the defendant he was estopped from denying that she had his permission to reside permanently in the house; "

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Similarly in this case a somewhat similar type of equity may be raised by the defendant against her husband personally thereby disentitling him from seeking an order for vacant possession albeit that he is only one of 3 trustees of the estate of his late father.

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Accordingly I am satisfied that the defendant has shown cause against an order for vacant possession in these summary proceedings. The application is dismissed with costs to the defendant.

(Application dismissed.)

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