

## BANK OF BARODA

v.

JOSEPH NAINIMA

[HIGH COURT, 1996 (Pathik J) 12 December]

Civil Jurisdiction

B *Land- mortgage- summary proceedings for possession of land- whether a mortgagee is a "registered proprietor". Land Transfer Act (Cap. 131) Section 169.*

C A mortgagee exercised powers of sale after default by the mortgagor but the mortgagor refused to vacate the property. The mortgagee brought summary proceedings for possession. On behalf of the mortgagor it was argued that the mortgagee was not a person entitled by the Act to bring such proceedings. The High Court HELD: that a mortgagee in possession is to be regarded as "the last registered proprietor" of the land and accordingly the proceedings were properly brought.

D Cases cited:

*A.G. v Butterworth* [1963] 1 Q.B. 696

*Bagnall v Villar* (1879) 12 Ch.D 812

*Dinesh Jamnadas & Others v. Honson Ltd.* (FCA 22/85, FCA Repts 85/111)

*Frazer v Walker* [1966] NZLR 331

*Muthusami v. Nausori Town Council* (F.C.A. 23/86-FCA Repts 86/432)

E *Ram Narayan v Moti Ram* (FCA 16/83- FCA Repts 83/237)

*Shyam Lal v Eric Martin Schultz* (1972) 18 FLR 152 FCA

Summary proceedings in the High Court for possession of land.

*H.M. Patel* for the Plaintiff

F *S. Matawalu* for the Defendant

**Pathik J:**

By summons dated 8 July 1996 the Plaintiff is applying to Court that the defendant show cause why he should not give possession of land comprised in Certificate of Title No. 16904, Lot 1 on D.P. No. 4058 (the "property").

G In support of its application the Service Manager of Bank of Baroda Ravindra Shrinivas Kamath in his affidavit states that the defendant mortgaged his said property to the Plaintiff. He fell into arrears of payment under the mortgage and the Plaintiff exercised its power of sale.

The property has been sold to one Nilesh Kumar Singh for the sum of \$135,000.00 and the Plaintiff as mortgagee executed the document of transfer dated 1 May 1996 and undertook to provide vacant possession of the property to the purchaser.

The Plaintiff therefore caused a notice to quit dated 15 May 1996 to be served on the defendant. The defendant has failed or refused to vacate the property.

In his affidavit in reply the defendant stated, inter alia, that he was not aware of the sale of the property until he was served with the eviction proceedings. He said that on 14 May 1996 he instituted civil action No. 215/96 against the Plaintiff for an injunction restraining it from disposing of the property. He further states that if he is successful in that action the Plaintiff will have to “release the mortgage”. He is asking the Court to stay this summons pending the determination of the said action.

#### Submissions

Mr. Patel made an oral submission that the Plaintiff can as Mortgagee bring an action under s.169 of the Land Transfer Act Cap. 131 (the Act). But Mr. Matawalu argues that s.169 does not permit the mortgagee to do so.

Mr. Patel’s argument is that under the Land Transfer Act, in s2(1) “proprietor” is defined as meaning “the registered proprietor of land, or of any estate or interest therein”; and “mortgagee” means “the proprietor of a mortgage”. He submits that mortgage is “interest in land”; and “estate or interest” means “any estate or interest in land subject to the provisions of this Act, and includes any mortgage thereon” (section 2(1) of the Act). Mr. Patel says that these definitions mean, that the mortgagee is “registered proprietor” and has “interest in land”. Therefore he argues that the words “registered proprietor” under s169(a) includes the mortgagee in this case and hence it is able to institute proceedings under s169 for ejection.

#### Consideration of the issue

The issue for the Court’s determination is whether the Plaintiff as mortgagee is enabled to bring an action for possession under s169 of the Act. It involves the interpretation of the words “registered proprietor” *vis a vis* the mortgagee under s.169(a).

Neither counsel in their submission quoted any authorities in support of their arguments.

A novel situation has arisen in this case.

Now to the consideration of the issue.

Section 169 of the Act provides as follows as to who may summon any person in possession under that section:

- “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;

- A (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;
- B (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.

C The summons filed by the Plaintiff seeks an order for possession pursuant to sections 169 to 172 of the Act and in reliance upon the affidavit it filed. The affidavit sets out, inter alia, the sequence of events and the Plaintiff seeks possession because the Plaintiff as mortgagee had completed its power of sale under the mortgage and wants to give immediate vacant possession to the purchaser (in whose favour it has already executed the document of transfer which is annexure 'D' to Kamath's affidavit).

D This is a case of a registered mortgagee which has exercised its power of sale and has even gone to the extent of executing the document of transfer but is unable to give vacant possession of the property to the purchaser because the defendant (who was the registered proprietor prior to the exercise of power of sale) is refusing to vacate the property.

E When a mortgagee sells under his power of sale, he can convey the fee simple to the purchaser. Here the Plaintiff is the registered mortgagee. In the headnote to the Privy Council case of Frazer v Walker and Orthers [1967] N.Z.L.R.1269 it is stated:

F "Registration under the Land Transfer Act 1952 confers on the mortgagees as registered proprietors a title to the interest of the proprietor in fee simple which under ss.62 and 63 of the Act (subject to exceptions not applicable here) was immune from adverse claims because of the conception of indefeasibility inherent in the system of registration under the Act." (underlining mine)

Lord Wilberforce in Frazer at p.1077 in delivering the judgment said:

G "... Although a mortgage of a fee simple does not take effect as a transfer of the fee simple it does create a charge on the land which the Act treats as an estate or interest in the land (see s.2 definition of "estate or interest" and "proprietor")."

Then again in Frazer at p.1079 the Court rejected the argument that he is only a vendor who sells the precise estate or interest of which he is the registered proprietor, so that a mortgagee does not fall within the description. It said:

"The appellant argued that the second respondents were not

“vendors” within the meaning of the section - the suggestion being that he is only a vendor who sells the precise estate or interest of which he is the registered proprietor, so that a mortgagee does not fall within the description. It was further contended that the second respondents were not “proprietors” because they did not own the estate or interest (i.e., the fee simple) which they purported to transfer. Their Lordships are in agreement with the Court of Appeal in holding that the section should not be so narrowly read and that it extends to the case of a mortgagee who is “proprietor” of the mortgage and who has power of sale over the fee simple.” (underling mine for emphasis).

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The second respondents referred to in the above passage were the mortgagees.

Although the document of transfer has not been registered by the Mortgagee it does not affect the position of the mortgagee and its powers under s.169(a) as I have indicated above. However, it is worth noting the effect of registration of transfer if it was done in this case and I quote below from The Principles of the Australian Land Titles (Torrens) System by Donald Kerr 1927 Edition at p.418, 430 and p.431:

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At page 418:

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“Upon registration of a transfer executed by the mortgagee for the purpose of giving effect to any sale under statutory power, the estate and interest of mortgagor passes to the transferee, who becomes the registered proprietor, free from any subsequent charge. The receipt of the mortgagee is a sufficient discharge to the transferee for the purchase money, who is by Statute relieved from enquiry as to the default or sufficiency of notice.”

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At p.430, as in this case:

“if a transfer has not been actually registered, the mortgagor’s remedy in the case of improper exercise of the power of sale is to set the transaction aside.”

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And at p.431:

“Upon the registration of a transfer executed by the mortgagee for the purpose of effecting sale to a purchaser the mortgagor’s interest rests in the purchaser freed from subsequent charges.”

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I agree with Mr. Patel on his submission and hold that in the light of the definitions of the words “proprietor”, “mortgagee” and “estate or interest” and in the light of the authorities cited above the Plaintiff as mortgagee can be regarded as “registered proprietor” within the meaning of s169(a) so as to enable the Plaintiff to apply for possession. The Plaintiff Bank is the “registered proprietor” of “any estate or interest” in the land although before the exercise of power of sale by the

Plaintiff the defendant was the "registered proprietor". This was the position in the Court of Appeal in Frazer v Walker [1966] NZLR 331 at 357 when McCarthy J said that:

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"The Landowners were registered as proprietors of an estate or interest as mortgagees. Therefore, they were strictly, proprietors as defined by the Act."

In Frazer at p.1069 the Court regarded the mortgagee as "registered proprietor".

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In Bagnall v Villar (1879) 12 Ch.D 812 at p.813 Hall V.C said that:

"..... the possession of the mortgagor after the demand of possession was made on behalf of the mortgagees was a wrongful withholding of possession from them."

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I am further fortified in holding as above by reference to the use of the word, "mortgagee" in s172 where it states, inter alia, "... the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor ..." It indicates that a mortgagee can apply under s169(a). The relevant sections under s169 procedure are sections 169 to 172. Section 172 has direct reference to 169(a) otherwise the word "mortgagee" would not have appeared in s172. I consider that this is the type of case which is envisaged in s172 when reference is made to "mortgagee" therein.

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Had the Plaintiff registered the transfer the purchaser would no doubt have been able to apply under s169. However in this case the mortgagee may bring an action under s169 for recovery of the land before or after exercise by the mortgagee of the power of sale.

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Quoting from The Principles of the Australian Land Tiles (Torrens) System by Donald Kerr 1927 edition (supra) at p.416, in South Australia a special statutory proceeding in ejectment (which does not find its parallel in other States), is provided by s192 of the South Australia Act 1886, in favour of certain persons, who may summon any person in possession of land like our s.169 except that there it specifically provides for mortgagee when it states, "(b) any registered mortgagee or encumbrancee where the person in possession is a mortgagor or encumbrancer in default, or a person claiming under such mortgagor or encumbrancer".

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I therefore conclude that in the light of the above definitions and the authorities and the fact that s172 of the Act provides that "... the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor ..." the mortgagee may be regarded as the "registered proprietor" within the meaning of s.169(a). The said s.172, in so far as it is relevant, provides:

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"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." (underlining mine for emphasis)

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What I have stated above is the interpretation which I have given to the words "registered proprietor" in s.169(a) in the context of this case bearing in mind the authorities in so far as the mortgagee is concerned. If I am wrong in my analysis I take refuge in the following words:

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"No judge may refuse to give a decision. If no rule is at hand, he invents one. "It may be" said Lord Denning, M.R., "that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better". (A.G. v Butterworth [1963] 1 Q.B. 696 at p.719). In such a situation declaring what the law is and what it ought to be amount to the same." (Jurisprudence by Dias 4th Edition)

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The defendant is in possession of the property and the onus is on him to show cause as to why he "refuses to give possession of such land".

I do not accept the defendant's contention in his affidavit that he was not aware of the mortgagee's sale. He is mainly relying on the civil action commenced by Originating Summons No. 215/96 on 14 May 1996 in which he alleges negligence, fraud and breach of contract on the part of the defendants (in which action the Plaintiff is the first defendant). In that action the defendant (the Plaintiff in that action) is seeking certain declarations and damages. They do not seem to have relevance to the exercise by the Plaintiff of its power of sale as mortgagee. The Court there found that no reasonable cause of action has been disclosed against the Plaintiff (being first defendant in that action). Therefore on 25 July 1996 the Court ordered the dismissal of the Originating Summons against the Plaintiff and ordered that its name be struck out as a party to the Originating Summons. There was, however, an application before me to reinstate the Summons because the hearing date was allegedly wrongly entered in counsel's diary and hence he did not appear at the hearing which said application I have this day dismissed as I am *functus officio*.

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However, there is nothing to prevent the defendant continuing with his said action and seek whatever remedy he wishes. The Fiji Court of Appeal has made it very clear that the existence of other proceedings before the Court is not in itself a cause sufficient to resist an application under section 169 of the Act (vide Dinesh Jamnadas & Others v. Honson Ltd. FCA Civ. App. 22/85, Muthusami v. Nausori Town Council F.C.A. 23/86).

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In Jamnadas, Mishra J.A. said:

"At the hearing, the appellants' main submission was that, as proceedings relating to the same matter were already before the

A Supreme Court, the application should be dismissed. The learned Judge, quite correctly in our view, held that existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169 of the Land Transfer Act.”

Also in Muthusami Mishra J.A. had this to say:

B “... that mere institution of proceedings by Writ did not by itself shut out a claim under section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on affidavit evidence, some right to remain in possession which would make the granting of an order under section 169 procedure improper.”

C The authorities make it clear that despite the claims in the said originating summons which I have already dismissed against the Plaintiff it is still open to me to deal with this application under section 169. Here there are no complicated issues of fact or law which would preclude me from hearing this matter under section 169 (Shyam Lal v Eric Martin Schultz (1972) 18 FLR 152 .

In Shyam Lal Gould V.P. said that:

D “the procedure in chambers under section 169 is not appropriate when there are complicated questions of fact (particularly if there are allegations of fraud) to be investigated.....”

“the case fell within the ambit of section 169 of the Land Transfer Act, 1971, and the basic facts not being in dispute, the proceedings were rightly entertained by the learned judge under that section.”

E Also in Ram Narayan s/o Durga Prasad v Moti Ram s/o Ram Charan (Civ. App. No. 16/83 FCA) Gould V.P. stated:

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”.

In the result I find that the defendant has failed to show cause why the order prayed for should not be made.

G Accordingly there will be an order against the defendant for immediate vacant possession but execution to be stayed until 31 December 1996. The defendant is ordered to pay costs to the plaintiff to be taxed if not agreed.

*(Judgment for the Plaintiff.)*