

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. **HBC 93 of 2008L**

BETWEEN : **SHIU JIT and RAJ MATI LAL**

Plaintiffs

AND : **DAVENDRA GOUNDAR**

Defendant

FINAL JUDGMENT

Of: Inoke J.

Counsel Appearing: Mr Chandra Singh for the Plaintiffs
Mr Haroon Ali Shah for the Defendant

Solicitors: Chandra Singh & Associates for the Plaintiffs
Haroon Ali Shah Esq for the Defendant

Date of Hearing: 17 September 2009

Date of Judgment: 18 September 2009

INTRODUCTION

[1] This is an application under **s 169** OF THE **Land Trasfer Act** [Cap 131] by the Plaintiffs to evict the Defendant who is occupying their land.

THE SUMMONS AND AFFIDAVITS

[2] The Summons was filed on 19 May 2008 supported by an affidavit by the First Plaintiff, Shiu Jit, on behalf of both Plaintiffs also filed on 19 May 2008. A mix up in instructions between the Plaintiff's Ba solicitors and their Lautoka agents led to the matter being struck out in June 2008 but then restored in August. The Defendant filed his affidavit in reply on 26 August

2008. Shiu Jit gave a power of attorney to one Latchman Singh who swore a further affidavit in response on his behalf on 25 March 2009.

THE EVIDENCE

[3] The Plaintiffs are the last registered proprietors of the subject land. They purchased the land under mortgagee sale.

[4] The land was previously held by the Defendant's father who is now deceased. At the time of his death, his father, the Defendant, the Defendant's step mother and her two young children were living together. The Defendant's mother became the executrix and trustee of his father's estate. She allegedly mortgaged the property to one Tilak Chand for \$4,000 without consultation or court sanction who then sold to the Plaintiffs pursuant to the mortgage. The property is allegedly worth a lot more.

[5] The Defendant alleges that the transfer to the Plaintiffs is tainted with illegality in that they are non residents and Ministerial approval would have been required. There appears to be none obtained in this instance. He also alleges that the mortgagee sale was irregular. He has been living on the land since birth in the house that his father built. He has, he says, a legal right as a beneficiary of his father's estate and equitable right to occupy and remain on the land.

[6] The Plaintiffs deny these allegations and claim that they are Fiji citizens and hence do not require consent and they purchased the land as bona fide purchasers without notice.

THE LAW

[7] Recently, in **Chand v Bacau** [2009] FJHC 117; HBC115.2008 (11 June 2009), I referred to cases on the topic:

"...the passage in the Fiji Court of Appeal decision in **Ram Chand & Ors v Ram Chandar & Ors [2003] FJCA 10** ... sets out the procedure to be followed:

"Section 169 of the Land Transfer Act (Cap. 131) provides that the registered proprietor of land 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 of the land to the applicant.

Section 170 provides that the summons shall contain a description of the land and shall require the person summoned to appear at the Court on a day not earlier than sixteen days after the service of the summons.

By s.171, on the day appointed for the hearing of the summons, if the person summoned does not appear, the Court may act in his absence.

By s.172, if the person summoned appears, he may show cause why he refuses to give up 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 or he may make any order or impose any terms he may think fit.

The dismissal of the summons is not to prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled."

.....

In **Deo v Mati [2005] FJHC 136** in which His Lordship quoted and adopted a passage from the judgment of the then Supreme Court (now the High Court) in **Morris Hedstrom Ltd v Ali [Civil Action 153/87]**:

"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."

CONSIDERATION OF THE APPLICATION

[8] I agree with Mr Shah for the Defendant that the affidavits raise several issues which can only be resolved by viva voce evidence at trial. I think the Defendant has an arguable case.

[9] I therefore dismiss the Plaintiffs' application. They are free to issue a Writ and statement of claim to pursue the matter claimed in their affidavit.

[10] I award costs to the Defendant which I summarily assess as \$800 to be paid by the Plaintiffs in 21 days.

ORDERS

[11] I therefore make the following Orders:

1. The Plaintiffs' summons filed on 19 May 2008 is dismissed.
2. The Plaintiffs shall pay to the Defendant costs of \$800 within 21 days.

.....
Sosefo Inoke

Judge
