

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 232 of 2017

BETWEEN : SHYAM NAND AND DEO CHAND PLAINTIFFS
AND : SHALESH VIKASH CHAND DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr. S Singh [Shelvin Singh Lawyers]
DEFENDANT : Mr. K Chang [Legal Aid Commission]
JUDGMENT OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 27 June 2019

JUDGMENT

[Section 169 application for vacant possession]

1. This is the Plaintiff's application under Section 169 of the Land Transfer Act seeking orders:

"That the Defendant gives up immediate vacant possession to the Plaintiff of the property comprised in the Certificate of Title No. 23643 being Lot 2 on Deposited Plan No. 5906 which the Plaintiffs are the registered proprietors of which the Defendant occupies."

An Affidavit of the Plaintiffs was filed in Support of the application.

2. Said application is opposed by the Defendant who has filed an affidavit in opposition.

The Plaintiffs had filed a reply to the opposition.

3. According to the Plaintiffs, they are the registered proprietors of property in CT No. 23643 being Lot 2 on DP 5906. A copy of the Certificate of Title is annexed to the Affidavit.

The Defendant is said to be occupying part of the property without the consent or authority of the Plaintiff.

They had previously allowed the Defendant to occupy part of the property and build a temporary structure. The Defendant was to move out when they required him to vacate. They had allowed him to build the structure as he is the biological brother of Deo Chand and he had problems at his previous place of residence.

By a notice dated 27 July 2016, they have asked the Defendant to vacate the property. Despite this the Defendant continues to occupy the property.

The Plaintiff claims the Defendant came to Deo Chand on several occasion begging Deo Chand that the Defendant needed to move out of their mother's residence as their mother was creating problems with the Defendant.

Out of pity and love the Defendant was allowed to occupy the property.

The consent letter to the Defendant was to allocate a piece of land to build a house but not to occupy the land.

Deo Chand consented to power and water to be supplied to help the Defendant when he needed the same.

Deo Chand denies communicating with the Defendant to get title on payment of \$808.

Deo Chand had borrowed \$2,000 from Defendant and has paid \$1,200. Amount outstanding is \$800 and this is not for the Defendant to get Title to the property.

The Defendant's family is now creating problem with Deo Chand's family.

4. According to the Defendant, on or about 2014 Deo Chand told him he could build his house on an allocated piece of land. Due to this he moved out of his mother's residence and built his house on the property.

The Second Plaintiff gave consent letter for the Defendant to build the house. As a result the Defendant was eligible recipient of the Rural Housing Programme. He had to pay \$6,102.45 as his contribution for the program.

His house was built in 2015 after which Second Plaintiff have consent to have power poles and lines run through the property to Defendant's house.

Deo Chand also gave consent for water meter and pipe.

Deo Chand verbally communicated to the Defendant to pay \$800 to get title to Defendant's name.

He gave \$800 to Deo Chand without any receipt.

If the Plaintiffs had indicated the building of house was to be temporary he would not have applied for the Rural Housing Program.

He claims to have been encouraged to believe he will be allowed to live on the property indefinitely.

5. Section 169 of the Land Transfer Act reads:

“ The following person 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 lesser 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 tenant or lessee is in arrears for one month, whether there be or be not sufficient distress found on the premises to countered such rent and whether or not any premises demand has been made for this 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 expired.*

- 6. Under Section 170 *“the summon shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than 16 days after the service of the summon”.*
- 7. Pursuant to Section 172 if *“the person summoned appears he or she may show cause why he or she refuses to give possession of such land and if he or she proves to the satisfaction of the Judge a right to the possession of such land, the Judge shall dismiss the summons with cost”.*

Section 172 also empowers court to make any other order and impose any terms he or she 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 summon to which he or she may be entitled to.

The Judge is also allowed to dismiss the summon if lessee before the hearing pays or tenders all rental due and all costs incurred.

8. Annexure A to the Affidavit in Support of Shyam Nand and Deo Chand is copy of certified true copy of title (certified copy on 25 July 2019) for CT No. 23643 for property known as "Block 2 Deuba" and containing three (3) hectares 3654 square meters situate in Serua being Lot 2 on Deposited Plan No. 5906.

9. The last registered proprietors are Shyam Nand and Deo Chand.

Hence I find the Plaintiffs have satisfied the provision under Section 169 of the Land Transfer Act, thus having a locus standi to bring the proceedings.

10. The amended summon filed on 25 April 2018 describes the land and required the Defendant to appear in court on 18 June 2018. There is nothing to confirm when the amended summon was served.

However the Defendant on 24 May 2019 filed an Affidavit in Opposition.

Since there is no dispute raised by the Defendant I hold the Plaintiff is in compliance with requirement of 16 days period under Section 170 of the Land Transfer Act.

11. The onus now shifts to the Defendant to show cause why he or she refuses to give possession of such land.
12. According to the Defendant, sometimes in 2014 Deo Chand (one of the registered proprietor and Defendant's brother) told the Defendant, that the Defendant could build his house on an allocated piece of land on the property. Due to this he moved out of his mother's house.

The Plaintiff states that they had allowed the Defendant to occupy part of the property and build a temporary structure. The Defendant was to move out when they required him to do so. The Defendant was allowed to occupy the property as he had problem with his previous place of residence.

The Defendant is said to have approached Deo Chand on several occasions.

Deo Chand had consented to supply of utilities and construction of a house to help the Defendant who needed the same.

Deo Chand is now said to be causing problem to the family members.

13. There is no evidence before this court that the Defendant has move the court in any proceedings to claim for specific performance of the alleged promise made to give title to land upon payment of \$800.


According to Deo Chand the \$800 is balance outstanding for a loan he took from the Defendant.

14. The consent given by Deo Chand on 11 November 2014 does not state that the land allocated is for temporary basis. It was based on this consent that the Rural Housing assistance was provided to the Defendant as it was a requirement of the program for the Defendant to have a title to the land (Annexure B in the Affidavit in Opposition).
15. The Defendant had spent substantive amount of approximately \$6000 to construct the house on the land.
16. With the evidence before the Court I do not find this is a proper case to be heard and dealt with summarily. Parties ought to be heard under oath to determine how and why the Defendant was allowed to occupy the piece of land and if there were exchange of money to gain title to the piece of land.
17. Accordingly, I convert the action into a writ action.

The Affidavits filed shall be considered as pleadings.

The Plaintiff is now directed to file and serve its summon for direction in 14 days.
18. No orders are made for costs.




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Vandhana Lal [Ms]
Acting Master
At Suva.