IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0021 OF 2002S
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(High Court Civil Action No. HBC236 of 2000S)
(High Court Civil Action No. HBC237 of 2000S)

BETWEEN:

RAM CHAND AND OTHERS

Appellant

AND:

RAM CHANDAR

Respondent

AND:

BETWEEN:

RAM CHAND AND OTHERS

Appellant

AND:

MRS HARI PRASAD

Respondent

Coram: Reddy, P
Kapi, JA
Sheppard, JA

Hearing: Tuesday, 25th February 2003, Suva

Counsel: Mr. S.Parshotam and Ms. R. Morris for the Appellant
Ms. R. Shoma Singh Devan for the Respondent

Date of Judgment: Friday, 28th February 2003

JUDGMENT OF THE COURT

These two appeals are against the dismissal of proceedings brought by originating summons issued pursuant to s.169 of the Land Transfer Act (Cap.131). The primary order sought in each originating summons was in the following terms:

> *"(a) That the defendant give up immediate vacant possession to the Plaintiffs of the premises located at Rovodrau, Nakaulevu, Navua and comprised and described in Certificate of Title No. 5079 of which the Plaintiffs are the registered proprietors and which the Defendant now occupies."*

Certificate of Title No. 5079 describes the land as the land known as "Block 2 District of Serua (part of)" containing 149 acres one rood eleven perches. Neither of the respondents who were the defendants below occupies the whole of the land. Each occupies a comparatively small part of it. But the originating summons does not identify which part. If, as the primary Judge held, the respondents are entitled to succeed, the orders to which they are entitled cannot be left in the form in which they are expressed in the originating summons. This was a matter raised with counsel during the argument and we shall deal with it again before we conclude this judgment.

The affidavit in support of the originating summons in the first matter was sworn by Kiran Chandra who is one of the appellants and one of the executors and trustees of the estate of late Krishan Chandra. The appellants were the plaintiffs in the proceedings at first instance. Mr Chandra said that he was authorized by the other plaintiffs to make the affidavit on their behalf.

He said that the executors were the registered proprietors of the property comprised and described in certificate of title No. 5079. He said that, at all material times, the defendant, now the respondent, Mr Chandar had been and continued to be an occupant of the property as yearly tenant of the executors. He also said that by notice dated 5th March 1999

served on Mr Chandra the plaintiffs sought vacant possession of the property from Mr Chandar to be given on or before 30th September 1999. Despite the notice Mr Chandar had failed to vacate the property and was refusing to vacate and deliver up possession of it. The notice to which the witness referred was given by solicitors acting on behalf of the executors. It referred to the respondent's occupancy of the land and said that the executors gave him notice to quit and deliver up possession on or before 30th September 1999 or at the expiration of 6 months from the service upon him of the notice, vacant possession of that part of the land which he and his family were occupying. It may be observed that the letter referred to the fact that the respondent was occupying "part of this land as a yearly tenant." The solicitors do not identify which part of the land was being occupied by the respondent. No doubt the respondent knows where his house is in relation to the whole of the land but precisely what part of the land is being sought by the executors is not stated. That is simply another part of the problem mentioned in the first paragraph of this judgment.

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.

The procedure provided for is common in common law jurisdictions in many countries. There is a significant amount of case law which has been developed over the years as to the matters that a person in occupation of land seeking to resist a summons under a provision such as s.169 of the Land Transfer Act has to establish in order to secure the dismissal of the proceedings against him.

On 11th July 2001 the respondent, Mr Chandar, swore an affidavit. He said that he had been in occupation of the subject land for a period of 59 years. He said that he had been advised "by the registered proprietors" that if carried out improvements to the property, he would be given an opportunity to purchase the land "for a nominal sum" and could otherwise remain on the land as long as he wanted in consideration of the improvements later mentioned in the affidavit. He said that a number of improvements had been carried out and listed what they were. The list is as follows:

"4.1 Constructing road, digging drains and clearing bushes on the land.

4.2 Cultivating the land into farm lots.

4.3 Arranging for electricity to be installed and telephones.

4.4 Expenditure totalling some $110,500.00"

It may be observed that he does not identify the registered proprietors who allegedly made the promise to give him an opportunity to purchase the land for a nominal sum. Nor does he say when this conversation occurred nor when any of the improvements to which he refers were carried out. And, like the appellants, he does not attempt to identify precisely the land which he occupies. None of the expenditure of $110,500.00 is supported by any evidence such as the production of receipts.

Mr Chandar also said that he had erected a wood and iron dwelling comprising four bedrooms and a lounge with usual kitchen and other associated amenities where he resided along with his wife, children and their family members.

He said that after the notice to quit was served the executors had various meetings with the group of individuals, including the respondent himself, who were presently in occupation of the land which constituted a total area (undivided) of 259 acres 1 rood 11 perches. This would appear to be an error because the Certificate of Title specifies an area of 149 acres. The discrepancy is not explained.

He said that the executors had recently applied to the Navua Rural Local Authority for the approval of the subdivision of the property. He said that the application was refused. He also said that one of the executors said to him that he could continue to occupy the property as the executors intended to enter into further negotiations with the group of occupiers of the land with a view to the sale to them of the land occupied by them.

We mention in passing the reference in the appellant's affidavit to cultivating the land into farm lots. This raised in our minds the question whether or not the land or part of the land might be affected by the provisions of the Agricultural Landlord Tenant Act (Cap. 270). The protections for tenants covered by this Act are significantly more than they are for the tenants of other types of land. Although we discussed this matter with counsel, particularly counsel for the two respondents, she was unwilling to have the matter investigated or to take the matter any further. We remain, however, concerned that part of the land may be agricultural in nature and so that a different regime might apply to the land in question here from that which the parties have assumed applies.

Mr Chandra on behalf of the executors made an affidavit in reply to that filed by the appellant. He said that " the subject land was originally, this being some time in the 1950s, under the name of Maini a grandparent of the defendant". He denied that Mr Chandar was advised as alleged in his affidavit. He said that the advice given to him was that he should not construct any permanent structure as the property would be subject to subdivision and/or sale in the future. He said that Maini and all other tenants had been advised likewise. The only structure approved was in accordance with the requirements of the Navua Rural Local Authority. He said that Mr Chandar was further advised to restrict additional dwelling structures on the property.

So far as we can tell from the record no objection to the admissibility of this paragraph was taken on behalf of the respondents. It is difficult to see why it should not have been rejected because it is hearsay. It is true that Mr Chandra said in paragraph 1 of his affidavit that the matters to which he thereafter deposed were true to the best of his knowledge and

belief and that they were either within his personal knowledge or had been supplied to him in his capacity as executor and trustee. Nowhere does he identify which matters are within his personal knowledge nor does he say what the basis of the knowledge which he purports to have was. He merely makes the statement that some of the material has been supplied to him in his capacity as executor and trustee of the estate.

In paragraph 6 of the affidavit Mr Chandra says that the joint effort by all tenants on road improvement, clearing drains and bushes were part of conditions when basic road construction was approved by landowners for tenants' accessibility. He also said, "The land in question was agricultural and was thus utilized." The paragraph concludes with a statement that the landowners gave consent to water, electricity and telephone access for all tenants "as a social gesture upon request."

In paragraph 7 he says that he believed that there were other adults living on the land. He further says that Mr Chandar had illegally used the adjacent property (that is not identified as part of this land) as a soccer field earning income from hiring it to organizers. Electricity had also been illegally used for flood lights on the adjacent property with the respondent "illegally subleasing and/or subletting the adjacent property for use as a sports ground for reward without the consent of the landowners." No particulars of these various statements are given. He said that he admitted that meetings were held between the landowners and some of the tenants. The meetings were held to explain the landowners' plans to develop and subdivide the property for eventual sale to "sitting tenants" . He said that the total area of the property was 159 acres 1 rood 11 perches. That is closer to the area specified in the Certificate of Title but is still 10 acres in excess of that area. Mr Chandra denied that the

"scheme plan" deposited with the Navua Rural Local Authority was refused. Rather, he said, the scheme plan was held in abeyance in order to give more time to the tenants to raise funds through a cooperative scheme, "but this ended dismally with misuse of funds." Delays of more than three years were experienced without any success.

Mr Chandra denied that there was any discussion as deposed to by Mr Chandar in paragraph 8 of his affidavit. The witness also said that, in any event, all discussions were held without prejudice to the current court proceedings. If that were the case, so he said, the respondents would not now be advancing the court proceedings. He added that the negotiations were with a view to reaching agreement for the sale of the property (upon subdivision) and no agreement had been reached on the sale and negotiations had collapsed. He said that the respondent could not make use of the fact of the negotiations to extend his continued occupation of the land.

That concludes the account of the evidence in the case involving Ram Chandar. It was tried by Byrne J. along with two other cases. He dealt with them in one judgment. In one, there was no appearance and he made an order as asked in the originating summons. The other concerned Mrs. Hari Prasad. The evidence given on behalf of the appellants in the Prasad case was similar to the evidence given by them in the Chandar case. We thus do not need to refer to it. We need, however to refer briefly to the evidence of Mrs. Prasad. She is the widow of the late Hari Prasad and his legal representative. She was married to him when she was 15 years old. She said that she was about 90 years of age and had been living on the subject land for about 75 years. She said her husband had been born on the subject land and that she and her husband had had eight children and about 50 grandchildren born

there. She said that, at the time the land was first given to her husband to live on, they were advised by the registered proprietors that if they carried out improvements to the property they could stay there with their family and, if they wanted they could purchase the land occupied by them at a very nominal price. She described improvements carried out by her husband. They appear to be the same improvements as are referred to in the evidence in the other case. She said that they had erected a six bedroom concrete and wooden dwelling over the years. She resided there with her sons and family members. She said that after the notice to quit was served she had various meetings with the executors along with the other people occupying land in the area. She referred to the refusal of the Navua Rural Local Authority to approve the proposal for subdivision. She said that at the time one of the appellants served the originating summons on her, he "represented to me that I could continue to occupy the property, as he intended to enter into further negotiations with the group of occupiers of the land in view to the sale to them of the land occupied by them." That conversation is denied by Mr Chandra in paragraph 10 of his affidavit in reply.

There was no cross-examination. It would have been impossible for the Judge who tried the matter to determine the question of whether such a conversation occurred without hearing and seeing the witnesses.

In his judgment Byrne J. recounted the facts of each of the matters. Eventually he said:

> ***"It will be obvious from what I have just said that the tenants have made improvements on the land which must increase its value for the Plaintiffs. As a matter of equity I consider the Defendants would be entitled to at least some compensation. It was suggested by the Plaintiffs in their very helpful submissions that the defendants should pursue such claims by separate***

proceedings. My present view is that such a course would be impractical, particularly in view of the decision I have reached that the allegations by the 1st and 2nd Defendants raise triable issues of fact which cannot be resolved by the summary procedure under ss.169 and 172 of the Land Transfer Act.

It also seems to me on the evidence so far that the improvements to the land were made with the knowledge or at least acquiescence of the Plaintiffs and their predecessors. Whether or not the Defendants will be able to make good their allegations of what amount to a right to be given an opportunity to purchase the land for a nominal sum remains to be seen but it is impossible for me, and indeed improper, to attempt to resolve these questions on simply affidavit material. I therefore, but with some reluctance, dismiss the Summons of the Plaintiff's against the 1st and 2nd Defendants, Ram Chandar and Mrs Hari Prasad."

His Lordship concluded his judgment by saying that the dismissal of the summons under s.169 of the Land Transfer Act had not closed the door on further proceedings to the appellants. He said that he also felt compelled to add that in his view the proceedings could have been handled better by all the parties. He said that the appellants might consider whether some advantage might be gained by attempting to achieve some monetary settlement with the respondents. He added that he considered that the notices to quit served by the appellants accorded with the law.

We are troubled by this last statement. The notice to quit required the delivery up of that part of "this land which you and your family are occupying." No argument was addressed to us on the validity of the notice to quit. Accordingly, we leave open the question whether the notices should have defined more precisely the land possession of which was sought.

Otherwise we agree with the various remarks made by the Judge but the essential question is whether we should disturb his Lordship's judgment on the basis that the respondents have not raised triable issues of fact which is the main thrust of the appellants' submissions. They relied on what had been said by the Supreme Court in Morris Hedstrom Limited v. Liaquat Ali, Supreme Court of Fiji, Action No. 153 of 1987 at p2. There it was said:

> ***"Under Section 172 the person summonsed 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."***

The appellants submitted that the respondents had failed to provide any real particulars of the allegations put forward. There was thus no basis upon which the Judge could have satisfied himself that issues which required resolution by trial were raised. They also submitted that the Judge was in error in finding that any claim for compensation that might possibly be available to the respondents could not be pursued in separate proceedings.

In their submissions the respondents listed a number of matters which they said required investigation by the court at a proper trial where oral evidence could be called. The matters specified are as follows:-

1. The court would require evidence of all improvements carried out by the respondents including contributions made towards the development of the land

2. The court needed to ascertain what representations were made by the appellants when the respondents made the improvements. This could only be done through the production of oral and documentary evidence.

3. What was the exact nature of the discussions and/or negotiations held between the appellants and the various respondents?

4. The appellants needed also to produce evidence that the respondents had without lawful authority utilized adjoining property and had been profiting from this.

5. What steps had the respondents taken to purchase the pieces of land of which they were in occupation?

6. What improvements were approved by the Navua Rural Local Authority?

7. Whether in fact a subdivision plan was lodged and the reasons behind the disapproval of it.

We comment on these matters as follows:

In relation to paragraph 1, the fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue in the occupation of the land if the landlord is otherwise lawfully entitled to it. On the other hand, if improvements are carried out pursuant to some understanding, however loose, it may be that in some cases rights will be conferred on tenants at least to purchase the land if a price can be agreed upon. One cannot lay down any hard and fast rule. Every case will depend upon its own facts. The great difficulty in the present case is the passage of time and the uncertainty of when and between whom the various conversations which are referred to by both sides took place. Much of that evidence may well have been lost by the fact the people are no longer living. It seems unlikely to us that there would be any documentary evidence available. What seems to have happened is that the land, a long time ago, was let out to a variety of tenants in various occupancies over various areas. The appellants now wish to bring the matter to a head. This is understandable. It is for the respondent to show some right or title to continuing occupation of the land or to purchase the land they occupy. It is difficult to conclude that the evidence which they have led meets this requirement.

In relation to paragraph 2 we agree that it would be desirable to find out precisely what, if any, representations were made either by the appellants or by predecessors in title by which they may be bound. Again it seems unlikely that there will be any such evidence and it is for the persons in occupation to establish their title if they are to defeat the legal title which the appellants clearly have. The same remark replies in relation to the matter raised in paragraph 3.

We are at a loss to understand the relevance of the matters referred to in paragraphs 4, 6 and 7. As to paragraph 5 it was surely for the respondents to give evidence of the steps they had taken to purchase the lands of which they are in occupation. That matter should appear in their evidence. It does not seem to us that it does.

Then there are legal issues raised. They firstly refer to the understanding which is referred to in the evidence, that if the tenants carried out improvements to the land, then in the future the tenants would be given the opportunity to purchase the respective pieces of land each of them occupied. But the trouble about this is again the lack of evidence which there is about the matter. Furthermore there would be a question, if there were evidence of an option to purchase, as to whether the agreement needed to be in writing and whether or not the agreement, if any, was capable of being enforced. It may be that the expression "nominal price" is too a uncertain to be capable of enforcement.

There were other matters raised in the respondents' submissions but they are much the same as those to which we have referred. The respondents relied strongly on the decision of the Court of Appeal in England in Inwards v. Baker [1965] 2 Q.B.29. We have considered that case. But the facts of it are very different from those in the present cases. We do not think that the decision is of assistance to the respondents because it is clearly distinguishable from their cases.

In all the circumstances we have reached the conclusion that the evidence led by or on behalf of the respondents was not sufficient to raise triable issues in the ejectment actions. We agree that the respondents may be entitled to compensation for the improvements which

they have made over many years. These may have to be valued. But we are unable to understand how it is that, if that is the real question, that matter cannot be dealt with in proceedings other than the ejectment actions. As we have said, the fact that improvements were made is not really an answer to the appellants' case.

We certainly agree with the sentiments which are expressed inferentially in the appellants' submissions that the cases would be well settled provided that can be done on terms which are fair and just. But we can do nothing about this; it is a matter for the parties. We do urge them, however, to see what can be done about the matter. Perhaps the appointment of a suitable mediator independent of the interests of both parties might be of assistance.

There are two problems that concern us. We have mentioned each of these. It seems to us that there is strong ground for saying that at least some of these lands may be covered by the provisions of the Agricultural Landlord Tenant Act (Cap.270). As earlier mentioned, the provisions of that Act, if it applies to any of the tenancies, may be much more protective of the respondents' rights than the general law. Again, in the absence of any point being taken by counsel for the respondents about the matter, we can do little about it but we are at a substantial loss to understand why, when the court raised the matter more than once, counsel for the respondents did not at least seek an opportunity of looking into the matter. We find counsel's attitude in this regard inexplicable unless there is in the background going on some negotiation for the overall settlement of the matter.

Finally we come back to the question of the form of the order. For the reasons earlier

given we will not make an order in terms of that sought in the originating summons. During the luncheon adjournment of the matter on 26th February 2003 we asked counsel to consult in relation to the form of orders to which the appellants would be entitled if they were otherwise entitled to succeed. Both counsel returned without having explored the matter at all and with an apparent unwillingness on both sides to consider it. In the view we take of the substance of these appeals, we think that they should be allowed. In the ordinary course we would have made appropriate orders. But we will not make orders which are too uncertain to be capable of enforcement. Each of the orders obliges the respondent in question to yield possession of the whole 149 acres comprised in the certificate of title. That, of course, is absurd and should be corrected The form of the orders is a matter for the court. It is not a matter that concerns only the parties. The court will not make orders that ought not to be made. It has to be remembered that the order may have to be enforced by execution and anyone executing a writ of execution must know precisely what it is that he or she is to do. No court officer entrusted with execution of the order sought by the appellants in this case could possibly have any certainty as to what was required.

In the light of the opportunity given to the appellants to amend the order for possession which they seek, the only alternative, we have is to conclude that the proceedings were rightly dismissed by Byrne J. although not for the reasons he gave. Our reasons are based upon the failure of the appellants to formulate appropriate orders to which the Court can give effect. Accordingly these appeals are dismissed but without prejudice to the appellants right to bring properly constituted proceedings in subsequent actions.

In the circumstances there will be no order as to the costs of the appeals.

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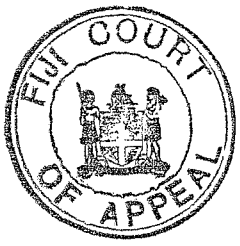
Reddy, P



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Sheppard, JA

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