

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No: HBC 34 of 2013.

BETWEEN: **ADARSH VIKASH SHARMA** and **NEELAM DEO** both of Matanikorovatu Road, Nasinu, Technical Services Manager and Purchasing Officer respectively.

PLAINTIFF

AND: **ROHIT KUMAR** of Lot 15 Matanikorovatu Road, Nasinu and **THE OCCUPANTS.**

DEFENDANT

BEFORE : Justice Deepthi Amaratunga

COUNSEL : Ms. Devan R. S. S. for the Plaintiff

Mr. V. Singh for the Defendant

Date of Hearing : 22nd March, 2013

Date of Judgment : 27th March, 2013

JUDGMENT

A. INTRODUCTION

1. The Plaintiffs, who are the purchasers of the property from a mortgagee sale, filed this action in terms of the Order 113 of the High Court Rules of 1988 on 18th February, 2013 seeking eviction of the occupants of the property who were the previous owners and the ex-mortgagors of the property. At the time of the application, though the Plaintiffs executed the transfer the property on 3rd December, 2012 and said settlement of the transfer was lodged with the

registrar of the lands on 21st January, 2013 to effect registration of the transfer and evidence to the lodgment was annexed, no transfer was effected on the memorials of the title, hence this application in terms of Order 113 was made instead of an application in terms of Section 169 of the Land Transfer Act. The memorials at the time of filing of the originating summons depicted the Defendants as the owner-mortgagors of the property since the transfer to the Plaintiff, was yet to be recorded in the memorials of the certificate of title. In the affidavit in reply to the affidavit in opposition the Plaintiffs filed a copy of the certificate of title as at 21st March, 2013 and this indicates the Plaintiffs as the present owners of the property. The factual matrix is not disputed, but the Defendants contention is Order 113 cannot be resorted to evict the previous owners of the property who entered premises as legal owners of the property and remained in possession of the property. The Defendants also state that they are not trespassers and remained in the premises as previous owners and has to be considered as over holding tenants of a premises who are excluded from eviction. There is no right for the Defendants to remain in the property, they had mortgaged the property and defaulted it and had not taken any step to prevent mortgagee sale, any right to remain in the property is waived by their own actions and or inactions that resulted a mortgagee sale and also transfer of the property to the Plaintiffs. After, the mortgagee sale was over and transfer of the property was executed and registered, allegedly an action is filed against the mortgagees, but this does not confer any right to remain in the property since under Torrens system of Land Law the registration is everything and only exception is fraud and no allegation of fraud on the part of the Plaintiff is alleged. The issue is whether the Plaintiff can proceed this originating summons in terms of Order 113 of the High Court Rules of 1988.

B. LAW AND ANALYSIS

2. Order 113 of the High Court Rules of 1988 state as follows:-

‘1. **Where a person claims possession** of land which he or she alleges is **occupied solely by a person** or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into **or remained in occupation**

without his or her licence or consent or that of any predecessor in title or his or her, the proceedings may be brought by originating summons in accordance with the provisions of this Order.’ (emphasis is added)

3. The contention of the Defendant is that Plaintiff as the registered owner of the property can institute an action or succeed this summon if it were in terms of the Section 169 of the Land Transfer Act, but cannot institute proceedings under Order 113 since the Defendants were previous owners and their entry to the property was not an illegal entry and were not trespassers since they were the predecessors of the title. I can say that I do not agree with the said contention and such an interpretation would certainly create a mischief, if may say so.

4. The Plaintiffs who ‘claim possession’ in terms of the executed transfer in pursuant to a mortgagee sale (now registered owners) can institute action in terms of the Order 113 of the High Court Rules for eviction of any person ‘remained in occupation without his licence or consent’. The words ‘*remained in occupation*’ covers any previous owners and non- trespassers whose initial entry to the premises could not be categorized as trespasser. The phrase ‘remained in occupation’ denotes that their initial entry may or may not be legal but their remaining in occupation is the illegality and the basis of the action for eviction in terms of the Order 113 is the illegal ‘remaining’ of the property and there is no mention as to the initial entry to property may or may not be legal and the consideration of that is irrelevant to the Order 113, and in order to satisfy this requirement what the Plaintiff who claims possession has to establish is that the Defendants are remaining on the property without their consent or licence. The Plaintiffs in this action has satisfied all these requirements and no restriction of this provision of law is warranted. I have not been presented with any authority that warrants restrictive interpretation under this provision or similar provision of law.

5. The introduction of Order 113 in UK (which is the identical provision found in Order 113 of the High Court Rules of 1988 in Fiji) was due to a decision of the English courts (Manchester Corporation v Connolly [1970] Ch.420) where it was held that it could not make an order for injunction for the recovery of possession except as a final judgment. The correctness of the said judgment was questioned three years later in a decision by Lord Denning (McPhail v Persons [1973] 1 Ch 447 at 458 para D) but before this the spillover of the said decision in 1970 was put right immediately by new rules of court which introduced the Order 113, in 1970 (see Dutton v Manchester Airport [1999] All England Law Reports 675) which specifically granted the court to evict a person in possession summarily which was held impossible except by a final judgment in the case of Manchester Corporation v Connolly [1970] Ch.420. So, what was introduced by the Order 113 is not a new provision but rather a nullification of the ratio of the court that except with final judgment a party cannot be evicted from the premises and while doing it this also addressed the issue of the service of the summons when it deals with the persons who cannot be named, like squatters. So there were two purposes achieved by the new introduction of Order 113 in UK, and they are the providing alternate solution to the ratio in Manchester Corporation v Connolly [1970] Ch.420 which stated that unless by a final judgment a recovery of possession is not possible in an injunction, and also the issue of service to defendants who cannot be named like squatters. So the provision contained in Order 113 can be utilized as an alternate to an injunction seeking possession of the property and in such a situation one cannot exclude the previous owners who do not derive special status under law regarding injunctions for eviction. The only exceptions are the parties mentioned in the parenthesis of the Order 113 and this cannot be expanded to include previous owners who do not have any right to remain in the property.

6. Any person could claim possession of a land either as the owner or under any instrument that is accepted in law which grants that person a right to possession. Under the Torrens System of Land Law the registration is paramount consideration and in this case though initially the Plaintiff had only the execution of transfer and the lodgment of the same for registration the same

was registered and a copy of the said title was subsequently filed and there is no dispute as to the title. Perhaps, that may be the reason that the counsel for the Defendants in the oral submissions admitted that they do not have a right to remain in the property if an action under Section 169 of the Land Transfer was instituted, but he strenuously argued that the procedure under Order 113 cannot be utilized to evict the ex-owners of the property who had entered the premises lawfully and cannot be considered as trespasser. The counsel for the Defendants argued the words in the parenthesis “(not being a tenant or tenants holding over after the termination of the tenancy)” in support of his argument. He stated that if these proceedings cannot be utilized to evict a tenant who is overholding the property after the termination of the tenancy which derives the right from the owner of the property or from the previous owner, the same rule should be applied to the previous owners, though it is a plausible argument, I do not agree with the said argument. The exception granted in the said provision of the law contained in the parenthesis cannot be expanded or *iusdem generis* rule of interpretation can be applied and it can only be restricted to the specifically mentioned category. This is clear as any person who remained in the property without the consent of the owner can be evicted in terms of the provision under Order 113 of the High Court Rules of 1988 and no exception is made for the previous owners though the licencees of the previous owners are specifically excluded.

7. In ***Dutton v Manchester Airport*** [1999] *All England Law Reports* 675 at 679 *paragraph d* (Chadwick LJ dissenting judgment) it was held

“Order 113 was introduced in 1970 (by the Rules of the Supreme Court (Amendment No 2) 1970, SI 1970/944), shortly after the decision of this court in *Manchester Corp v Connolly* [1970] 1 All ER 961, [1970] Ch 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right--that is to say,

against trespassers. The order does not extend or restrict the jurisdiction of the court. In *University of Essex v Djemal* [1980] 2 All ER 742 at 744, [1980] 1 WLR 1301 at 1304 Buckley LJ explained the position in these terms:

'I think the order is in fact an order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession.'

As that passage makes clear, Buckley LJ made those remarks in the context of a claim by the owner of the relevant property. The question, in *Djemal's* case, was whether the university could obtain an order excluding those involved in a student protest from the whole of the campus; or only from such part of the campus actually in their occupation, as the judge had held in the court below. He was not addressing the question which arises in the present case: whether the plaintiff had a right to possession at all. But, it is plain from his remarks that he would have taken the view that that was a question which had to be determined under the general law. If the right does not exist under the general law, there is nothing in the new procedure introduced in Ord 113 which can have the effect of conferring that right."

Further at p 680 paragraph d stated

"It is against that background that I consider the question whether the airport company has shown that it has a right to possession of the relevant part of Arthur's Wood which is

of the quality necessary to support the order for possession made in these proceedings and the writ of possession issued consequent upon that order. It is essential to keep in mind that it is not contended by the airport company that it is, or ever has been, in actual possession of the wood (or of any part of it) to the exclusion of the appellants. It has been common ground that the appellants had entered the wood and encamped there before the licence of 22 June 1998 was granted. This is not a case in which the plaintiff can rely on its own prior possession to recover possession of land from which it has been ousted. The airport company must rely on the title (if any) which it derives under the licence.”

At page 681 paragraph b stated

‘It is plain, therefore, that the licence of 22 June 1998, whatever its terms, could not confer on the airport company a right to exclusive possession of the surface of Arthur's Wood. It could not do so because the National Trust had no power to grant such a right. The airport company do not contend otherwise. In those circumstances the question is whether some right enjoyed by the airport company under the licence of 22 June 1998 (being a right less than a right to exclusive possession) can be the basis for an order for possession--that is to say, for an order in rem--made under Ord 113.’

8. Laws LJ in the majority decision in ***Dutton v Manchester Airport*** [1999] *All England Law Reports* 675 interpreted the provision under Order 113 and stated at p 686-687 as follows

In those circumstances, the question which falls for determination is whether the respondents, being licensees who are not de facto in occupation or possession of the

land, may maintain proceedings to evict the trespassers by way of an order for possession. Now, I think it is clear that if the respondents had been in actual occupation under the licence and the trespassers had then entered on the site, the respondents could have obtained an order for possession; at least if they were in effective control of the land. Clause 1 of the licence confers a right to occupy the whole of the area edged red on the plan. The places where the trespassers have gone lie within that area. The respondents' claim for possession would not, were they in occupation, fall in my judgment to be defeated by the circumstance that they enjoy no title or estate in the land, nor any right of exclusive possession as against their licensors (which the National Trust had no power to grant). This, as it seems to me, is in line with the passage in Lord Upjohn's speech in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 at 486, [1965] AC 1175 at 1232 which Chadwick LJ has already cited, and is supported by the judgment of Megarry J in *Hounslow London Borough v Twickenham Garden Developments Ltd* [1970] 3 All ER 326, [1971] Ch 233; and it is clearly consonant with the view of the editors of *Clerk and Lindsell on Torts* (17th edn, 1995) para 17-18. Nor, I think, would such a claim be defeated by the form of possession order required in RSC Ord 113 proceedings (Form 42A) or by the prescribed form of the writ of possession (Form 66A). As Chadwick LJ has said, the writ commands the sheriff 'that you enter upon the said land and cause [the plaintiff] to have possession of it'. If the respondents were in de facto occupation of the site, such an order would [1999] 2 All ER 675 at 687 be perfectly appropriate as against the trespassers, notwithstanding that the order for possession is said to be a remedy in rem.

Further at p 689 after analyzing the historical development of the law relating to the eviction held

In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, **the plaintiff's remedy is strictly limited to what is required to make good his legal right.** The principle applies although the licensee has no right to exclude the licensor himself. **Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own.....'** (emphasis is mine)

9. What the Plaintiff has to establish in an application in terms of the Order 113 of the High Court Rules is that he has a superior claim for possession than the Defendants. If the defendants can prove that they have a right to possession that is equal or superior to the Plaintiff then only they can succeed. After mortgaging the property and defaulting the payments of it and waiting till the conclusion of the mortgagee sale and registration of the same transfer in pursuant to the mortgagee sale the Defendants acquiesced the actions of the mortgagors and mere filing of an action after the transfer was recorded on the certificate of title, cannot be considered as reason to refuse this summons for ejectment filed by the present owners of the property. The fact of filing an action against the mortgagee does not derive a right under the circumstances to remain in the property as previous owners. If such right is recognized that will be contrary to the Torrens System of Land Law applicable in Fiji.

10. The provisions of the Land Transfer Act are conclusive as to the rights derived from a registered title and Section 37 and 38 of the Land Transfer Act states as follows.

“PART V-EFFECT OF REGISTRATION

Instrument not effectual until registered

37. No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.

Registered instrument to be conclusive evidence of title

38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.”

11. In Torrens system the registration is everything. In Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005) His Lordship Gates J (as he then was) held ‘**In Fiji under the Torrens system of land registration, the register is everything:** Subramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections 39, 40, 41, and.....’. So the Plaintiff had obtained the registration and with that he undisputedly obtained the right to possession and since he had this right how he is going to exercise it cannot be restricted, unless specially done so by law.

12. The Supreme Court Practice (White Book) 1999 p 1795 113/8/3 states as follows

In proceedings under this order, the only claim that can be made in the Originating Summons is for the recovery of possession of land; notwithstanding O.15 r. 1 no other cause of action can be joined with such a claim in proceedings under this order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r.1.

Where the existence of a serious dispute is apparent to a plaintiff he should not use this procedure (Filmat Ltd v Avery [1989] E.G.92) In Eyles v Wells [1991] CA Transcript 376, the Court of Appeal following Greater London Council v Jenkins, above, held that the Court had no discretion to prevent the procedure being used in cases that fell within the rule O14, r 7 may assist in **considering the appropriate order for costs where the plaintiff was aware of a serious dispute.**' (emphasis is added)

13. There is no dispute as to the facts and the rights of the parties are not in dispute. The Defendants are unable to show any right to remain in the property and the ownership of the property is not disputed. Only issue was a legal argument whether the previous owner is in a special category as the same as parties specifically excluded in the Order 113 in the parenthesis. I have held this issue in negative and rejected the Defendants contention in more than one ground.

C. CONCLUSION

14. The Defendants contention that they be categorized as same as the words in the parenthesis namely as tenants or licencees of the previous and present owners, since Defendants came to property initially as the legal owners cannot be accepted. I have not been presented with any legal authority that supports such a contention. I do not think such restrictive interpretation is warranted when the words of the provision contained in Order 113 are clear and unambiguous. The Defendants who were ex-owners and ex-mortgagors have lost the right to remain in property after the mortgagee sale and execution of the transfer which is now registered. Their remaining in property is illegal and there is no right to remain in the said property, which is the basis of this originating summons seeking eviction. The refusal to move out from the property knowing that the mortgagee sale was carried out and sale and transfer of the property was executed, does not give any right though they were previous owners. They have mortgaged the property and also waited till the conclusion of the mortgagee sale and also transfer of the property to the Plaintiffs without seeking any relief. If they had any right to remain in the property they could have exercised that right. This stubborn attitude of mortgagors who refuse to move out after allowing the mortgagee sale is counterproductive as any buyers or prospective bidders of such a mortgagee sale are uncertain as to their right to possession and contingencies subsequent to the mortgagee sale and this had prompted the mortgagees to sell such property 'as is where is' basis which invariably be sold to a much discounted value than the market value of the property. This again being utilized by the defaulting mortgagors to challenge the mortgagee sale stating that the value of the property is higher than the mortgagee sale. If not for their own actions the mortgagee sale would have attracted higher bids which would have resulted a win-win situation, for both banks and to mortgagors, since higher price for the property would undoubtedly benefit the mortgagors by higher reduction of the loan outstanding and if there is any excess that would have to be paid to the mortgagors. So, the Defendants do not have any right to the property and should be evicted immediately. Considering the circumstances

of the case I grant immediate possession of the property described in original summons to the Plaintiff. I do not grant any costs.

D. FINAL ORDERS

- a. The Plaintiffs are granted immediate possession of the premises described in the originating summons.
- b. No costs.

Dated at **Suva** this **27th day** of **March, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva