

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 179 OF 2013

BETWEEN : **CHANDRA SEN** and **BABU MANOJ KUMAR** both of
Maqere Tavua, Fiji, Cultivator and Carpenter respectively
as the Administrators of the **ESTATE OF TAM SARUP**
late of Maqere, Tavua, Fiji, Cultivator, Deceased, Testate.

Plaintiff

AND : **PRADEEP SINGH** of Maqere, Tavua, Fiji, Carpenter

Defendant

Appearance:

Mr Prakash R for the Plaintiff

Mr Nandan for the Defendant

Date of Hearing : 08/04/14

Date of Order : 08/04/14

R U L I N G

[1] By an originating summons dated 26 September 2013 (the application) plaintiff sought possession of the land comprised in Certificate of Title Register Vol. 58 Folio 5730 (the property). An affidavit of Chandra Sen is filed in support of the summons. The affidavit annexes documents marked "A"- "C" & "D1" & "D2"). The application is made pursuant to Land Transfer Act, s. 169 (a). The section, so far as material provides:

“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;**

(b) ... ;

(c) ...” (Emphasis added).

[2] Defendant appeared in court and on 6 November 2013 filed affidavit in reply (sic) together with annexure “PS1”.

[3] The plaintiff then filed his affidavit in reply together with annexure “A1”.

[4] The matter was set down for hearing on 13 February 2014. That day hearing was adjourned to 8 April 2014 on the application made on behalf of the defendant with costs in the cause.

[5] When the matter came up for hearing on 8 April 2014, Mr Nandan appearing for the defendant indicated that his client had already left the property as such he is no more on the property.

[6] Mr R Prakash on behalf of the plaintiff confirmed it. Nonetheless, he still insisted an order for possession as there is likelihood that the defendant may come again and make different claim. He further submitted that the house has been destroyed and the material removed, but had no idea as to who did it. He also sought costs of the proceedings in the sum of \$1,500.00, if a reasonable cost not agreed.

[7] The issue has arisen whether the court can still make an order for possession of the property even if the person summoned (defendant) not in possession of it pursuant to section 169 of the Land Transfer Act.

[8] By virtue of section 169 summary proceedings may be taken for the recovery possession of the property. In this case, it is common ground that the defendant is not in possession of the property right now. Can the court still make an order for possession against the defendant, for the plaintiff

fears that he may enter the property and remain in possession and make a different claim?

[9] An action for recovery of land presupposed that the plaintiff was not in possession of the relevant land and that the defendant was in possession without the claimant's permission. An order for possession would be inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover as the plaintiff is already in possession of the property.

[10] In the case of **Secretary of State for the Environment, Food and Rural Affairs v Meier and others** (UKSC) [2010] 1 All ER 855 at 856 it was held:

*“An order for possession against trespassers could not be made in relation to wholly distinct land not occupied or possessed by trespassers and where the claimant enjoyed uninterrupted possession of it. **An action for recovery of land presupposed that the claimant was not in possession of the relevant land and that the defendant was in possession without the claimant's permission. An order such as the wider order in the instant case was inconsistent with the fundamental nature of an action for recovering land because there was nothing to recover.**”* (Emphasis added).

[11] Where a trespass into the plaintiff's property was threatened, and had been committed in the past by the defendant, an injunction to restrain the threatened trespass would be appropriate.

[12] The court's jurisdiction to make an order for possession under section 169 of Land Transfer Act does not extend to a case where the plaintiff is enjoying uninterrupted possession of the property. Therefore, in the circumstance, I have no option but to dismiss the plaintiff's application for an order for possession.

[13] Learned counsel for the plaintiff raised his concern for costs. He submitted that his client had already incurred costs in the sum of \$1,500.00 including disbursements. Mr Nadand on behalf of the defendant contended that \$1,500.00 costs are unreasonable and it is too high. He suggested that any sum between \$500.00 and \$600.00 would be appropriate.

[14] It is true that the defendant had voluntarily moved out of the property before the hearing. As such the matter was not argued. The plaintiff had incurred disbursements for filing this application and for the service. He had also made few appearances through counsel, albeit the matter was not argued. It should be noted that previous hearing date was adjourned on the application of the defendant with costs in the cause. I therefore, taking all into my account, summarily assess the costs at \$800.00. That would be appropriate in the circumstance.

[15] To conclude, I dismiss and struck off the application for summary recovery of possession dated 26 September 2013 with the summarily assessed costs of \$800.00 payable to the plaintiff by the defendant.

[16] Accordingly, I make the following orders:

- (a) The plaintiff's application for summary eviction dated 26 September 2013 is dismissed;
- (b) The defendant must pay the summarily assessed costs of \$800.00 to the plaintiff;
- (c) Orders accordingly.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer
Actg Master of the High Court

At Lautoka

08/04/14