

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 295 of 2015

BETWEEN : **DEVINA DEVI PRASAD**

APPELLANT/DEFENDANT

AND : **DEEP SINGH**

RESPONDENT/PLAINTIFF

Counsel : Mr. Young M. for the Appellant - Defendant (the Defendant)
Ms. Chetty K. for the Respondent -Plaintiff (the Plaintiff)

Date of Hearing : 27 October, 2016

Date of Judgment : 28 October, 2016

JUDGMENT

INTRODUCTION

1. This is an appeal against the decision of the Master made on 5th September, 2016 granting the vacant possession to the Plaintiff-Respondent (the Plaintiff). The Defendant-Appellant (the Defendant) had appealed against the said decision. The Defendant had also sought a stay order which I granted till the final determination of the matter. The Plaintiff and Defendants were previously husband and wife respectively and they are presently divorced and their property had been distributed in pursuant an order of the court in accordance with the Family Law. The ownership of the house remained with the Plaintiff and even after distribution of the property. Apart from the said distribution of the property the Defendant had made an application for maintenance to the Magistrate's Court, where an interim order was made allowing the Defendant to remain possession of the matrimonial home. This order was made on 12th September, 2013 and this had not been varied. This order was annexed to the

affidavit in opposition as DP 8, but the Plaintiff did not respond or reply to the said annexed document. The decision of the Master has not dealt with that order.

ANALYSIS

2. The grounds of appeal are as follows
 1. 'The Master erred in law and in fact and or misdirected himself in law and in fact in dismissing and misdirected himself in law and in fact in failing to recognize that there was an existing order of the Magistrate's Court in Nasinu, Family jurisdiction, that the Appellant be maintained in the property until further orders of the Family Magistrate's Court;
 2. The Master erred in law and in fact and or misdirected himself in law in failing to make a ruling on that order.'
3. The Plaintiff is the registered proprietor of the premises more fully described in the originating summons filed by the Plaintiff in terms of the Section 169 of the Land Transfer Act (LTA)(Cap 131).
4. Section 172 of the LTA (Cap 131) states :

"If the person summoned appears he may show cause why he refuses to give 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 against the proprietor, mortgagee or lesser or he may make any order and impose any terms he 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 summoned to which he may be otherwise entitled." (emphasis is added)
5. In this case there is an interim order that was made on 12th September,2012 by the learned Resident Magistrate in following terms;

'Respondent/man's employer to release Respondent's pay slip for the purpose of the proceedings;

Applicant /lady to remain in the Matrimonial home until further orders of the Court' (emphasis added)
6. There is no evidence of this order being varied or rescinded by the Magistrate's Court or being appealed to the High Court where it was varied or quashed. So that order, of the Magistrate granted the Defendant to remain in possession of the subject matter, 'until further order of the court'.

7. The right recognized in the Section 172 of Land Transfer Act (Cap 131) can be an order of a court as in this case.
8. So the Defendant had in terms of the Section 172 of the Land Transfer Act (Cap 131) shown a cause to remain in possession, and it is an existing interim order of the learned Magistrate in an application for maintenance.
9. The property distribution between the parties had no impact on the said interim order. By looking at the said order made on 12th September, 2012 one could see that it was an interim order and it could be varied by the same court. There was no application for such variation. Without rescinding that order, provisions contained in the Section 169 cannot be used to vary an interim order made by Learned Magistrate.
10. The argument that Master's order is a variation of that order of the Learned Magistrate, cannot hold water as jurisdiction of the Master is contained in the Order 59 of the High Court Rules of 1988 and there is no provision to vary an order of a Magistrate conferred to the Master. In contrary, the jurisdiction even to deal a chamber matter in respect of 'Proceeding under Family Law Act 2003' (see O.59 r.2(iv) or any matter 'from Magistrates' Courts or any other tribunal'(see O.59 r.2(v) are expressly excluded from the Master's jurisdiction.

CONCLUSION

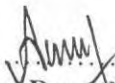
11. The Defendant had shown that she had obtained a right to remain in the premises in pursuant to interim order of the Magistrate's court. Until that order is varied or rescinded. She obtains a right to remain in possession of the premises in issue. There is no dispute that premises covered in the decision of the Master and learned Magistrate are the same. The Appeal is allowed the decision of the learned Master delivered on 5th September, 2016 granting possession to Plaintiff is quashed. The Defendant is represented by Legal Aid, but considering the circumstances of the case the Plaintiff is ordered to pay a cost of \$200 as the cost for this Appeal as well as costs for the application before Master.

FINAL ORDERS

- a. The decision of the Master dated 5th September, 2016 is quashed.
- b. The Plaintiff to pay a cost of \$200.

Dated at Suva this 28th day of October, 2016




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Justice Deepthi Amaratunga
High Court, Suva