

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 21 of 2023

IN THE MATTER of Mortgage, No: 836707 over iTaukei Lease No.32804 given by **HASMAT ALI** in favour of the **FIJI DEVELOPMENT BANK.**

BETWEEN:

FIJI DEVELOPMENT BANK a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva in Fiji.

PLAINTIFF

AND:

SAMSERUN NISHA TOGETHER WITH HER AGENTS AND/OR SERVANTS of Saweni, Lautoka

DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Mr. N. Lajendra for the Plaintiff
Ms. V. Cava for the Defendant

Date of Judgment : 05.03.2024

JUDGMENT

01. The plaintiff Bank (**the plaintiff**), as a Mortgagee, took out the originating summons pursuant to Order 88 rule 1 (1) (d) of the High Court Rules against the defendant. The summons is supported by an affidavit sworn by Ramesh Sewak Chand - the Manager, Assets Management Department of the plaintiff. The summons seeks the following orders:

1. **DELIVERY** by the defendant together with her agents and or servants to the plaintiff of vacant possession of **ALL THAT** property comprised and described in:

iTAUKEI LEASE NO. 32804 being Veibona Subdivision Lot 1 on SO 5720 situated in the Tikina of Vuda and Province of Ba, having an area size of 4431 square meters.

2. AN injunction restraining the Defendant together with her agents and/or servants from interfering with the improvements on the said property in any way so as to deplete its value.
 3. COST of this action; and
 4. SUCH further and/or other orders the Honorable Court may deem just and appropriate in the circumstances.
02. The defendant filed affidavit in opposition which was replied by the plaintiff. The defendant thereafter filed a supplementary affidavit with the leave of the court. The plaintiff decided not to file an affidavit in reply to supplementary affidavit.
03. The Order 88 of the High Court Rules provides for the procedure for the mortgage actions. It applies to any action by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the reliefs mentioned in sub rule 1 (1). If the plaintiff is the mortgagee and claims delivery of possession, in an originating summons, the supporting affidavit must comply with certain requirements mentioned in rule 3 of the Order 88, which reads that:
- (2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.
 - (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of-
 - (a) the amount of the advance;
 - (b) the amount of the periodic payments required to be made;
 - (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and
 - (d) the amount remaining due under that mortgage.
 - (4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property.
04. The certified true copy of the Mortgage is annexed with the supporting affidavit. It is marked as Exhibit "D". In addition the counsel for the plaintiff tendered the original

copy of the Mortgage at hearing as required by the rules. It is evident from the supporting affidavit that, late Hasmat Ali was the registered proprietor of all that property comprised and described in iTaukei Lease No. 32804 being Veibona Subdivision Lot 1 on SO 5720 situated in the Tikina of Vuda and Province of Ba, having an area of 4431 square meters (subject property). Late Hasmat Ali obtained loan from the plaintiff under three different accounts, namely; (a) Loan Account No. 16975, (b) Loan Account No. 151700, and (c) Loan Account No. 151411. He mortgaged the subject property as a security for the loan obtained under all three loan accounts. The Mortgage was for total of \$ 594,025.00 lent to late Hasmat Ali for the term of 12 years on an agreed interest rate of 12% per annum. He defaulted in repayment and then passed away. The loan remained unsettled.

05. The plaintiff bank sent arrears notices and demand letters to the Estate of late Hasmat Ali. However, the loan was not settled. The plaintiff bank then advertised the subject property for Mortgagee's Sale. The bank entered into a Sale and Purchase Agreement with the successful tenderer.
06. The defendant is the wife of late Hasmat Ali. She filed two affidavits in opposition of the summons for vacant possession. In the first affidavit she stated (paragraph 5) that, she did not have knowledge about the loan facility and the mortgage by her late husband Ali. Finally at paragraph 14 of the same affidavit she moved the court to allow her to operate the business and pay the loan or to be given time to vacate the subject property.
07. The defendant, in her supplementary affidavit averred contradicting her own affidavit initially filed in opposition of the summons. However, there is no dispute as to the arrears of loan obtained by her late husband. The defendant merely seeks further time to do business and settle the loan.
08. It has been a long-established right in common law that, a mortgagee has proprietary right as the owner of the legal estate to go into the possession of the mortgaged property, at any time after the mortgage is executed unless such right is limited either by a contract or a statute. There is number of cases which established this right. In **Fourmaids, Ltd. v. Dudley Marshal (Properties), Ltd** (1957) 2 All ER 35 Harman, J held at page 36 that:

The right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right. He has the right because he has a legal term of years in the property. If there is an attornment clause, he must give notice. If there is a provision expressed or to be implied that, so long as certain payments are

made he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.

09. Goff L.J. in **Western Bank Ltd. v. Schindler** (1977) 1 Ch. 1 cited the wording of Harman J in the above matter, and said of a mortgagee's right to possession of the mortgaged property at p.20 as follows:

"It has for a very long time been established law that a mortgagee has a proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property. This right has been unequivocally recognised in a number of modern cases: see, for example, *Four Maids Ltd. v. Dudley Marshall (Properties Ltd.)* (1957) Ch. 317. ... It has nothing to do with default: See per Harman J. in the *Four-Maids* case

10. This common law right has now been incorporated into the statutes in many jurisdictions and also has become a standard clause in the Mortgage Bond signed by the mortgagors and mortgagees. Accordingly, the statutes and the Mortgage Bonds now permit the mortgagees to enter into possession of mortgaged property upon failure of the mortgagor to repay the money so secured by mortgage.

11. The section 75 of the Property Law Act No. 18 of 1971 [Cap130] gives the power to the mortgagee to enter into possession of the mortgaged property upon default in payment of the mortgage money or any part thereof. The said section reads:

Mortgagee may, after default, enter into possession

75. A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may distrain upon the occupier or tenant of the said land for the rent then due.

12. The clause 6.2 of the Mortgage (**Exhibit D**) provides for various consequences of default. Among those sub-clauses, (a), (b) and (f) are important for determination of this summons. Those sub-clauses are:

5.2 Consequences of default

If any event of default occurs, I am in default under each agreement with FDB and FDB may:

(a) require that I immediately pay the secured money; and

(b) take or give up possession (as often as FDB may think necessary) of property and of any rents and profits of the property; and

(c)

(d)

(e)

(f) exercise all other rights, powers and remedies that a mortgagee or owner has at law in relation to the property.

13. The plaintiff and late Hasmat Ali by their covenants in Clause 6.2 conferred on the plaintiff the power to demand for immediate payment of money; and to take possession of the mortgaged property and to exercise all rights, powers and remedies that a mortgagee has at law. The court should enforce these positive covenants made on voluntary agreement between the parties. In addition, the plaintiff and late Hasmat Ali agreed in Clause 13.3 that, the plaintiff has all the rights, powers and remedies available to the plaintiff as mortgagee under the Property Law Act Cap 130, and the Mortgage to prevail in case of inconsistency between Mortgage and covenants and powers and conditions implied into Mortgages under Property Law Act.
14. The plaintiff as the mortgagee in this matter, has the contractual power under Clause 5.2 of the Mortgage to take possession of the subject property; the statutory powers under section 75 of the Property Law Act Cap 13; and on top them, has the long-established proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property.
15. In **Australia and New Zealand Banking Group Limited v. Amit Kumar and Another** [2003] FLR 1, Singh J said at page 3 that:

Hence the mortgagee in the present case has its contractual powers under the mortgage to take proceedings for ejection, the statutory powers under the Property Law Act and its powers under common law to enter into possession. These powers have not been negated by the mortgage. The mortgagee therefore entitled to the possession.

16. It is a well-established rule that, if the debt has not been actually paid, the Court will not, at any rate, interfere to deprive the mortgagee of the benefit of his security, unless an equivalent safeguard is provided to him, by bringing in an amount sufficient to meet what is claimed by the mortgagee to be due [see: **Inglis v Commonwealth Trading Bank of Australia** [1972] HCA 74; (1972) 126 CLR 161 (28 April 1972)]. W D Calanchini J (as he then was) held in **Housing Authority v Delana** [2010] FJHC 277; HBC283.2006 (30 April 2010) that:

This Court has long held the view that failing payment into Court of the amount sworn by the Mortgagee as due and owing under the Mortgage, no restraint should be placed on the exercise of the Mortgagee's powers of sale under the mortgage (see **Westpac Banking Corporation Ltd –v- Adi Mahesh Prasad (1999) 45 FLR 1**; **NBF Asset Management Bank –v- Kolinio Bulivakanua and Selina Mau Bulibakarua** Civil Action No. 97 of 1999 unreported decision of Byrne J (as he then was) delivered on 30 November 1999; **NBF Asset Management Bank –v- Donald Thomas Pickering and Eileen Pickering** Civil Action No. 170 of 1999 unreported

decision of Byrne J (as he then was) delivered on 19 May 2000 and *NBF Asset Management Bank –v- Naipote Vere and Another* Civil Action No. 323 of 2001 delivered 10 November 2003 unreported per Scott J). (Emphasis is original).

17. The loan secured by the Mortgage in this case, admittedly, remains unsettled. The Estate failed to comply with the default notices sent by the plaintiff. As such, this court cannot interfere to deprive the plaintiff of the benefits of its security. The plaintiff also moved the court for an order preventing the defendant from removing any improvement to the subject property in a way so as to deplete the value of the property. Buckley LJ in *Western Bank Limited v. Schindler* [1976] 2 All ER 393 said at page 396 that:

A legal mortgagee's right to possession is a common law right which is an incident of his estate in the land. It should not, in my opinion, be lightly treated as abrogated or restricted. Although it is perhaps most commonly exercised as a preliminary step to an exercise of the mortgagee's power of sale, so that the sale may be made with vacant possession, this is not its only value to the mortgagee. The mortgagee may wish to protect his security: see *Ex parte Wickens*⁴. If, for instance, the mortgagor were to vacate the property, the mortgagee might wish to take possession to protect the place from vandalism. He might wish to take possession for the purpose of carrying out repairs or to prevent waste. Where the contractual date for repayment is so unusually long delayed as it was in this case, a power of this nature to protect his security might well be regarded as of particular value to the mortgagee.

18. The above dictum of Buckley LJ clearly recognizes the right of the mortgagee to protect the security and prevent it from being vandalized and or wasted. The underlying rationale is to maintain the value of the mortgaged property in order to recover all the amount due under the mortgage. The Halsbury's Laws of England (4th Edition) Volume 32 states in paragraph 559 that, the power of the mortgagor while in the possession to exercise all the rights of ownership is subject to limitation that, he may not diminish the security so as to render it insufficient. Waste by a mortgagor in possession for example by felling timber or pulling down a house will be restrained by injunction on proof that, the security is being deficient, or after order for foreclosure without such proof. Accordingly, the plaintiff is entitled for an order by this court restraining the defendant and or her family members and or agents and or servants and employees from removing any improvement to the subject property in a way so as to deplete its value.
19. In result, I make the following orders:
 - a. the defendant and or her agent and or servant and or all her family members are to deliver the vacant possession of the subject property to the plaintiff immediately,

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- b. the defendant and or her agent and or servant and or all her family members are restrained from removing the improvement of the subject property in a way so as to deplete its value,
 - c. the police assistance is granted for execution of writ and for peaceful handing over of possession of the subject property to the plaintiff, and
 - d. the defendant should pay a summarily assessed cost in sum of \$ 2,000 to the plaintiff within a month from today.

At Lautoka
05.03.2024



Mohamed Azhar
U.L.Mohamed Azhar
Master of the High Court