

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA FIJI

CIVIL CASE NO.: HBC 158 of 2013

[On an appeal from a Judgment given by the Learned Master of the High Court of Fiji at Lautoka on the 10th of April 2014 in the District Registry HBC No.: 158 of 2013]

BETWEEN : **BHAGYA WATI** of Vunisamaloa in the District of Ba, in the Republic of Fiji presently residing at Eagle Vale, New South Wales, Australia.

APPELLANT

AND : **KOKILA DEVI** of Vunisamaloa, in the District of Ba, in the Republic of Fiji, Domestic Duties

RESPONDENT

Appearances: Mr Padarath with Mr A. Dayal for Appellant
Ms. Karan N for Respondent

J U D G M E N T

1. This is an appeal from the Masters' Decision dated 10th April, 2014 with regard to an application for eviction under Section 169 of the Land Transfer Act which was struck out and dismissed with costs summarily assessed for \$400.00.
2. The Notice of Appeal filed by the Appellant sets out the following grounds of Appeal.
 1. The learned Master of the High Court erred in law in holding that the Defendant had shown an arguable case under Section 172 of the Lands Transfer Act to remain in possession of the land after having found that the agreement upon which the Respondent relied on was illegal.

2. The learned Master erred in law in fact in finding that the benefit of the Appellant under the agreement was to claim possession of land from the Respondent when:
 - 2.1 If the agreement were legal, the benefit to the Appellant would be payment of the consideration for the sale and purchase of the land;
 - 2.2 The benefit to the Respondent would have been the right to remain in possession of the land;
 - 2.3 The ruling of the learned Master effectively allowed the Respondent to remain in possession and therefore obtain a benefit from the illegal agreement.
 3. The learned Master erred in law in holding that the principle of *pari delicto* applied to a contract, which was illegal.
 4. The learned Master of the High Court erred in making the order for costs in the sum of \$400.00.
 5. The Appellant may add further grounds of appeal upon receipt of the record.
- 3.
- At the hearing of this matter both Counsels made oral submissions and tendered their written submissions as well.

Determination

4. I find that the grounds of Appeal can be summarised into one issue and that is whether the illegal agreement would give a right of possession to the Respondent over and above the registered proprietor, the Appellant in this matter.
5. The Appellant (Original Plaintiff), Bhagya Wati by way of Originating Summons filed on 6th September, 2013 sought the Defendant to show cause why she should not give up vacant possession to the Appellant of the premises situated on the land contained in Crown Lease No. 7451, Land known as Lot 2 on Plan BA 2338 and Lot 8 on Plan BA 2339 part of Vunisamola, Rarawai and Vunivesi formerly CT 7822 and CT X1/05/19 (Farm 1568) in the Tikina of Ba, in the province of Ba containing an area of 12 acres, 2 roads and 18 perches. The application was supported by the Affidavit of the Appellant.

6. The Appellant's case in brief was that the Respondent is occupying part of her property without her authority and consent and no sub lease had been created over the property to give Title to the Respondent nor does she have the requisite consent from the Lands Department. The Respondent relied upon an agreement to justify her possession of the property for 14 years she also contended that later the property was sold to her and Copy of the transfer was lodged for consent of the Director of Lands.
7. The Master has relied on the Decision of *Morris Hedstrom Limited v Liaquat Ali (Civil Appeal No. 153 of 1987, Supreme Court of Fiji)* and held that the Defendant is required to prove his or her right to possession by adducing "some tangible evidence establishing a right or supporting an arguable case for such a right". On the basis of the said Decision he has held that final or incontrovertible proof of a right to remain in possession need not be adduced by the Defendant under Section 172 of the Land Transfer Act.
8. The Master then says that the purported agreement would be illegal because it has been executed without the consent of the Director of Lands as required under Section 13 of the Crown Lands Act. He states further that in any event the purported agreement which is intended to deal with the protected lease would be unlawful by operation of Section 13 of the Crown Lands Act Cap 132.
9. As mentioned above the Master makes a finding of fact that there is a Sale and Purchase Agreement between the Plaintiff and the Defendant dated 8th February, 2002. He has held that the said agreement is illegal due to the lack of consent of the Director of Lands.
10. The Master then poses a question whether the Plaintiff is entitled now to rely on and claim benefits from that illegality. In answer to the said question he states that he is of the view that both parties were *pari delicto* (equal fault) at the time of making the agreement and therefore that Plaintiff cannot be permitted to rely on the illegality of the agreement. On the same basis the Master has held that an arguable case for right of possession had been established.
11. In other words the Master has held that the illegal agreement give a right of possession to the Respondent over and above that of the registered proprietor.
12. I find that it is not the Appellant who had relied on the illegal agreement but rather the Respondent who is relying on it to show cause that she has a right to possession. What the Plaintiff has relied on is the Crown Lease No. 7451 to prove that she is the Registered

Proprietor of the property. Furthermore, the onus of proof is on the Respondent to show cause and not the Appellant who is the Registered Proprietor of the property.

13. I will now discuss the principles laid in the authorities relied upon by the Counsel for the Appellant. In *Singh v Singh & Another [1980FJSC 9; [1980] 26 FLR 77 (31 July 1980)* at p84 Madhoji. J said;

“The rule is that the Plaintiff’s entering into possession and the subsequent agreement to subject were unlawful dealing in land comprised in a protected Crown Lease and null and void. The rule is that “ex turpi causa non oritur actio”. The claim of the Plaintiff and the Defence and Counter claim are based on and arise from an unlawful transaction and agreement and both Plaintiff and Defendants are in this case in pari delicto. It follows that neither party has any right of action therefrom. The Plaintiff however is in unlawful possession of the land and he cannot justify remaining in possession.”

In the Privy Council case of Mistry Amar Singh v Kulubya 1963 3 All ER page 499 it was held that a registered owner of land was entitled to recover possession because his right to possession did not depend on the illegal agreements in that case but rested on his registered ownership and as the person in possession could not rely on the agreement because of their illegality he could not justify his remaining in possession.”

14. In *Hamid Khan & Rahmat Khan v Simon Prasad [High Court 1996 (Pathik J) 23rd December]* it was held;

“(i) that the Fair Rents Act could not avail the Tenant first because the property had never been valued for the purposes of the Act, and secondly because the Act could afford no protection when Tenancy was itself void and;

(ii) the fact that the Tenancy was void for want of consent to its creation by the Director of Lands was no bar to the registered owner taking summary proceedings for possession.”

15. Similar view was expressed by *Kermode J in Ram Kali v Saten (Action No. 93/77)*. Kermode J said;

“It is not necessary to determine whether there was an alleged Sale as the Defendant contends or a Tenancy as the Plaintiff alleges. Either transaction was illegal without

the consent of the Director of Lands.....while the Plaintiff did disclose the illegal Tenancy, her claim for possession is based on the independent and untainted grounds of her registered ownership and she does not have to have recourse to the illegal Tenancy to establish her case.”

16. On the basis of the above authorities I find that the Appellant in this matter need not rely on the illegal agreement to seek vacant possession of the property under Section 169 of the Land Transfer Act. Though both parties are at fault or in pari delicto the Appellant as the Registered Proprietor is entitled to an Order for vacant possession.
17. For the reasons set out above I hold that the Learned Master erred in law in holding that the Defendant had shown an arguable case under Section 172 of the Lands Transfer Act to remain in possession of the Land after having found that the agreement upon which the Defendant relied on was illegal.
18. However, when the appeal was argued before me the Learned Counsel for the Respondent raised a preliminary issue in regard to the Lease and stated that it has expired while this Appeal was pending. He contended that due to the expiry of the lease the Appellant is no longer the proprietor of the Land and as such she cannot go ahead with a Section 169 application.
19. The Learned Counsel for the Appellant in reply to the said submission drew the attention of Court to Clause 20(f) of the lease and stated that the Appellant has a right to get the lease renewed and therefore she has a right to go ahead with the Section 169 application.
20. Clause 20(f) of the Lease states;

“If the Lessee applies for a renewal of the lease provisions of Clause 20 shall be deemed to be suspended as from the date of the application by the Lessee for a renewal of the lease until the date of refusal or approval of such application.”

It is clear from the said clause that the discretion of renewing a lease is solely vested with the Director of Lands.

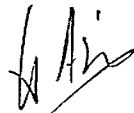
21. Due to the reason set out above I cannot enter Judgment in favour of the Appellant and grant possession of the property to her by this Judgment as she is no longer the registered proprietor of the property. The Appellant is at liberty to make a fresh application for possession if the

lease is renewed in her name. This Judgment should have no effect on the Director of Lands discretion to renew or refuse to renew the lease.

22. **Final Orders**

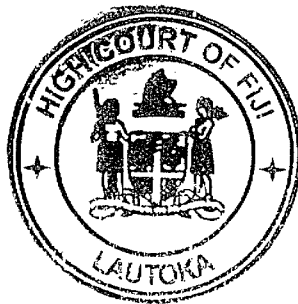
(a) Appeal is Dismissed.

(b) No costs.



Lal S. Abeygunaratne

[Judge]



At Lautoka

15th May 2015