

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 289 of 2017

BETWEEN : **LILA WATI aka LILA WATI SHARMA** **PLAINTIFF**

AND : **HIRDEI WATI SHARMA and RAJIV SHARMA** **DEFENDANTS**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms S Saumatua on instructions [Varna Law]

DEFENDANT : Ms Lata [Shelvin Singh Lawyers]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 27 June 2019

JUDGMENT

[Section 169 application for vacant possession]

Application

1. This is an application seeking orders for Defendant and/or any other occupants forthwith deliver to the Plaintiff vacant possession of all that piece or parcel of land comprised in Certificate of Title No. 17153 being Lot 60 on Deposited Plan No. 4257 containing an area of one rod two perches and nine tenths of a perch and situated at Qarase Road, Nadera, Nasinu together with all improvements and fixtures thereon.

Evidence in Support

2. The Affidavit in Support is deposed by a Chandra Kant Sharma who is the son of Lila Wati (the Plaintiff). He is said to be a power of attorney holder for his mother.

Lila Wati is the registered proprietor of certificate of title no. 17153 being Lot 60 Qarase Road, Nadera, Nasinu.

The property is said to be occupied by Hirdei Wati and Rajiv Sharma.

Hirdei is Chandra's sister in law (wife of his brother Chandra Shekar Sharma who died on 10 June 2014).

The property in question was purchased by Chandra's father Vijendra Sharma who is passed away in March 1977. His father died intestate.

On 27 January 1993, Letter of Administration for the administration of his father's estate was granted to Lila Wati.

In order to accommodate the grant and to ensure that Lila Wati was looked after, all siblings as natural issue of Vijendra and Lila Wati executed deed of renunciation as follows:

NAME	RELATIONSHIP	DATE OF DEED RENUNCIATION EXECUTED
Manjula Narayan Mishra	Daughter	17 December 1992
Chandra Kant Sharma (the Deponent)	Son	08 December 1992
Chandra Shekar Sharma	Son	24 November 1992
Chandra Prakash Sharma	Son	11 December 1992
Chandra Diwakar Sharma	Son	12 December 1992
Angela Prithi	Daughter	24 November 1992
Sunita Devi Khan	Daughter	12 December 1992

These Deeds of Renunciation were filed in the High Court.

Subsequent to the grant of Letter of Administration Lila Wati retained possession and ownership of the property as it was her intention to keep the property as a family home where she would stay whenever she returned to Fiji.

With the consent of the family, Lila Wati permitted Shekar and his family to live on the property.

Shekar died on 10 June 2014 and his wife Hirdei and son Ranjiv continued to stay on the property with the consent of Lila Wati and the rest of the family.

In 2015 Lila Wati formed intention to sell the property. In September 2015 she instructed her solicitors to effect the transfer of the property from her name as administratrix of estate of Vijendra into her name as sole beneficiary of the Estate and beneficiary under the Deeds of Renunciation.

This was done to put beyond Lila's ownership of the property and her sole entitlement to any proceeds from the anticipated sale of the property.

On 14 December 2015 the relevant transfer was registered by the Registrar of Titles.

On 26 May 2017 a notice was served on the Defendants to vacate the property.

According to the Plaintiff, the Defendant has no right to remain on the property as there was no agreement to occupy the property.

Despite the notice to vacate, the Defendants have failed and/or refused to vacate and are still occupying the property.

Hence the Plaintiff seeks order for Defendants and any other occupants of the property forthwith deliver up possession and vacate the said property and for an injunction restraining Defendant from interfering with the improvements and/or fixtures on the property in any way together.

Evidence Opposing the Application

3. The Defendants alleges that the registration of the Transfer in the name of the Plaintiff was obtained by fraud on part of the Plaintiff and Chandra Kant Sharma.

Along with owing CT No. 17153 being Lot 60 on DP No. 4257 the deceased Vijendra Sharma also owned Lot 61 on CT No. 17168 where the Plaintiff and Vijendra resided before they all migrated to Australia over 40 years ago.

She and her husband occupied lot 60 on CT 17153 and erected and maintained the dwelling on it. They moved on the property prior to the death of Vijendra Sharma.

According to the Defendants, Vijendra assured them they will own Lot 60 after Vijendra's death and the property should always stay in the family. They were also told that the property was not to be sold or transferred to a third party.

After Vijendra's death, the Plaintiff on 8 March 1992 approached Shekar and told him words to following effect:

- i. Father in now deceased;*
- ii. We need to sell Lot 61;*
- iii. You need to sign a paper before a lawyer to say yes to the sale;*
- iv. Lot 60 will be yours.*

Acting on reliance of the promises, Shekar and Hirdei attended before a lawyer on 24 November 1997 and a paper was given to her husband to sign.

Her husband was not explained what the paper was for and was simply told (whom Hirdei understood to be a clerk) that it must be signed.

According to Hirdei, her husband signed the paper on clear understanding that he will be the owner of the property of Lot 60 as promised by Vijendra Sharma and the Plaintiff and the paper would not affect his rights.

She is surprised to see the Deed of Renunciation. It was never the intention of her husband and her to give up the rights in the property to his mother.

Hirdei alleges that after Vijendra's death and up to her husband's death, the Plaintiff and Chandra Sharma never brought up the issue of the renunciation as the signatures were obtained by fraud.

During her husband's lifetime, her husband had requested the Plaintiff to transfer the said property to her husband and the Plaintiff had agreed but they were not able to engage a lawyer to have the transfer done,

The Plaintiff has forgotten her promises and has deceitfully transferred the property in her name so that the Defendants can be removed from the property.

Hirdei's husband was unemployed and they both worked hard to build a simple dwelling on the property and maintain it.

Estate of Chandra Shekar Sharma never renounced its rights on the property and Hirdei and her husband claim to have invested life's savings on the property. They resided on the property and invested on it on clear representation of the original owner Vijendra Sharma that the property will be Hirdei's husband after Vijendra passes away.

Hirdei has instructed her lawyers to file a separate action to challenge the fraudulent transfer in the name of the Plaintiff which will be filed in due course.

Letter of Administration has been issued for the estate of Chandra Shekar Sharma.

Response by the Plaintiff

4. According to Chandra Kant Sharma the transfer on 14 December 2016 was made from last memorial of 25 February 1993 pursuant to transmission by death to Lila Wati.

The First Defendant had prior to the transfer on 9 December 2015 lodged a caveat on the said property. The said caveat was not accepted by the Registrar of Titles.

A year after this the transfer was registered as the Plaintiff had to complete administration process.

Vijendra Sharma had never met or communicated with the First Defendant as he had migrated and was living in Australia prior to First Defendant occupying the property.

Vijendra's relationship with Shekar was not good hence there is no sense why Vijendra would agree to transfer the property to Shekar and the First Defendant.

Lot 61 was jointly purchased by Vijendra and the Plaintiff in July 1993. The Plaintiff distributed part of the proceeds of sale (\$3, 000) to all children alive at the given time.

The houses on both lots were built by Vijendra, Lot 60 first and later Lot 61. At this time the First Defendant had not occupied the property with Shekar.

During Vijendra's lifetime both houses were maintained and associated expenses funded by him.

The Plaintiff subsequently extended the house through Modern Home Builders and property furnished at the expense of the Plaintiff when First Defendant occupied it.

The Plaintiff would give money to Shekar to pay various expenses – council rate etc.

After the demise of Shekar, the Defendants paid rates for 2015 and 2016; the Plaintiff for 2017 and Chandra for 2018 which was reimbursed by the Plaintiff.

Prior to his death, Shekar paid rates from monies given by the Plaintiff.

The property was provided to Shekar to occupy only without any promises or guarantee for transfer to him.

As assistance he was allowed to occupy the property.

The First Defendant first occupied the property on or about 1992 a week after Vijendra Prasad passed away. Hence First Defendant cannot make assertion that Vijendra made assurances of ownership.

Due to cultural views the Plaintiff did not approve of the First Defendant and hence there is no sense for her to allow the First Defendant to own the property.

At the time the Deed of Renunciation was signed the First Defendant was not married to Shekar but was in a de-facto relationship.

It is now 25 years since probate was granted and transmission by death registered.

He cannot speculate why his brother did not inform the First Defendant of the deed of renunciation.

He was not in Fiji when the signature on the deed or renunciation was obtained. Hence it cannot be obtained fraudulently by him.

He has personally assisted his late brother and the First Defendant since 2010 for approximately 3 years.

Once he gave his brother around \$700 for boat engine repair and subsequently transferred \$10,000 to buy a new engine.

He also incurred \$1,000 for his funeral expenses. When his brother was alive he gave money to cover expense and their needs.

Law

5. Section 169 of the Land Transfer Act reads:

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) *a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
- (c) *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

6. Under Section 170 "*the summon shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than 16 days after the service of the summon*".
7. Pursuant to Section 172 if "*the person summoned appears, he or she may show cause why he or she refuses to give possession of such land and if he or she proves to the satisfaction of the Judge a right to the possession of such land, the Judge shall dismiss the summons with cost*".

Section 172 also empowers court to make any other order and impose any terms he or she 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 or she may be entitled to.

The Judge is also allowed to dismiss the summon if lessee before the hearing pays or tenders all rental due and all costs incurred.

Registered Proprietor and Description of the Property

8. As far the certificate of title is concerned the Plaintiff is registered as the last proprietor of the property with effect from 14 December 2016.

The summons does describe the property in respect of which orders are sought.

Have the Defendants shown cause why there should not be an order made in favour of the Plaintiff? Do they acquire an interest in the property by estopped?

9. In *Inwards v. Baker* (1965)2 QB 29 Lord Denning MR had stated the following regarding proprietary estopped:

"This latter [Plimmer v. Wellington Corp (1884) 9 App Cas 699] was a decision of the Privy Council which expressly affirmed and approved the statement of law made by Lord Kingsdown in Ramsden v Dyson (1866) LR 1 HL 129 at 170. It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raise an equity in the license such as to entitle him to stay. But it seems to me from Plimmer's case in particular, that the equity arising from the expenditure on land need not fail "merely on the ground that the interest to be secured has not been expressly indicated"the court must look at the circumstances in each case to decide in what way the equity can be satisfied".

10. The Defendants claim they are living on the family property with the leave and permission of the Plaintiff.

There was never proceeding brought to evict the First Defendant whilst her husband was alive.

11. According to the Defendant, her father-in-law Vijendra Sharma had prior to his death asked her and her late husband to move onto Lot 60 and build a residence on it.

They were assured that they will own Lot 60 after the father-in-law's death. The property was not to be sold to a third party and that the First Defendant and her husband maintain the property and pay utility bills and rates.

The Plaintiff is said to have approached Defendant's husband after Vijendra died stating:

- i. *Father is now deceased;*
- ii. *We need to sell Lot 61;*
- iii. *You need to sign paper to say yes to the sale;*
- iv. *Lot 60 will be yours.*

The Deed of Renunciation of 24 November 1992 was obtained by fraud as her husband was not explained what the paper was about. Her husband signed the paper on understanding that Lot 60 will be his.

Both the First Defendant and her husband is said to have built a dwelling on the property and maintained it for all the years.

12. The First Defendant as administrator of the estate of Chandra Shekar Sharma (her late husband) has caused a writ to be issued against the Plaintiff.

The claim is for cancellation of transfer dealing no. 836835 on CT 17153 as the deed of renunciation by Chandra Shekar Sharma lacks consideration; is vague about who the gift was being made to; was not stamped properly; was in breach of the Lands Sales Act forbidding transfer of land in town or city-boundary in favour of a non-resident.

13. In the present case I am satisfied that the matter cannot be determined on affidavit evidence. There are allegation and assertions made by parties which should be heard under oath orally. Hence I am refusing to make any orders under Section 169 of the Land Transfer Act.

The application fails and is dismissed. The dismissal of the summons shall not prejudice the right of the Plaintiff to take any other proceedings against the Defendants to which she is entitled to,

Plaintiff is ordered to pay cost summarily assessed at \$1,000. Said cost is to be paid in 14 days.



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Vandhana Lal [Ms]
Acting Master
At Suva.