

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

**HBC No. 110 of 1969**

**BETWEEN** : **ARYANDRA SHEKHAR GAJI aka ARYENDRA**  
**SHEKHAR GAJI aka ARYENDRA SHEKHAR**  
**PLAINTIFF**

**AND** : **PRAKASH CHANDRA AND NAVIN CHANDRA**  
**DEFENDANTS**

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : Ms P. Narayan and Mr V. Prasad for the Plaintiff  
: Ms S. Narayan for the Defendants

**DATE OF HEARING** : 25, 26 and 27 March 2014

**DATE OF JUDGMENT** : 26 March, 2015

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**JUDGMENT**

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## 1.0 Introduction

- 1.1 Before I commence my Judgment, I would like to express this Court's concern about this matter being left in total darkness for some forty years which saw the demise of original litigants and one of the Executors and Trustees of the original Defendant.

The reason for this matter going into "**coma**" for such a long period is anyone's guess as the original file went missing.

The file for this matter was reconstructed in 2011 by Plaintiff's current Solicitors providing copies of all the pleadings filed.

- 1.2 This matter was finally heard on 25 to 27 March 2014 and on 27 March 2014 when parties were directed to file Submissions by 26 May 2014 and this matter was adjourned for Judgment on Notice.
- 1.3 Plaintiff and Defendant filed their Submissions on 15 and 26 May 2014 respectively.
- 1.4 On 6 June 1969, Narendra Gaji filed this proceeding against his elder brother Jagannath seeking following remedies:-

*"(i) Declaration that Defendant hold two acres of land subject to land known as Lot 2 on Deposited Plan No. 777 comprised and described in Certificate of Title No. 6073 containing twenty acres (now known as "the land");*

*(ii) Alternatively, for a declaration that the Defendant is not entitled to eject the Plaintiff from the said land without paying him for the improvements effected on the said land and for the monies spent by the Plaintiff in respect of the said land;*

*(iii) An order that the caveat lodged on the said title namely caveat number 106903 be extended indefinitely;*

*(iv) Such further or other relief in the premises as to this Honourable Court shall seem meet."*

- 1.5 On or about 17 March 1971, Defendant filed his Statement of Defense and Counterclaim.
- 1.6 On or about 23 March 1972, Plaintiff filed Summons to Enter Judgment which Summons was dealt on 1 August 1972 as Summons for Direction and this action was entered for trial.
- 1.7 Defendant died on 12 April 1973 and on 3 June 1975, an Order was made for Executors and Trustees of Defendant's Estate to be substituted as Defendants

and Plaintiff was granted leave to include contents of letter dated 23 March 1971 written by Defendant to his Solicitors, Messrs Cromptons.

- 1.8 In June and July 1975, Parties then filed Amended Statement of Claim, Amended Statement of Defense and Counter Claim and Reply to Statement of Defense and Counter Claim.
- 1.9 Thereafter Parties did not take any action until 19 May 2011. During this period, the file in relation to this matter went missing.
- 1.10 Plaintiff, Narendra Gaji died on 9 June 2010.
- 1.11 On 19 May 2011, Executors and Trustees of the Plaintiff applied to be substituted as Plaintiff and on 15 August 2011 an Order was made to substitute the Executors and Trustees of the Estate of Narendra Gaji as Plaintiff.
- 1.12 On 4 July 2012, Plaintiff was granted leave to amend Statement of Claim and on 12 July 2012, Plaintiff filed Amended Statement of Claim seeking following relief:-
  - “(i) for a declaration that the Defendant holds the said two acres of land in trust for the Deceased Narendra and now the beneficiaries of the Estate of Narendra Singh Gaji aka Narendra Singh aka Narendra Gazi;*
  - (ii) A Declaration that the Defendant is not entitled to evict or eject the Plaintiff and or the beneficiaries of the Estate of Narendra Singh Gaji aka Narendra Singh aka Narendra Gazi;*
  - (iii) Or Alternatively a Declaration that the Defendant is not entitled to direct the Plaintiff or the beneficiaries of the Estate of Narendra Singh Gaji aka Narendra Singh aka Narendra Gazi to be removed from the said property until the defendant reimburses the Plaintiff of the improvement made by the deceased of the property and all payments made to the Suva City Council being rates applicable on the property and any other expenses incurred by the Plaintiff or the Deceased Narendra in maintaining the said property;*
  - (iv) A declaration that the defendant holds the property in trust for the Plaintiff and the beneficiaries of the Estate of Narendra Singh Gaji aka Narendra Singh aka Narendra Gazi;*
  - (v) A declaration that the settlement offer made by the Deceased Jagannath was valid and the property be transferred to the Plaintiff for the benefit of the beneficiaries of the Estate of Narendra Singh Gaji aka Narendra Singh aka Narendra Gazi;*

- (vi) *A declaration that the Deceased Narendra having occupying the said property for more than 50 years and now the beneficiaries of his Estate are entitled to ownership of the said property by way of adverse possession under the Land Transfer Act;*
- (vii) *An order the caveat lodged on the said title namely caveat number 106903 be extended until the final destination of this case;*
- (viii) *Any further or other relief in the premises as to this Honourable Court shall seem meet.”*

## **2.0 Background Facts**

- 2.1 Original Plaintiff, Narendra Gaji (hereinafter referred as **“Narendra”**) and Original Defendant Jagannath (hereinafter referred as **“Jagannath”**) were lawful brothers and sons of Gaji Pratap Singh (hereinafter referred to as **“Gaji”**).
- 2.2 Gaji was married to Chandi.
- 2.3 Gaji had nine children with Jagannath being the eldest and Narendra being the youngest. The tenth child was deceased.
- 2.4 The property in Samabula comprising in Certificate of Title No. 6073 and consisting of 20 acres was initially acquired by late Gaji on 9<sup>th</sup> July 1937.
- 2.5 Gaji died intestate as such, upon Gaji’s death, Gaji’s wife, Chandi was appointed the Administratrix of his Estate on or about 25<sup>th</sup> March 1943 following which, the property was then transferred to the beneficiaries of Gaji’s Estate, being one third of the property to Chandi and two third shares of the property to each of Gaji’s nine children on 17<sup>th</sup> October 1946.
- 2.6 On or about 30<sup>th</sup> November 1946, out of the 20 acres, approximately 2 roods were transferred to one Shiu Narain whilst the balance of approximately 19 acres remained in the ownership of Jagannath, under Certificate of Title No. 7153.
- 2.7 At the time of his death, Gaji used to own and operate a huge dairy farm over the said twenty acre property.
- 2.8 Out of the nineteen acres, seventeen acres was sold out to Hooker Fijian Developments Limited on 27<sup>th</sup> August 1969. However ownership of two acres remained with the Defendant, being Certificates of Title No. 13795 and 13796.
- 2.9 This two acre property consists of a three bedroom residential dwelling.

2.10 The Plaintiff has also secured its interest in the interim over the said 2 acres via Caveat No. 106903 which was registered on 16<sup>th</sup> December 1968 and was extended by a Court Order dated 11<sup>th</sup> June 1969 until the final determination of this matter.

### **3.0 Issues to be Determined**

3.1 From the pleadings it is apparent that there are three issues that need to be determined:-

- (i) Whether Jagannath held two acres of land initially subject to Certificate of Title No. 6073 and now Certificate of Title No. 13795 and 13796 in trust for Narendra;
- (ii) Whether Plaintiff is entitled to Claim Title on the ground of Adverse Possession;
- (iii) Whether Caveat No. 106903 should be extended.

### **4.0 Plaintiff's Case**

4.1 Plaintiff in addition to him giving evidence called two other witnesses.

4.2 Plaintiff gave evidence that:-

- (i) He is the lawful son of Narendra and Executor and Trustee of Estate of Narendra;
- (ii) He is 61 years old;
- (iii) His father Narendra resided at 38 Kula Street and later moved to 35 Kula Street, Suva after he had constructed a house at 35 Kula Street;
- (iv) He became aware of this action after his father died;
- (v) He was 11 years old when his family moved to 35 Kula Street;
- (vi) His father was an insurance agent and his father built the house at 35 Kula Street;
- (vii) He left Fiji twenty years ago and would visit Fiji every two years and reside at 35 Kula Street when visiting Fiji;
- (viii) His uncle Harish Chandra also resided with his family at 35 Kula Street, Suva.

- (ix) His father Narendra and uncle Jagannath had a good relationship;
  - (x) His mother occupied the subject property until her death in 2010;
  - (xi) After his father's death the subject property was occupied by his sister Prathana Deo;
  - (xii) He is not aware about the circumstances under which his grandfather's property was transferred to Jagannath.
- 4.3 During cross-examination, Plaintiff confirmed that his sister occupied the subject property and that all rates in respect to the subject property was paid by his father and sister Prathana Deo and that his sister is staying on the property free of charge.
- 4.4 During re-examination, Plaintiff stated that no demand for rent has been made by Jagannath either from his father or his sister Prathana Deo.
- 4.5 Plaintiff's next witness was Prarthana Deo, daughter of Narendra.
- 4.6 Relevant parts of her evidence during examination in chief were that:-
- (i) She is a retired school teacher and resides at 35 Kula Street, Samabula, Suva (previously known as 43 Kula Street);
  - (ii) Her grandfather Gaji acquired twenty (20) acres of land subject to Certificate of Title No. 6037 in "dowry" after he married her grandmother Chandi;
  - (iii) Her grandparents had ten children namely Jagannath Gaji, Sushila, Baijnath Gaji, Sukhraj, Ahiliya, Harish Chandra Gaji, Bipin Chandra Gaji, Tara aka Sumintra, Narendra Gaji (her father) and Surend;
  - (iv) Surend passed away and Jagannath was the eldest whilst her father was the youngest;
  - (v) Her grandfather had an eight (8) bedroom house at 38 Kula Street and all her uncles (except for Harish Chandra Gaji) who left for India at the age of nine and resided there with their families;
  - (vi) After her grandfather Gaji died, Letter of Administration in respect to his Estate was granted to her grandmother Chandi;
  - (vii) Her grandmother transferred the property comprised in Certificate of Title No. 6073 to all the children of Gaji;
  - (viii) At her grandmother's request, all the children of Gaji transferred their interest in Certificate of Title No. 6073 to Jagannath who was the eldest

and responsible for running the dairy farm and looking after the affairs of the family after her grandfather died;

- (ix) Two roods of property comprised in Certificate of Title No. 6073 was transferred to one Shiu Narain and the remaining portion of the subject property was subject to Certificate of Title No. 7154;
- (x) In 1963, her father built a house at 35 Kula Street which formed part of the subject property;
- (xi) On 1<sup>st</sup> May 1963, she moved with her parents and siblings into the house built at 35 Kula Street;
- (xii) The house was built from a loan obtained from Munro Warren Leys & Kermode;
- (xiii) Loan was repaid by her father with the assistance of her uncle Harish Chandra Gaji;
- (xiv) Since property in Jagannath's name, loan was in his name as well. She agreed that Jagannath may have made a few payments towards the loan;
- (xv) Sometime in 1968, Jagannath came and told her father that he has sold the subject land and her father was only entitled to part of the property where his house was built. It is then her father went and lodged caveat against the titles in respect to two acres of land;
- (xvi) Certificate of Title Nos. 13795 and 13796 were issued in respect of land known as lot 2 on Deposited Plan No. 3468 containing one acre (hereinafter referred to as "**Lot 2**") and Lot 3 on Deposited Plan No. 3468 containing one acre (hereinafter referred to as "**Lot 3**"). These titles were issued subject to Caveat lodged by Narendra;
- (xvii) Both Lots 2 and 3 were utilized by her father;
- (xviii) Both lots were part of her father's share in her grandfather's estate which was transferred to Jagannath at her grandmother's request;
- (xix) Her mother died on 30 December 2009 and her father died on 9 June 2010;
- (xx) Since her father's death, she has been residing on the property at 35 Kula Street with her family;
- (xxi) Her father had paid city rate in respect to Lot 3 (CT13796) when he was alive and upon his death she continued paying the rates;

- (xxii) Her father did not pay city rates for Lot 2 (CT 13795) and sometimes in August 2008, she received phone call from Suva City Council informing her that the property she was residing on will be auctioned for non-payment of rates in respect to Lot 2;
- (xxiii) On 1 August 2008, she paid \$5,000.00 towards the rate arrears and on 30 April 2010 and 22 April 2010, her father wrote to Suva City Council (hereinafter referred to as **“the Council”**) for waiver of city rate which was between \$150,000.00 to \$200,000.00;
- (xxiv) She could not recall whether the Council responded to her father’s letter but upon his death she and her sister paid \$30,000.00 each to Council for payment of rates for Lot 2;
- (xxv) By letter dated 22 May 2011, the Council waived interest on rates leaving balance of \$90,000.00 which she paid.

4.7 Plaintiff’s third witness was Salendra Kumar, Director Finance for Suva City Council.

4.8 Mr Kumar in his evidence stated that:-

- (i) Rate payers name for Lot 2 in Council records is Jagannath whereas for Lot 3 it is Jagannath Deo;
- (ii) Notice of Assessment for Lot 2 was sent at Lot 2 Kula Street whereas Notice of Assessment for Lot 3 was sent to 35 Kula Street, Suva;
- (iii) From the records dating back to 2008, the rates for Lot 3 were always paid in time whereas rates for Lot 2 were in arrears and as at 31 December 2008, the outstanding rate was \$175,000.00;
- (iv) On 30 May 2011, at the request of Prarthana, Council waived compounded interest of \$60,330.40;
- (v) Rates for Lot 2 was now cleared and updated;
- (vi) Following lump sum payments were made to clear the arrears:

<b><u>Date</u></b>	<b><u>Receipt No.</u></b>	<b><u>Amount</u></b>
04/08/09	24214	\$ 5,000.00
21/08/09	25820	\$25,000.00
21/08/09	25821	\$30,000.00
30/05/11	99199	\$90,000.00



- 4.9 Rest of the evidence of Mr Kumar related to the policy, procedure and practice of Council in respect to payment of arrears of rates action taken against defaulters which is not directly relevant to this proceeding.
- 4.10 Plaintiff's fourth witness was Purnima Gaji of 15/24-26 Honsey St. Homebush West, NSW, Retired Nurse.
- 4.11 Ms Purnima Gaji gave evidence in respect to family composition of Gaji family; acquisition of the subject property by Gaji; and transfer of the subject property to Gaji's spouse and children and to Jagannath; payment of city rates in conformity with the evidence of Plaintiff's second witness, Prarthana Deo.
- 4.12 Ms Purnima Gaji in her evidence in chief stated that:-
- (i) She is the second eldest child of Narendra, the original Plaintiff and has two sisters and two brothers;
  - (ii) At her father's request, Jagannath gave permission to her father to build house at 35 Kula Street;
  - (iii) Construction of the house at 35 Kula Street was financed by her father with assistance of her uncle Harish Chandra Gaji;
  - (iv) Her father and uncle Jagannath were very close;
  - (v) One day in 1969, at about 7.00a.m. Jagannath came to her place and told her father that he has sold the property;
  - (vi) Her father then asked Jagannath as to what has he done;
  - (vii) She could hear the conversation between her father and Jagannath because at the time she was in the kitchen and later came on the balcony with her mother;
  - (viii) After that and her father went and saw her uncle Bipin Chandra who worked for Munro Warren Leys & Kermode at that time;
  - (ix) Her uncle told her father that he cannot do anything as the matter was between her father and Jagannath;
  - (x) Her father came home and then went to town and lodged Caveat against the Title;
  - (xi) Identified her father's signature on the Caveat (Exhibit P6)
  - (xii) Her father was using two acres of the subject property for gardening and grazing cattle;

- (xiii) She was told by her father that her uncle Jagannath had offered to transfer the two acres of subject property to her father but later refused to transfer it to him;
  - (xiv) When her father and her family moved to 35 Kula Street, Jagannath was residing at 62 Belo Street;
  - (xv) When her father stopped working, her uncle and she paid city rates;
  - (xvi) From 1960 to 2010, property at 35 Kula Street was occupied by her father and her family;
  - (xvii) All children of Narendra except Prarthana Deo left the property.
- 4.13 It must be noted that midway through examination in chief of this witness, Skype connection with the Defendant, Navin Chandra terminated and his Counsel informed Court that she is happy for examination in chief to continue without Defendant's presence via Skype.
- 4.14 Cross-examination of Ms Purnima Gaji was adjourned to next day (27 March, 2014) and Defendant was present via Skype.
- 4.15 There was no or very little inconsistency between the evidence of Ms Nirmala Gaji gave during examination in chief and cross-examination.

## **5.0 Defendants Case**

- 5.1 The surviving Executor and Trustee of Estate of Jagannath, Navin Chandra, gave evidence for the Defendant via Skype.
- 5.2 Mr Chandra's evidence in respect to family composition of Gaji, the acquisition of the twenty acre property subject to Certificate of Title No. 6073 and Transfer of the property comprised in said Certificate of Title No. 6073 to Gaji's spouse and children and thereafter to Jagannath is consistent with evidence given on behalf of the Plaintiff.
- 5.3 Mr Chandra in his evidence in chief stated that:-
- (i) He is the son of Jagannath, the original Defendant;
  - (ii) His father, Jagannath passed away on 12 April 1973 and at time of his death he owned two acres of land at Kula Street;
  - (iii) He did not know Street number for the said property;
  - (iv) When his father passed away he was 38 years old;

- (v) He was told by his father that when the 20 acres was transferred to his father, the understanding was his father would subdivide the land and the children of Gaji would have option to buy quarter acre (1/4) from him at market price;
- (vi) The house at 35 Kula Street was built by his uncle Narendra and loan taken out by Narendra was guaranteed by his father;
- (vii) Building loan for 35 Kula Street property was paid by Narendra, Harish Chandra (uncle) and his father Jagannath;
- (viii) His father sold eighteen (18) acres of the land to L.J. Hooker and could not sell other two acres because of Caveat lodged by his uncle Narendra;
- (ix) Narendra did not pay any monies to his father and only paid city rates for the subject land with assistance of his uncle Harish Chandra;
- (x) Narendra occupied the property at 35 Kula Street until his death and thereafter it was occupied by his daughter Prarthana Deo.

5.4 During cross-examination Defendant mostly confirmed his evidence given during examination in chief and maintained that his father Jagannath only agreed to give Narendra quarter acre of land to build house.

## **6.0 Whether Lots 2 and 3 are held by the Defendant in Trust for the Plaintiff**

6.1 It is well settled that Constructive Trust is an equitable remedy and trust imposed by law in favour of a party who does not have legal ownership of the property.

6.2 In **Gissing v. Gissing** [1971] AC 886 Lord Diplock stated as follows:-

*“Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust.....” (page 904)*

6.3 His Lordship at page 906 further stated as follows:-

*“As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not*

*communication to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.”*

6.4 In **Paul Nagaiya v. James Subaiaya** (1969) 15 FLR 212 (FCA) his Lordship Justice Marsack (as he then was) stated as follows:-

*“...if it is sought to establish that the registered proprietor is in fact holding as trustee then, in my view, there must be cogent and compelling evidence of the existence of such a trust. This evidence should prove how the trust came into existence and who are the persons on behalf of whom the property is held by the trustee. In my view the evidence falls far short of establishing these two facts with reasonable certitude.” (page 216 para G and H)*

6.5 Above principle from **Nagaiya’s** case was quoted with approval in **Din v. Kumar** [2008] FJHC 187; Civil Action No. 62 of 2006 (25 August 2008) and **Nair v. Raman** [2012] FJHC 1019, HBC 107.2006L (13 April 2012).

6.6 The onus of proof that trust exists lie on the person propounding it. **Nagaiya** (Supra)

6.7 After analyzing the above case authorities it is apparent that some of the factors that court should take into account are the manner in which holder of legal title to property acquired it; the relationships between the parties; the occupation of the property by person claiming the trust; contribution made to the property by the person claiming the trust.

6.8 Of course the factors listed in preceding paragraph are not exhaustive and will vary from case to case.

6.9 In respect to the issue of Constructive Trust I make following findings:-

- (i) Gaji acquired the twenty (20) acre property that was subject to Certificate of Title No. 6073 as dowry upon his marriage;
- (ii) Upon Gaji’s death his spouse and children were entitled to share in his Estate and as such property comprised in Certificate of Title No. 6073 was transferred to them;

- (iii) At request of Chandi, all children of Gaji transferred their share in Certificate of Title No. 6073 to Jagannath as he was the eldest and was to operate the dairy farm and support the family;
- (iv) There was agreement between children of Gaji that when property subject to Certificate of Title No. 6073 was transferred to Jagannath that upon request he would transfer part of the property to other children of Gaji to enable them to build their house;
- (v) The house built on Lot 3 was constructed by Narendra from loan obtained from Munro Warren Leys Kermode;
- (vi) Loan to Munro Warren Leys Kermode was paid by Narendra with assistance from his brother Harish Chandra Gaji, who was residing with late Narendra's family;
- (vii) Narendra occupied the house at 35 Kula Street until his death in 2010 and upon his death the said property was occupied by his daughter Prarthana Deo;
- (viii) Narendra also paid city rates in respect to Lot 3 and maintained the said property;
- (ix) There was no agreement for Narendra to buy quarter ( $\frac{1}{4}$ ) acre of the property from Jagannath at market price as was stated by the Defendant, Navin Chand in his evidence;
- (x) Narendra and his families occupation of Lot 3 was never challenged or threatened until he was informed of the sale of the property by Jagannath. Upon becoming aware of the impending sale he immediately sought to protect his interest by lodging Caveat.
- (xi) According to the Plaintiff's evidence in particular Nirmala Deo's evidence her father Narendra did not cultivate land subject to Lot 2 and only used it for grazing cattle;
- (xii) No city rates were paid by either party for Lot 2 until Prarthana Deo received a call from the Council sometimes in 2011.

6.10 From above findings and analysis of all the evidence and the case authorities, inference can be drawn that Jagannath (deceased) and his Estate held Lot 3 in trust for Narendra (deceased) and his Estate.

6.11 However the same inference cannot be drawn for Lot 2 as there was no intention on the part of Jagannath (deceased) and Narendra (deceased) that Jagannath will transfer Narendra's share in Estates of Gaji, which was about two (2) acres of the property to Narendra. Only common intention that can be

inferred is that Jagannath would transfer on request part of property for Narendra and his family's occupation. This finding is in supposition by following statement of Narendra at paragraph 5 of his Affidavit sworn on 6 June 1969 at paragraph 3.03 of Plaintiffs Submission:-

*“at that time it was agreed between the members of family at the instance of my mother that we should all transfer our properties in the land to the Defendant (Jagannath) because he was the eldest and because he kept a dairy farm and in return the Defendant would permit us to have a reasonable amount of land in which to build our dwelling houses....”*

**7.0 Whether Plaintiff is entitled to Claim Title on the ground of Adverse Possession**

7.1 Section 78 and 79 of the Land Transfer Act Cap 131 provides as follows:-

*“78.-(1) Where-*

- (a) Any person is in possession of any land subject to the provisions of this Act, for which a certificate of title has been issued or a Crown grant registered under the provisions of this Act; and*
- (b) such possession has been continuous for a period of not less than twenty years, and is such that he would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the provisions of this Act, he may apply to the Registrar in the manner hereinafter provided for an order vesting the land n him for an estate in fee simple or for such other estate or interest as may be claimed by him:-*

*Provided that, unless such person has been in possession of such land for a continuous period if not less than thirty years, no such application may be made in respect of any land or any part thereof, if the registered proprietor of, or any person appearing by the register to be entitled to the benefit of, any estate or interest therein is under any disability.*

- (2) For the purposes of this Part, possession of any land by any other person through or under whom any person making application under the provisions of this section (hereinafter in this Part referred to as "the applicant") claims, shall be deemed to be possession by the applicant.”*

*“79. Every application made under the provisions of section 78 shall-*

- (a) *be in writing in the prescribed form or in a form to like effect and shall include the several particulars therein mentioned or referred to;*
- (b) *be signed by the applicant or, in the case of a corporation, by a person authorized in that behalf in writing under the seal of the corporation;*
- (c) *be attested by a qualified witness;*
- (d) *be accompanied by a survey plan (with field notes) of the land certified by a registered surveyor:*

*Provided that the requirements of this paragraph may be waived in a case where the land the subject of the application is the whole of an island.”*

- 7.2 Having found that Jagannath (deceased) and his Estate held the property subject to Lot 3 in trust for Narendra (deceased) and his Estate there is no need to deal with the issue of adverse possession in respect to Lot 3 and as such the issue of adverse possession only relates to Lot 2.
- 7.3 To be able to prove claim for adverse possession the Claimant needs to establish that he was in continued possession of subject property for more than twenty (20) years.
- 7.4 Even though continuous possession has not been defined in the Act for the purpose of the provisions of Section 78 of the Land Transfer Act the possession must be actual and to the exclusion of others including the registered owner and should be without the consent of the registered owner.
- 7.5 In this instance there is no evidence that Narendra (deceased) or his Estate has been in continuous possession of property subject to Lot 2.
- 7.6 This is supported by evidence of Nirmala Deo that Lot 2 was not cultivated by Narendra.
- 7.7 Paying of city rates because of fear of losing property subject to Lot 3 and lodging a Caveat against Certificate of Title No. 13795 and leaving cattle for grazing does not amount to continuous and exclusive possession.
- 7.8 Therefore Plaintiff's claim for adverse possession in respect to Lot 2 fails.
- 7.9 However it is only just and fair that Plaintiff be reimbursed city rates paid by beneficiaries of Estate of Narendra in respect to Lot 2 to the Plaintiff with interest.

## **8.0 Conclusion**

8.1 The question that needs to be answered are as follows:-

- (i) Whether property comprised in Certificate of Title No. 13796 is held in trust by Defendant for the Plaintiff;
- (ii) Whether property comprised in Certificate of Title No. 13795 is held in trust by Defendant for the Plaintiff;
- (iii) Whether title to the property comprised in Certificate of Title No. 13795 is to be vested to the Plaintiff on the ground of adverse possession;
- (iv) Whether Plaintiff is entitled to Judgment in respect to city rates paid for property comprised in Certificate of Title No. 13795 with interest.

8.2 I answer questions 8(i) and 8(iv) in the affirmative and question 8(ii) and 8(iii) in the negative.

8.3 In respect to costs, I take into account that this action arose due to Defendant's failure to transfer Plaintiff's share of property to Plaintiff prior to arranging sale of the entire property to third party was in breach of trust bestowed upon him.

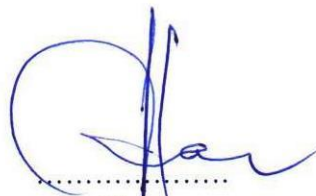
8.4 I therefore make following Declaration/Orders:-

- (i) Declare that property known as Lot 3 on Deposited Plan No. 3468 comprised and described in Certificate of Title No. 13796 containing one acre is held by the Defendant in trust for the Plaintiff;
- (ii) Declare that property known as Lot 2 on Deposited Plan No. 3468 comprised and described in Certificate of Title No. 13795 is not held in trust by the Defendant for the Plaintiff;
- (iii) Plaintiff's claim for title by adverse possession in respect to Lot No. 2 on Deposited Plan No. 3468 comprised and described in Certificate of Title No. 13795 is dismissed;
- (iv) Defendant within sixty (60) days from the date of this Judgment execute transfer in respect to property comprised and described in Certificate of Title No. 13796 in favour of the Plaintiff and forward the said transfer together with Record of Death of Prakash Chandra and Certificate of Title No. 13796, to Plaintiff's Solicitor, Ms Prem Narayan;
- (v) Defendant do all things necessary to enable registration of transfer Certificate of Title No. 13796 to the plaintiff including but not limited execution, stamping and obtaining of capital gains tax clearance;



- (vi) If Defendant fails to comply with any of the Orders in 8.4 (iv) and (v) within the time stipulated in this Order then Plaintiff is at liberty to apply for further directions and Orders with thirty days notice;
- (vii) Plaintiff is to prepare Transfer of Certificate of Title No. 13796 and forward it to Defendant's Solicitor for Defendant's execution;
- (viii) All costs for transfer of Certificate of Title No. 13796 to Plaintiff pursuant to this Order be paid by Plaintiff;
- (ix) Caveat registered against Certificate of Title No. 13795 is to be removed by Register of Titles Office within fourteen (14) days of this Judgment;
- (x) Caveat registered against Certificate of Title No. 13796 is to be removed upon lodgement of Transfer of Certificate of Title No. 13796 from Defendant to Plaintiff;
- (xi) Defendant do pay the Plaintiff a sum of \$150,000.00;
- (xii) Defendant do pay Plaintiff interest on the said sum of \$150,000.00 at the rate of 8% per annum from 1<sup>st</sup> June 2011 to the date of this Judgment;
- (xiii) Defendant do pay Plaintiff costs of this action assessed in the sum of \$5,000.00 within sixty (60) days of this Judgment.



  
K. Kumar  
**JUDGE**

**At Suva**

Prem Narayan for the Plaintiff  
Diven Prasad Lawyers for the Defendants