

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 441 of 1999

BETWEEN:

TARA MATI, MAYA WATI, BIMLA WATI (father's name Suruj Ram Singh) all of Davuilevu, Nausori, Fiji, Domestic Duties respectively, **SUBHAS CHAND RAMRAKHA** (father's name Harish Ramrakha) of Waiyavi, Lautoka and **AMAR RAMRAKHA** (father's name Harish Ramrakha) of Suva, Civil Servant.

PLAINTIFFS

AND:

SARAS WATI (father's name Suruj Ram Singh) of Viria, Nausori, Domestic Duties.

1ST DEFENDANT

RADHE PRASAD (father's name Shiu Ram) of Viria, Nausori, Farmer.

2ND DEFENDANT

SUSHIL PRASAD SHARMA (father's name Radhe Prasad) of Viria, Nausori.

3RD DEFENDANT

REGISTRAR OF TITLES

4TH DEFENDANT

ATTORNEY-GENERAL OF FIJI

5TH DEFENDANT

Counsel:

Mr V. Maharaj, Mr S. Chand and Mr I. Samad for the Plaintiffs

Mr S. Sharma and Mr E. Narayan for 1st, 2nd and 3rd Defendants

Ms T. Sharma for 4th and 5th Defendants

Date of Hearing: 30 July 2015

Date of Judgment: 31 August 2018

JUDGMENT

Introduction/Chronology of Events

1. The chronology of events are as follows:-

1999

September 17 Writ of Summons filed by MC Lawyers.

Tara Mati, Maya Wati, Bimla Wati, Subash Chand Ramrakha and Aman Ramrakha as Plaintiffs against Saras Wati (1st Defendant), Radhe Prasad (2nd Defendant), Sushil Prasad Sharma (3rd Defendant), Registrar of Titles (4th Defendant) and Attorney-General of Fiji (5th Defendant) seeking following relief:-

- “(a) *A Declaration that the instrument of Transmission by Death and transfer documents procured and registered by the first and second defendants are null and void under the Land Transfer Acts, Cap 131;*
- (b) *A Declaration that the third defendant has unlawfully acquired the estate property;*
- (c) *A Declaration that the fourth defendant negligently and unlawfully registered Transmission by Death and Transfer instruments are in contravention of the provision of the Land Transfer Act Cap. 131 and Property Law Act Cap.130;*
- (d) *An Injunction that the first, second and third defendants be restrained from evicting the plaintiffs from the estate property alternatively;*

- (e) *A Declaration that the third defendant holds the said property in trust for the beneficiaries of the Estate of Suruj Ram Singh;*
- (f) *An Order that the said estate property be transferred to the beneficiaries of the Estate of Suruj Ram Singh;*
- (g) *Costs of this action;*
- (h) *Such further and other relief as this Honourable Court may seem just and expedient in the circumstances of the case.”*

October 6 and
November 4

The 2nd, 4th and 5th Defendants filed Acknowledgement of Service.

2000

15 September
(1 year later)

Statement of Defence filed by 4th and 5th Defendants.

2001

February 6

Statement of Defence filed by 2nd Defendant

September 4

Summons for Direction (“**SD**”) filed

September 26

Order in Terms of SD made by Deputy Registrar (“**DR**”)

September 9

Plaintiffs filed Affidavit Verifying List of Documents

September 29

4th and 5th Defendants filed Affidavit Verifying List of Documents

2002

January 31

Notice requesting Pre-Trial Conference (“**PTC**”) filed.

2004

April 14
(more than two
years later)

Plaintiff filed Summons seeking Order that Defendants agree to PTC minutes or PTC be dispensed with.

May 5

DR adjourned Application to 19 May 2004, for service on all parties.

May 19

This matter was adjourned by DR to 2 June 2004 for mention only.

June 2	DR directed PTC to be held in MC Lawyer's office on 11 June 2004.
August 23	PTC Minutes signed by Plaintiffs' Solicitors and 4 th and 5 th Defendants filed.
September 15	Judgment by Default entered against 1 st Defendant.
October 6	Copy Pleadings and Summons to Enter Action for Trial filed by Plaintiff
October 6	File submitted to Justice Winter who refused to enter action for trial on grounds that: <ul style="list-style-type: none"> - Matter was not ready for trial - Plaintiff needed to file Reply to Statement of Defence of 2nd Defendant - All parties needed to complete discovery

2005

January 5	Judgment by Default entered against 3 rd Defendant
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2006

June 1 (More than 1 year 5 months)	Plaintiffs filed Notice of Intention to Proceed.
July 7	Plaintiffs filed Reply to Statement of Defence of 2 nd Defendant.

2007

February 8	Plaintiffs filed Notice of Intention to Proceed.
November 1	Plaintiffs filed Notice of Motion seeking Orders to remove name of Tara Mati (deceased) as Plaintiff and add Harish Chand Ramrakha one of beneficiary in the Estate of Subhadra Ramrakha as a Plaintiff.
November 22	Order made as prayed in above Notice of Motion by the then Master of the Court.
December 4	Amended Writ of Summons filed:- <ul style="list-style-type: none"> - Tara Wati's name removed - Harish Chand Ramrakha joined as Plaintiff

2008

February 15	The then Master directed Defendants to file Statement of Defence to Amended Statement of Claim and adjourned this matter to 4 April 2008, for mention.
April 29	Patel Sharma Lawyers informed Court that they will file Motion seeking leave to withdraw as Solicitors for 1 st , 2 nd and 3 rd Defendants and as such this matter was adjourned to 30 June 2008.
June 6	Summons filed by Patel Sharma Lawyers seeking Leave to Withdraw as Solicitors for 2 nd and 3 rd Defendants.
June 30	Patel Sharma Lawyers sought time to serve the Application when the then Master ordered Patel Sharma Lawyers to pay \$100.00 as wasted costs and ordered for substitute service of Application in the Fiji Times of 11 July 2008 and this matter was adjourned to 31 July 2008.
July 23	This matter was called on this day when Counsel for 1 st , 2 nd and 3 rd Defendants informed Court that they will remain on record when this matter was adjourned to 29 September 2008, and then to 23 October 2008.
September 18	Statement of Defence of 1 st , 2 nd and 3 rd Defendants filed by Patel Sharma Lawyers.
October 23	The then Master directed Plaintiffs to file Reply to Defence and adjourned this matter to 16 February 2009.
November 4	Reply to Statement of Defence of 1 st , 2 nd and 3 rd Defendants filed.
November 28	Summons for Security for Costs filed by 1 st , 2 nd and 3 rd Defendants.
 <u>2009</u>	
February 16	Plaintiffs filed Affidavit in Opposition and Application was listed for hearing on 26 March 2009.
March 26	The then Master of the Court ordered that:- <ul style="list-style-type: none"> - \$9,704.75 held in Trust Account of MC lawyers be held as Security for costs until further Order of Court - PTC to be convened on 9 April 2009 and Minutes of PTC to be filed by 17 April 2009 - Agreed Bundle of Documents to be filed by 23 April 2009.

April 21 Affidavit Verifying List of Documents filed by 1st, 2nd and 3rd Defendants.

July 16 The then Master directed 1st, 2nd and 3rd Defendants to respond to PTC Draft Minutes or submit their own draft and ordered \$150 costs against 1st to 3rd Defendants.

2010

May 2 Matter next called before Master Tuilevuka (as he then was) when this matter was adjourned to 18 June 2010 for PTC.

July 28 After a lapse of more than one (1) year, PTC Minutes filed.

July 29 Parties directed to file Copy Pleadings and Agreed Bundle of Documents and matter was adjourned to 27 August 2010.

August 24 Summons to Enter Action for Trial, and Amended Copy Pleadings was filed with Tara Wati's name added to these documents and Subhas Chand Ramrakha's name missing.

December 20 Agreed of Bundle of Documents filed.

2011

February 9 Fresh Summons to Enter Action for Trial filed.

February 24 Action was entered for trial and referred to Judge to give trial date.

2012

February 13,14,15 Listed for trial.

February 7-10 Supplementary Affidavit verifying Plaintiff's list of Documents, Plaintiff's Supplementary Bundle of Documents and Affidavit of Evidence filed

February 14 Hari Chand Ramrakha (one of the Plaintiffs) and Subhadra Wati's husband gave evidence which was recorded as per Justice Hettiararchchi's Minute.

- Adjourned before Master for parties to make necessary application to substitute for deceased Plaintiffs

February 28 Motion filed seeking Order that in lieu of Bala Ram Singh, Jasodra, Chandar Bhan Singh and Vijay Bhan Singh be added as Plaintiffs.

- Representatives of Bal Ram Singh be added as Plaintiff (Samad Law)
- February 28 Summons filed by Plaintiffs' Solicitors seeking following Orders:
- Vimal Wati aka Bimla Wati be substituted as Plaintiff for Maya Wati (2009 or 2010) and Tara Wati; (both deceased (18/8/05))
 - Subhas Chand Ramrakha (deceased) and Amar Ramrakha cease to be a party
 - Third Defendant be substituted as Trustee for 1st and 2nd Defendants
- May 11 Plaintiff filed Application for Interlocutory Injunction against 3rd Defendant.
- May 15 Orders by then Master:-
- (a) Executor and Trustee of Bal Ram Singh added as Plaintiff
 - (b)(i) Leave to remove Subhas Ramrakha and Amar Ramrakha names as parties refused.
 - (ii) Vimla Wati appointed to represent Maya Wati and Tara Wati for their estate for purpose of this proceedings
 - (iii) Proceedings continue between proposed Plaintiffs and Sushil Sharma as Executor and Trustee for 2nd Defendant and Administrator for 1st Defendant's estates.
- It must be noted that this Court is not aware on what basis the then Master made Order for Vimla Wati to represent Estate of Tara Wati when Tara Wati was removed as Plaintiff on 22 November 2007.
- May 21 Order filed by MC lawyers in respect to Patel Sharma Lawyers withdrawing as Counsel for 1st, 2nd and 3rd Defendants on 2 June 2004.
- Note:** No Order was made on 2 June 2004 (Mr Sharma informed Court he wishes to withdraw as Solicitors and enquires if he has to file formal application)
- Subsequently Summons for Withdrawal filed but not dealt with (That is why Order has not been signed by Chief Registrar).

- In fact on 23 July 2008, Mr Sharma informed Court that they will continue acting for 1st, 2nd and 3rd Defendants.
- May 18 Fresh Application for Security for Costs filed by 3rd Defendant
- May 21 In view of Pending Injunction Application and Masters Order for substitution – hearing dates were vacated again by Justice Hettiararchchi (as he then was).
- May 28 Court ordered that 3rd Defendant proceed with Sale of Property comprised in CT No. 19761 and deposit sale proceeds in Court
- July 9 Amended Statement of Claim filed
- July 24 Summons filed by 1st, 2nd and 3rd Defendants to strike out Amended Statement of Claim
- October 5 Summons by Plaintiffs Solicitors to remove name of Subash Chandra Ramrakha and have matter listed for trial.

2013

- February 14 Application was called before his Lordship Justice Amaratunga when he adjourned this matter to await outcome of pending appeal of his Order made on 15 May 2012.
- August 14 This matter was called in this Court for the first time when Counsel for parties were asked to go through their files and inform Court as to what steps are to be taken to bring this matter to finality and adjourned this matter to 6 September 2013.
- September 6 This Court expressed its disappointment in the way this matter was handled and dragged for almost thirteen years. Leave was granted to 1st, 2nd and 3rd Defendants to withdraw Application to Strike Out Amended Statement of Claim filed on 24 July 2013, and Plaintiffs Application filed on 5 October 2012.

1st, 2nd and 3rd Defendants were directed to file Defence to Amended Statement of Claim and Plaintiffs to file Reply to Defence to Amend Statement of Claim and this matter was adjourned to 7 October 2013, to fix trial dates.
- September 30 1st, 2nd and 3rd Defendants filed Defence to Amended Statement of Claim.

October 7 Plaintiffs were granted time to file Reply to Defence to Amended Statement of Claim and this matter was adjourned to 22 November 2013.

November 22 This matter was fixed for trial on 12 to 14 August 2014, which date was vacated by Court.

2015

March 6 This matter was fixed for trial on 28, 29 and 30 July 2015.

July 28 Trial proceeded and was completed within a day when parties were directed to file Submissions.

August 3 Plaintiffs filed Application by Notice of Motion to amend Statement of Claim.

September 15 Parties were directed to file Affidavits and Submissions and the Application was adjourned to 14 October 2015 for hearing.

October 14 Counsel for parties informed Court that they rely on Submissions filed in respect to the Application. Ruling to be delivered on notice.

Documentary Evidence

2. Counsel for the parties agreed that the documents forming part of Agreed Bundle of Documents dated 17 December 2010, can be tendered in evidence and marked as Exhibits 1 to 18.

Plaintiff's Case

3. Bimla Wati one of the Plaintiffs was Plaintiffs' first witness ("**PW1**").
4. PW1 during evidence in chief gave evidence that:-
 - (i) She is the daughter of Suruj Ram Singh (Father) and Suruj Kuar (Mother);
 - (ii) She had four (4) sisters and one (1) brother who from eldest to the youngest including her were:-
 - (a) Subhadra (Deceased - March 1982)

- (b) Tara Mati (Deceased)
- (c) Maya Wati (Deceased)
- (d) Bimla Wati (PW1)
- (e) Saras Wati (1st Defendant) (Deceased)
- (f) Bal Ram Singh (Deceased)
- (iii) Her father owned seven (7) acre property which he acquired from one Dip Singh but the Title to the property was issued after her father died and it issued was in the name of her mother Suruj Kuar as Administratrix of the Estate of Suruj Ram being Certificate of Title No. 19761 (Exhibit 2) (“**the Property**”);
- (iv) Her mother took out Letters of Administration in respect to her father’s Estate on 10 July 1970 (Exhibit 21);
- (v) She did not get any share in the property and she does not know if her siblings had share in the property;
- (vi) She is in Court for her share and does not know if her father made a Will;
- (vii) Her sister Maya Wati died on 18 August 2005, and both her and Maya Wati did not get their share;
- (viii) Sushil is living on the property and he is the son of Radhe Prasad and Saras Wati both of whom died;
- (ix) When asked if she asked Radhe Prasad for share she stated that she asked Sushil who told her that the Court will decide;
- (x) She knew that Radhe Prasad got property transferred into his name when he conducted a prayer session at his place for three days and when the priest asked him the reason for prayer he said he got the land;
- (xi) Subsequently she stated that when she came to lawyer before start of case she was then told by lawyer that property is transferred in Radhe Prasad’s name and she was surprised;

- (xii) Radhe Prasad transferred property to himself and transfer was done by Lakhan & Associates (Exhibit 10);
- (xiii) She did not get part of twenty thousand dollars (\$20,000.00);
- (xiv) She has been appointed to represent interest of late Tara Mati and late Maya Wati and she is claiming for their interest because she did their funeral from her place;
- (xv) Agreed that they claimed value of property was seven thousand dollars (\$7,000.00);
- (xvi) Tara Mati, Maya Wati and Saras Wati were Executors and Trustees of Estate of Suruj Kuar (mother) (Exhibit 11) and they did not consult her regarding any documents;
- (xvii) On 16 October 1981, her mother Suruj Kuar made a Will and gave whatever she had in the property to Tara Mati, Maya Wati and Saras Wati;
- (xviii) On 22 May 1994, Tara Mati got Caveat lodged against the property to claim her interest (Exhibit 12);
- (xix) Approximately one and half years later (28/12/1995) Radhe Prasad applied for Removal of that Caveat by his lawyers Sharma & Associates (Exhibit 13);
- (xx) Radhe Prasad transferred whole property to Sushil Prasad Sharma his son for twenty thousand dollars (\$20,000.00) (Exhibit 14);
- (xxi) She did not get part of that sum;
- (xxii) Tara Mati and Maya Wati lodged caveat against Property claiming property has been fraudulently transferred and they were defrauded;
- (xxiii) Harish Chand Ramrakha was Subhadra's husband who came from USA and gave evidence in previous trial which was not completed and he died one (1) year ago;
- (xxiv) Maya Wati was patient at St. Giles Hospital for three (3) months and she visited the Hospital often as she was on medication;

- (xxv) Maya Wati had her own house on the property where she was living when she died;
- (xxvi) There are two houses on the property of which one belonged to her mother and the other one was built by Sushil with mother's wooden and timber house being bigger one with four (4) bedrooms;
- (xxvii) The house is being rented out by Sushil and she does not know how many tenants were there;
- (xxviii) Radhe Prasad lived in another house on same property;
- (xxix) She did not answer when asked if there are three (3) or two (2) houses on the property;
- (xxx) Her mother built the house after she became owner and she lived there until she died;
- (xxxi) After she died her house was rented out by Radhe Prasad and she did not get any part of rental income;
- (xxxii) Second house being three (3) bedroom wooden and timber house was built by Radhe Prasad when he was alive and now Sushil is staying there;
- (xxxiii) She did not receive any income from mother's house;
- (xxxiv) She is seventy-one (71) years old and resides at Koronivia, Nausori with her son Kamlesh who looks after her;
- (xxxv) Bal Ram Singh was born on 10 June 1929, was married to Jasodra and died on 10 December 1990, in USA;
- (xxxvi) His wife Jasodra resides in USA;
- (xxxvii) Saras Wati was married to Radhe Prasad and they both died;
- (xxxviii) Family Tree (Exhibit P22) is correct ;
- (xxxix) She wants property to be transferred back to her father's Estate and is claiming for damages;
- (xl) She did no renounce her share to Radhe Prasad;

- (xli) She and Maya Wati went to school upto class 4, whilst Tara Wati did not go to school and Saras Wati went upto class 5.
5. In answering question by Counsel for Second Plaintiff PW1 confirmed that Balram Singh was her brother who had shares in the property and did not get any shares in the property.
6. PW1 was not cross-examined by Defendant's Counsel.

First, Second and Third Defendants' Case

7. First, Second and Third Defendants called Vilikesa Qauqau of Tokatoka Navua, Senior Court Officer as their first witness (**D1W**).
8. D1W during examination in chief gave evidence that:-
- (i) He has been subpoenaed to produce Court file in respect to Suva High Court Civil Action No. 82 of 1995 ("**Action No. 82/95**") which he has with him;
- (ii) Parties to Action No. 82/95 were Tara Mati, Maya Wati, Bimla Wati, Subhas Chand Ramrakha and Amar Ramrakha as Plaintiffs and Saras Wati, Radhe Prasad, Registrar of Titles and Attorney-General of Fiji as 1st, 2nd, 3rd and 4th Defendants respective;
- (iii) Actions take in Action No. 82/95 were as follows:-

1995

February 10	Writ of Summons was issued
March 7	Acknowledgement of Service filed by 1 st and 2 nd Defendants
June 12	Statement of Defence filed by 1 st and 2 nd Defendants
September 13	Summons for Direction filed
September 27	Summons for Direction (" SD ") called and adjourned to 4 October 1995, to check if SD served on all parties.

October 4 Order on SD was made

1996

May 28 Plaintiff filed List of Documents and Affidavit Verifying List of Documents

August 7 Defendants filed Affidavit Verifying List of Documents

October 23 Notice requesting Pre-Trial Conference (“**PTC**”) was filed

November 19 3rd and 4th Defendants filed Statement of Defence and Application by Summons to extend time for service of Statement of Defence

December 4 Order in terms of Summons was made

1999

January 12 3rd Defendant filed Application to dismiss action for want of prosecution which was returnable on 3 February 1999

February 3 No appearance for Plaintiffs. Matter was struck out by Deputy Registrar Legal.

I. Razak applied to withdraw as Counsel for Plaintiffs and informed Court that he advised his clients in writing.

(iv) Next document in the file in respect to Action No. 82/95 is Order granted on 3 February 1999, when leave was granted to Respondent’s Counsel to withdraw and the action was struck out.

9. Court file in respect to Action No. 82/95 was received in evidence and marked as Exhibit D1.

10. During cross-examination D1W confirmed that 1st, 2nd, 3rd and 4th Defendants in Action No. 82/95 were Saras Wati, Radhe Prasad, Registrar of Titles and Attorney-General of Fiji.

4th and 5th Defendants Case

11. 4th and 5th Defendants called Torika Goneca of 19 Nasevu Street, Lami, Acting Deputy Registrar of Titles as their witness (D4W).
12. D4W during examination in chief gave evidence that:-
 - (i) She is Acting Deputy Registrar of Titles with twenty (20) years experience in current position;
 - (ii) Lot 1 on Deposited Plan No. 1796 was transferred to Suruj Kuar as Administratrix;
 - (iii) Exhibit P21 is transfer document and attached to it is Letter of Administration;
 - (iv) New title over Lot 1 on DP 1796 was issued being Certificate of Title No. 19761;
 - (v) After Certificate of Title 19761 (Exhibit P2) was issued the transaction recorded on it was:-
 - Encumbrance No. 176870
 - Easement No. 176871
 - Caveat No. 181685 (Removed)
 - Mortgage No. 185078 (Discharged)
 - Application for Removal of Caveat
 - Request for Provisional Title
 - Transmission by Death No. 326269
 - Caveat by ROT (Cancelled)
 - Transfer No. 337968
 - Caveat No. 359656 (Removed)
 - Application for Removal of Caveat

- Transfer No. 400588
 - Caveat No. 465588
- (vi) Transmission by Death No. 329269 was registered Tara Mati, Maya Wati and Saras Wati were registered as Executor and Trustees;
- (vii) After Transmission by Death property was transferred to Radhe Prasad;
- (viii) After that property was transferred to Sushil Prasad Sharma on 8 August 1996 being Transfer No. 400588 which was last transfer.
13. During cross-examination by Counsel for 1st, 2nd and 3rd Defendants D4W:-
- (i) Agreed that she is a career civil servant; is familiar with Land Transfer Act and other Acts administered by Titles Office; is familiar with Torrens System; Register at Registrar of Titles is guarantee by the State; entries on Register is true representation of dealings; Registrar of Titles and Deputy Registrar of Titles have statutory duty in that regards; and integrity of register must be maintained;
 - (ii) Agreed that she has seen CT 7711 which was seventy-three (73) acres plus property and transferred by partial transfer;
 - (iii) Stated that Suruj Ram's name does not appear on the Title as proprietor;
 - (iv) Agreed that 1st entry that is relevant is Partial Transfer No. 176869 (Exhibit 2) made on 6 June 1980;
 - (v) Stated that Transfer shows Suruj Kuar as Administratrix;
 - (vi) Agreed that Suruj Ram according to Letter of Administration (Exhibit 21) died on 16 September 1961, and the property was transferred some nineteen (19) years later;
 - (vii) Agreed that CT 19761 was issued on 6 June 1980, same date Partial Transfer was registered;
 - (viii) Stated that she understood paragraph 6 of Amended Statement of Claim which read as follows:-

“6. That the Trustees of the Estate of Suruj Kuar Second Plaintiff with Tara Mati deceased and First Defendant applied for registration of Transmission By Death on or about 15th day of November 1992, which was negligently and unlawfully registered on the said property by Four Defendant representing the Trustees of Suruj Kuar as well as Trustees of the Estate of Suruj Ram Singh.”

- (ix) When it was put to her that allegation is that when Transmission by Death (“**TBD**”) was registered it was registered negligently she stated that it was incorrectly registered;
- (x) Stated that TBD should not have been registered and accepted that it was unlawfully registered;
- (xi) Stated that TBD was lodged by Solicitors who certified it as correct for purpose of Land Transfer Act and Register of Title proceeded to register;
- (xii) Agreed that next entry on the Title was Caveat which was cancelled;
- (xiii) Agreed that next entry is Transfer of property to Radhe Prasad which was prepared and lodged by Lakhan & Associates, witnessed by Solicitor concerned and was certified correct for the purpose of Land Transfer Act;
- (xiv) Agreed that Registrar of Titles looked at that and proceeded to register the Transfer;
- (xv) Agreed that if TBD would not have been registered Transfer to Radhe Prasad would not have been registered;
- (xvi) When it was put to her that registration of TBD was an internal administrative act of Registrar of Titles she stated she cannot answer that;
- (xvii) Agreed that Radhe Prasad did not come to Registrar of Titles Office to say to register Transfer;
- (xviii) Agreed that next entry is Transfer No. 400588 to Sushil Prasad Sharma which was prepared by Solicitors; was registered on 8 August 1996 and the act of registration was done by Registrar of Titles.

14. During cross-examination by Plaintiffs’ Counsel (Mr S. Chandra) D4W:-

- (i) Stated that in Titles Office she supervised operations, signed documents in absence of Registrar of Titles; endorsed documents and issued new Titles;
- (ii) Stated that procedure was same over last twenty (20) years has not changed but has become more stringent;
- (iii) In reference to Exhibit 20 being Partial Transfer from Dip Singh and Others to Suraj Kuar as Administrator she stated that:-
 - (a) Letters of Administration (“**LA**”) will need to be attached to the Transfer;
 - (b) In this case LA was attached;
 - (c) Registrar of Titles will not accept Transfer on its own;
 - (d) Transferee - Suraj Kuar is the Administrator of the Estate of Suruj Ram;
 - (e) Lot 1 from CT 7711 was transferred;
 - (f) They had to issue new Title which was issued in this case.
- (iv) In reference to Exhibit 2 Certificate of Title No. 19761:-
 - (a) Agreed that Transferee’s name appears on front page with Suraj Kuar as Administrator of the Estate of Suruj Ram;
 - (b) Title was issued to Suraj Kuar as Administrator;
 - (c) The Title was issued and signed by S. Chandra.
- (v) In relation to Exhibit 11 (Transmission by Death No. 329269):-
 - (a) Agreed that it was by Tara Mati, Maya Wati and Saras Wati as Executrix and Trustees of the Estate of Suraj Kuar;
 - (b) Agreed that the three (3) signatures were of the Applicants;
 - (c) Agreed Kapadia’s signature states that TBD is correct for purpose of Land Transfer Act;
 - (d) Agreed Applicants signatures have not been witnessed as is required under Land Transfer Act;

- (e) Agreed that TBD has been incorrectly registered and have two (2) problems with one being Applicants are Trustees of the Estate of Suraj Kuar and the other is that Applicants signatures are not witnessed;
- (f) Stated that in such cases documents are returned for correction;
- (g) Stated that if she would know that the document is not witnessed she would not register it;
- (h) When it was put to her that this document was slipped and missed the security of process she stated that was probably overlooked by registry;
- (i) When it was put to her that Applicants who signed could be anybody she stated that she cannot answer.
- (vi) It was normal practice for Registrar of Titles to lodge caveat after TBD was lodged in respect to Freehold Titles for the purpose of protecting the interest of Administrator which is no longer the case;
- (vii) When it was put to her as to what about interest of beneficiaries she stated that she did not know;
- (viii) In reference to paragraph 3 of 4th and 5th Defendants Statement of Defence filed on 15 September 2000, she agreed that they require certificate to be signed by Solicitor or party;
- (ix) Stated that if certificate is signed and document is not in order she will not register it;
- (x) Agreed that in the TBD (Exhibit P20) the Applicants are Executors and Trustees of the Estate of Suraj Kuar and not Suruj Ram and as such it should not have been registered;
- (xi) Agreed that since the witnesses signature was missing Register of Titles could have returned the document;
- (xii) Agreed that registration of TBD was a fatal error by Registrar of Titles.

15. During re-examination D4W:-

- (i) Stated that reason for error could be similar name: Suraj Kuar and Suruj Ram;
- (ii) When asked about absence of witnesses' signature she stated she cannot say;
- (iii) Stated that now when documents are lodged in respect to transfer and Transmission by Death ("**TBD**") they require:-
Transfer: CCT Certificate and Transferee's ID
TBD: Original Probate or LA with certified true copies and identification of Executor.
Once lodged, they are numbered and goes for endorsement and then to Registrar of Titles for signing and after that they are disbursed.
- (iv) In 2000 or when TBD was registered the requirements were not such as stated above.

Application to Further Amend Statement of Claim

- 16. When 4th and 5th Defendants closed their case Mr Maharaj, Counsel for Plaintiff sought leave to amend Statement of Claim to include prayer for damages when he was informed by Court that Plaintiffs will need to make formal application for amendment.
- 17. In Ruling delivered this morning, the Application to Further Amend the Statement of Claim was dismissed and struck out.
- 18. Issues for determination:-
 - (i) Whether Transmission by Death Registration No. 326269 is null and void or fraudulent and whether it was registered negligently or unlawfully by Fourth Defendant?
 - (ii) Whether Third Defendant unlawfully and fraudulently acquired the property to make transfer null and void?

- (iii) Whether Tara Mati (deceased), Maya Wati (deceased) and First Defendant (deceased) had powers to transfer the property of Estate of Suruj Ram?
19. Before this Court deals with the issues, it needs to be made clear that if an action is struck out for want of prosecution or in absence of Plaintiff and then Plaintiff is at liberty to file fresh action.
20. Hence, this Court with due respect rejects Defendant's Submissions that because Plaintiffs' Civil Action No. 82 of 1995 was struck out for want of prosecution, this action is an abuse of court process.

Issue No. 1

21. It is undisputed that:-
- (i) Suruj Ram purchased the property now known as Lot 1 on Deposited Plan No. 1796 "Davuilevu" (Part of) District of Suva, Island of Viti Levu containing seven acres two roods and nine perches comprised and described in Certificate of Title No. 19761 (Exhibit P2) (hereinafter referred to as **"the Property"**);
 - (ii) Suruj Ram passed away before the Title over the Property could be issued;
 - (iii) Suruj Ram passed away on 16 September 1961 and Letters of Administration in respect to his Estate was granted to his wife SURAJ KUAR;
 - (iv) On 6 June 1980, Certificate of Title over the Property was issued under the name of SURAJ KUAR as Administratrix of the Estate of SURUJ RAM;
 - (v) SURAJ KUAR died on 16th January 1982, and Probate in respect to her estate was granted TARA MATI, MAYA WATI and SARAS WATI pursuant to her Last Will and Testament dated 16 October 1981 (Exhibit 5);

- (vi) On 27 April 1982, TARA MATI, MAYA WATI and SARAS WATI as Executors and Trustees of the Estate of SURUJ KUAR executed Transmission by Death in respect to the Property which was endorsed on Title to the Property on 13 November 1992 (Exhibit 4);
- (vii) On 14 May 1993, the Property was transferred to Radhe Prasad, who was the First Defendant.
22. On 27 May 1994, Tara Mati (now deceased) lodged Caveat against the Property through her Solicitors Messrs. Maharaj Chandra & Associates (Exhibit 10).
23. On 8 March 1996, the Caveat lodged by Tara Mati was cancelled/removed on the Application of Radhe Prasad (Exhibit 11).
24. On 8 April 1996, Radhe Prasad (now deceased) transferred the Property to his son Sushil Prasad Sharma, the Third Defendant (Exhibit 12).
25. Section 39 to 41 of Land Transfer Act 1971 provides as following;

“(39) Estate of registered proprietor paramount, and his or her title guaranteed

(i) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except -

- the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and*
- so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser*

or mortgagee for value or deriving title from a purchaser or mortgage for value; and

- *any reservations, exceptions, conditions and powers contained in the original grant.*

(ii) Subject to the provisions of Part 13, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.

(40) Purchaser not affected by notice

“Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

s41 Instrument etc void for fraud

“Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.”

26. It is well established that for Plaintiffs to defeat Third Defendant’s title to the Property they have to establish that Third Defendant acquired the Property as a result of fraud.
27. It is also established that party alleging fraud must provide evidence of actual fraud on part of registered proprietor.

28. The definition of fraud for the purpose of Land Transfer Act 1971 was stated by Privy Council in **Assets Company Limited v Mere Rohini** [1905] AC 176 at 210 as follows:

“Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, as 55, 56, 189, and 190) appear to their Lordships to shew that by fraud in these accounts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”

29. In **Fels v Knowles** (1907) 26 NZLR 608 the Court of Appeal dealing with similar provisions and proceedings for setting aside of transfer stated as follows:

“The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under

which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the cases of easements or incorporeal rights, to the right registered”.

See **Subarmani v Dharam Sheila** (1982) 28 FLR 82.

30. The principle in **Assets Company Ltd case and Fels v. Knowles** (Supra) was adopted with approval in Courts in Fiji and by Privy Council in **Wainimiha Sawmilling Company Limited (In Liquidation) v Waione Timber Company Limited** [1926] AC 101 (page 106).
31. At last paragraph of page 106 in **Wainimiha Sawmill** case his Lordship Lord Buckmaster stated as follows:-

“If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances.”

32. His Lordship Justice Singh in dealing with section 40 of Land Transfer Act in **Narayan v. Sigamani**; FJHC 204; HBC 059 of 2004 (5 September 2008) stated as follows:-

*“[19] What section 40 means is that knowledge is only one ingredient of fraud. It is not the be all and the end all of fraud. There are cases which when referring to actual notice also refer to "**wilful blindness**". This term covers situations where a person who has knowledge of facts which should put him/her on further enquiry but they do not conduct that enquiry. In the Assets Co. case Lord Lindley stated:*

"The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may properly be ascribed to him."

[20] Further in *Waimiha* in the Court of Appeal Salmond J. stated:

"The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that willful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud."

This comment of Salmond J. was adopted by the Fiji Court of Appeal in the unreported judgment *Gajadhar v. Jai Pal & Another* ABU 49 of 1981 (judgment 30th July 1982).

[21] Some Australian cases also have adopted '**willful blindness**' as an aspect of fraud. In *Macquarie Bank Limited v. Sixty Fourth Throne Pty Ltd.* (1998) 3 VR 133 this concept of "**willful blindness**" was explained as follows:

"to abstain deliberately from reasonable enquiry for fear of what the inquiry will reveal, to choose to shut

one's eyes to the obvious – to assume a state of ‘wilful blindness’ – or otherwise to generate a state of contrived ignorance, may of course be dishonest. It has been well said that willful blindness – deliberately turning a blind eye to obvious or obviously ascertainable facts is akin to fraud e.g. Lego Australia Pty Ltd v. Paraggio (1993) 44 FLR 151 at 171.

33. Plaintiff at paragraph 7 of the Amended Statement of Claim filed on 4 December 200... alleges that First Defendant as one of the Executors and Trustee of the Estate of Suruj Kuar transferred the Property to Second Defendant without explaining the contents of Transfer (Exhibit 9) being explained to Tara Mati and Maya Wati the other two Executors and Trustees.
34. The subject Transfer (Exhibit 9) was witnessed by a Solicitor who certified that the content of the Transfer was explained to the Transferors and he also certified the Transfer is correct for the purpose of Land Transfer Act.
35. This Court fails to understand as to why the concerned Solicitor was not joined as a party if he failed and/or neglected to explain the contents of the Transfer to the Transferors.
36. Since, Tara Wati, Maya Wati and Saras Wati are deceased; there was no reliable evidence before the Court as to the manner in which the Transfer to Radhe Prasad was executed.
37. It has also been alleged that Transfer of property by Radhe Prasad Sharma, to Third Defendant was to defraud Plaintiff and the consideration sum of \$20,000.00 was not paid to Trustees or the beneficiaries.
38. The Transfer (Exhibit P12) was between Radhe Prasad in his personal capacity and Sushil Prasad Sharma (Third Defendant) and as such there was no request for Third Defendant Sushil Prasad Sharma to pay consideration sum to Trustees or beneficiaries.

39. After careful analysis of the evidence at paragraph of this Judgment this Court finds the Third Defendant's Title to the property cannot be defeated on the ground that no evidence has been produced to show that Third Defendant was engaged in any fraudulent activity in Transfer of the property from Radhe Prasad to himself or for Transfer of Property to Radhe Prasad.
40. No evidence has been produced to show that Second Defendant who is now deceased acquired the property fraudulently.
41. This Court accepts D4W's evidence that Radhe Prasad did not go to Fourth Defendant's office to get the Transmission by Death registered against the title to the property.
42. This Court also accepts D4W's evidence that wrongful registration of Transmission by Death by Fourth Defendant was a mistake on Fourth Defendant's part and Fourth Defendant relied on the Certificate signed by Solicitor (Mr Kapadia) for the Applicant stating that the Transmission by Death is "correct for the purpose of the Land (Transfer and Registration) Cap 120".
43. This Court finds that wrongful registration of Transmission by Death by Fourth Defendant on its own does not amount to fraud.
44. There is also no evidence that Third Defendant acted fraudulently to register the Transmission by Death against the Title to the property.
45. The fact that Third Defendant is Radhe Prasad's son does not and allegedly have not paid the consideration sum (no evidence has been adduced to show it has not been paid) to Radhe Prasad does not amount to fraud.
46. Even though the Transmission by Death was registered wrongfully or due to mistake by the First Defendant, any transaction that followed the Transmission by Death cannot be defeated except on the ground of fraud in respect to the transaction that followed the Transmission by Death.
47. In **Boyd v. Mayor of Wellington** [1924] NZ.L.R. 1174B court held that:-

“...any person who can without fraud, as defined by their Lordships, procure himself to be registered as a proprietor of land under the Land Transfer Act has an indefeasible title, although he is not purchaser for value from a registered proprietor, or in fact a purchaser at all”.

48. In **Breksvar v. Wall** [1971] HCA 70; (1971) 126 CLR 376, at paragraph 15, it was held that:-

*“that the ‘the Torrens system ... is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies not historical derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in **Frazer v Walker** [1967] 1 A.C. 569 of the decision of the Supreme Court of New Zealand in **Boyd v Mayor of Wellington** [1924] N.Z.L.R.at p.1223, now places that conclusion beyond question”*

This statement confirms that, in the context of Torrens title land, the question of priorities is properly couched in the terminology of ‘registered’ and ‘unregistered interests

The practical significance of registration is ‘to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question’: **Westfield Management Ltd v Perpetual Trustee Co Ltd** [2007] HCA 45; (2007) 233 CLR 528, at 531; [2007] HCA 45; 239 ALR 75, at 77.”

49. The principle of indefeasibility of registered title was upheld in **Attorney General v Kumar** [1985] 31 FLR 23. In this case, the court rejected the Appellant’s submission that the Respondent was not a bona fide purchaser for value and was guilty of fraud, and therefore not entitled to the protection of indefeasibility of title. The court observed as follows: -

“This submission overlooks the entire philosophy underlying the Land Transfer system: which can be taken as notice to the world of the identity and extent of interest of the person who is certified to be the owner. Gibbs v Messer (1891) AC 248. It is recognised that innocent persons may suffer through error or other cause, but this must take second place to the merit of certainty, leaving injured parties to be compensated – in Fiji from the Consolidated Fund pursuant to Part XXII of the Act.”

In upholding the title of a third party, the court at page 30, paragraph C held as follows: -

In cases of fraud of course enquiry can be had into the right of the registered proprietor to hold- but saving that exception and the correction of clerical errors- the Act recognises that once registered the proprietor’s position is guaranteed, regardless of earlier blemishes.” (Emphasis added).

The court proceeded to quote with favour dicta from **Boyd v Mayor of Wellington** (supra) as follows: -

The effect of registration is to validate the purchaser’s title notwithstanding defects in the vendor’s registered title. The common law rule of Non dat qui non habet is wholly abolished in favour of purchasers of registered titles in good faith”.

50. That in principle there is no reason in law to distinguish between a purchaser for value and any other person has been placed beyond doubt. In **Subramani v Dharam Sheela** [1982] 28 FLR 82, the Appellants sought to argue that the protection of indefensibility of title contained in section 39 of the Land Transfer Act should always be interpreted to mean only a “purchaser for value”. In rejecting this argument, the court at paragraphs C and D at p 85, held as follows: -

“In our opinion, this argument is untenable. The whole issue depends on what is referred to as ‘indefeasibility of title’ of the registered proprietor. Section 39 of the Land Transfer Act provides that a registered proprietor, except in the case of fraud, holds the land free from encumbrances except

those registered against the title; but sub section 39(b) provides an exception to this in the following terms:

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value.

It is in our opinion clear that the restriction of the definition of registered proprietor to purchaser for value applies on in the case specified, that is to say an erroneous description of the land concerned. There is nothing in subsection (b) to indicate that ‘registered proprietor’ in any other circumstances is to be interpreted only as ‘purchaser for value’.

51. In **Frazer v Walker** [1967] 1 AC 569 in respect of the principle of indefeasibility of title. The court in that case held that:

“registration once effected must attract the consequences which the Act attaches to registration whether it was regular or otherwise. As will appear from the following paragraphs, the inhibiting effect of certain sections (e.g.; ss. 62 and 63) and the probative effect of others (e.g.; s. 75) in no way depend on any fact other than registration as proprietor. It is in fact the registration and not the antecedents which vests or divests title.”

52. After analysing the principles stated in preceding paragraph and the evidence before this Court, this Court finds that Third Defendant’s title to the property is indefeasible in absence of any evidence to establish fraud on his part.
53. This Court also accepts D4W’s evidence that registration of Transmission of Death No. 326269 was an innocent mistake on the part of Registrar of Titles and as such does not defeat Third Defendants title to the property in any way whatsoever.
54. When the property was transferred to Third Defendant there was no need or requirement for Third Defendant to check if he said Transmission by Death was registered regularly.

55. Therefore Plaintiffs' action is to be dismissed and struck out.

Costs


55. This Court takes into consideration of the fact that the parties are closely related and except for the Third Defendant all the other parties to the Original action has passed away. This Court is of the view that in the interest of justice no costs be awarded.

Declaration/Order

56. This Court makes following Declaration and Orders:-

- (i) Third Defendant, Sushil Prasad Sharma title to property comprised and described in Certificate of Title No. 19761 is indefeasible;
- (ii) This action is dismissed and struck out;
- (iii) Caveat No. 400488 registered against Certificate of Title No. 19761 be removed forthwith;
- (iv) Each party bear their own costs of this action.




K. Kumar
JUDGE

At Suva

31 August 2018

MC LAWYERS AND SAMAD LAW FOR THE PLAINTIFFS

PATEL SHARMA LAWYERS FOR 1ST, 2ND AND 3RD DEFENDANTS

OFFICE OF THE ATTORNEY-GENERAL FOR THE 4TH AND 5TH DEFENDANTS