IN THE FAMILY DIVISION OF THE HIGH COURTAT SUVA

APELLATE JURISDICTION

ACTION NUMBER:	**Appeal 15 of 2015** ***(Original Case Number 13/Suv/0345)***
BETWEEN:	**SHELVIN VINCENT CHETTY**
	Appellant
AND:	**ZABEEN NILUFA DESLEY**
	Respondent
Appearances:	*Mr. D. Sharma for the Appellant.*
	Mr. S. Singh for the Respondent.
Date/Place of Judgment:	*Wednesday31 January2018at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*
Category:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.*
Anonymised Case Citation:	Shelvin Vincent Chetty v Zabeen Nilufa Desley Family High Court Appeal Case 0345 Suv 2013

JUDGMENT

A. ***Catchwords:***

FAMILY LAW –LEAVE TO ADDUCE FRESH AND FURTHER EVIDENCE – distinction between fresh evidence and further evidence – fresh evidence is evidence existing before trial but discovered after trial -In case of fresh evidence the Court has discretion to grant leave to adduce the same when there exists special circumstances – what constitutes special circumstances?: principles in Ladd v. Marshall discussed – further evidence is evidence occurring after trial, in most circumstances, a setting aside of the judgment or order is the proper course – but

where the appellate court considers it in the interest of justice to deal with the question of leave, it has discretion whether or not to grant leave to allow further evidence: the second and third principles in Ladd v. Marshall inevitably applies.

B. (i). Legislation

1. The Family Law Act 2003 ("FLA"): ss. 162 (5) (a); 162(6); and 163 (1) (a).

(ii). Case

1. Ladd v. Marshall [1954]3ALL ER745.

A. Cause.

1. On the respondent's application for property distribution, the Family Division of the Magistrates' Court had ordered that she is entitled to 40 % of all the properties being a motor vehicle and a house in Laucala Beach Estate.

2. After the Court had worked out the parties entitlements, it ordered that the parties were at liberty to determine amongst themselves and their respective counsel how they wished to pursue the distribution. In absence of any settlement a formal application was to be made to the Court for payout of their shares as per the order of the Court.

3. The appellant then appealed the decision of the Court raising various grounds of appeal which is not necessary to outline at this stage since the appeal is not under consideration. There was no cross-appeal by the respondent or any intention expressed for one to be filed.

4. When the appeal matter was listed for call over in Court, both parties indicated that they wished to file an application for leave to adduce fresh and further evidence in Court. I allowed them the liberty to file the applications.

5. The respondent's counsel, then, on 21 March 2016 made an application for leave to adduce further and fresh evidence on appeal. The nature of the evidence sought to be introduced are:

    1. ***Copy of Receipt being deposit paid to the vendor Mr. Vicky Narayan by Total Construction for the purchase of the property in Laucala Beach Estate.***

    2. ***Transcripts and Compact Discs of voice recording of conversation between the parties in November 2015 and December 2015 which the respondent claims would show that the parties started courting from 2004 and not mid 2008 as claimed by the appellant and that the appellant lied in court at several places.***

6. In April 2016, the appellant's counsel filed a response opposing the application of the respondent and sought to introduce fresh evidence on behalf of the appellant. The fresh evidence that was sought to be introduced are:

    1. ***A copy of the faxed draft sale and purchase agreement of February 2008; and***

    2. ***A copy of the cyclone certificate of the subject house dated May 2006.***

7. The respondent is also opposing the introduction of the fresh evidence by the appellant. To enable the parties to argue the appeal with proper evidence, it was necessary for the two applications for leave to be heard first. This judgment therefore only relates to the question of leave to adduce further and fresh evidence.

8. In form of the parties' background, they were married in 2009. They separated in 2012. Their marriage was dissolved in 2013. There are no children of the marriage.

B. Parties Position: Further and Fresh Evidence: Source and Discovery.

(i) Cash Receipt

9. In her affidavit in support of the application, the respondent deposes how she obtained the two pieces of evidence she seeks to introduce at the appeal. In respect of the receipt, she says that she has in her possession now a receipt which shows that the deposit for the house was paid by Total Construction.

10. The respondent deposes further that she knows one Atul Raji v Masla Goenka ***(Mr. Goenka)***, the Managing Director of TEC Construction since January 2007. He was introduced to her by the appellant. Since then he has been her family friend. She says that since her introduction, Mr. Goenka has regarded her as his sister and she has also regarded him as his brother.

11. The respondent further says that after the appellant had given evidence, she informed Mr. Goenka that the appellant had told the Court that he has paid the deposit for the house to vendor Vicky Narayan. It was then when Mr. Goenka told her that it was him who paid the deposit and not the appellant. Mr. Goenka told her that the monies were paid to Patel &Sharma Lawyers in the West and that he could produce the receipt, which he did.

12. The respondent also deposed that Mr. Goenka stated that he can make an affidavit to confirm the same or come to court to give evidence. He can say why he gifted the monies for the house and the appellant. He can also give evidence as to whether these monies have been paid back to him.

13. The appellant's position is that Mr. Goenka is known to him from some time and he used to do a lot of work for him but he has not introduced him to the respondent in or about 2007 as claimed. He does not know of the relationship between them.

14. He said that Mr. Goenka paid the money on his behalf and it was not a gift. Mr. Goenka had no reason to gift him the monies for the deposit of the house. The

monies that he paid had been returned to him from the works he did for him and from the monies he paid to him from Labasa.

15. The appellant says that Mr. Goenka had previously prepared an affidavit which was filed on behalf of the respondent in the proceedings. He wanted to cross-examine Mr. Goenka during the proceedings but then the respondent's counsel objected to the same. There is therefore no reason why he should give evidence in Court now.

16. He further says that it was always open for the respondent and her counsel to subpoena Mr. Goenka then at the trial but no such opportunity was utilized. Even he was being deprived of cross-examining Mr. Goenka then.

17. The appellant goes onto explain the purpose of the deposit. He stated that the sale and purchase agreement required a higher deposit. The property was sold to him on "*as is where is*" basis.

18. The roof of the property that he was purchasing was burnt down along with some other parts of the house and in order for him to make the move from where he was staying; a lot of work was required to be done. He therefore asked Mr. Vicky Narayan to carry out the extra works and promised that he will pay the costs for the same.

19. Vicky Narayan then reconstructed a bedroom and did internal fixtures and fencing works. He made payments in return. He was in a good relationship with Mr. Vicky Narayan and so he did not label any payments as deposit for works done. The deposit was made for the works that was carried out.

(ii) Recordings of Conversation.

20. In respect of the voice recordings of the conversation of the parties, the respondent says that in November 2015, soon after the judgment was delivered, the appellant approached her on the court stairway wanting to discuss settlement with her without the counsel.

21. After conferring with her solicitors, she agreed to meet him to discuss settlement. She proposed to meet him at the Shop opposite the Court house. While walking down the coffee shop, she decided to record the conversation on her mobile phone in order to keep a record of what was discussed. She did this because the appellant has the propensity to say things and deny the same. She wanted to protect herself if he changed his stance or make accusations against her given the fact that he had already accused her solicitor and her of lying and tampering with evidence in Court.

22. She describes the manner in which she recorded the conversation. She said that she left her mobile phone on top of the table when the parties were having the conversation and recorded the same.

23. In December 2015, a second meeting was held at the conference room at a bank after the appellant requested for a second meeting to discuss his proposal for settlement. She again recorded the conversation for the same reasons.

24. According to the respondent, the recordings confirm that the appellant lied in several places in his evidence and also confirms the fact that the relationship started way before 2007 when he kept claiming under oath that he knew her since middle of year 2008.

25. In respect of the recordings, the appellant's position is that he knows the wife's nature very well. He has spent three years of his life with her. He knew that she was recording the conversation and that she will use it against him at some place for her quest for a share in his property at some point in time. He says he knew she would go to any extent to extract monies from him so he played along with the drama she was staging on both dates by crying and emotionally blackmailing him.

26. He only said things to expose her dramatic character in that she would go to any extent to get monies. The recordings were done discreetly by her but he was aware

of it. He allowed her to continue the recordings. Such recordings are in breach of his constitutional rights and he does not consent to the use of the same in Court. In any event the conversation does not establish anything except that he is of a very good actor. The admission of the recordings will only delay the appeal process.

(iii) Draft faxed Sale and Purchase Agreement.

27. The appellant states that the draft sale and purchase agreement could not be located during the trial proceedings. He only managed to locate the draft when he was recently going through some papers in his old filing cabinet. The draft agreement will show that whilst the agreement was signed in September 2008, it was circulated to him in February 2008. The fact that it was only sent to him and not the respondent will also negate her claims that she was aware or was involved in discussions on the acquisition of the property.

28. The respondent agrees that the sale and purchase agreement was tendered in court and that it required a deposit but says that the appellant has not provided any receipts of payments to the vendor. This draft sale and purchase agreement was always in the old filing cabinet and it could have been located if a proper search was made.

(iv) Cyclone Certificate.

29. The cyclone certificate, according to the appellant, was not produced during the trial. He was asked by the respondent's counsel as to when he knew of the property and also inquired whether there were any records of this. He says he did the cyclone inspection report on behalf of Engineered Designs in 2006 while his principal signed off on the form as the usual practice. This report is relevant and material to support his claim that he began negotiating for the property in 2006 well before he even had a relationship with the respondent.

30. The respondent's position is that the cyclone certificate is a standard report of 2 pages. The cyclone report does not say that it is prepared for the appellant. In any event he was aware of this certificate and should have tendered it in court during the trial.

31. The respondent further says that the report was prepared for someone else at the time and if he prepared the report whilst negotiating for this property then it was unethical for him to do so as the accuracy of the report is questionable.

32. The respondent also says that the property in question was transferred to Mr. Vicky Narayan in May 2006. The appellant could not have negotiated to buy this property in May 2006.

33. The respondent also says that the court had disallowed the appellant from filing further documents in Court due to the delay and this is a way of getting around and about that order which was not appealed on time.

C. Law and Analysis.

34. Having looked at the nature of the evidence that is sought to be introduced by both the parties, I find that the respondent seeks to introduce evidence which existed before the trial, that is, she is seeking to introduce fresh evidence, and also evidence which occurred after the trial, that is, further evidence. The appellant is only seeking to introduce fresh evidence which existed prior to the trial and not further evidence which occurred after the trial.

35. I find that the correct position of the law is this. If parties are seeking to introduce fresh evidence and by this I mean evidence which had existed at the date of the trial but discovered after the trial, they have to satisfy the court that there exists special circumstances.

36. To establish special circumstances, three conditions laid down in ***Ladd v. Marshall [1954] 3 All ER 745*** have to be met:

    1. ***it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;***

    2. ***the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and***

    3. ***the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".***

37. Where the evidence relates to matters which have occurred after the date of the trial or the hearing, the Court has the discretion in deciding whether to grant leave to adduce further evidence. I find that the court will invariably analyse the strength of evidence and see whether it will have an important influence on the result of the case, although it need not be decisive and whether the evidence is apparently credible. The second and the third conditions laid down in ***Ladd v. Marshall (surpa)*** will nevertheless have to be examined and fulfilled.

38. I will deal with each evidence that is sought to be introduced under different heads:

A. Wife's Evidence

(i) Copy Receipt

39. This receipt is not evidence that occurred after the trial. This is evidence that existed before the trial. I am to first determine whether this could have been obtained with reasonable diligence for use at the trial.

40. Mr. Goenka was always aware of the property proceedings on foot between the parties. He even filed an affidavit in court signed in June 2014 stating that he knows the parties since January 2007 and that they were in a relationship. He further stated that both of them mutually agreed on all matters regarding purchase of the property.

41. Mr. Goenka always knew about the parties' relationship status and their dealings in the property. His purpose of giving the affidavit was to establish two things: one was to establish that they were in a relationship when the property was purchased and the other was to establish that the respondent contributed by giving advice and making decisions regarding the purchase of the property.

42. It was then for the respondent to extract from him any material information that he knew regarding the property and ask it to be deposed in the affidavit. If Mr. Goenka was asked for information, since he knew a lot about the parties, he would have disclosed the information about the deposit by total construction.

43. I do not find that the respondent attempted with diligence to obtain information regarding the deposits for the sale of the property and that she cannot immediately after the trial find that information and attempt to cover her failure of not initially obtaining evidence with due diligence.

44. I have examined the receipt which the respondent wants to introduce as fresh evidence. The receipt shows that the monies were paid by Total Construction in February 2009 on behalf of the appellant. The sale and purchase agreement says that the deposit was to be paid on the date of the execution of the agreement, that is, in September 2008. Any contention therefore that the deposit was paid for the house by total construction contradicts the requirement in the sale and purchase agreement. The husband's version therefore is more acceptable that the monies were for other matters and not the deposit for the house.

45. Be that as it may, the receipt clearly states that the monies were paid on account of the appellant and not the respondent. The monies were therefore paid as contribution from the husband whether it be a gift by total construction or some form of loan that was repaid later. Even if the monies were not repaid, that does not affect the evidence on the parties' contribution. If it is a debt, total construction can take separate action to recover the monies.

46. The respondent had always admitted in the evidence that she did not play a strong part in the acquisition of the house. She did not contribute financially towards the acquisition of the property. Her only contribution was in terms of giving advice, having discussion regarding the renovations, exchanging ideas about the interior of the house, buying groceries, doing the household chores, and maintaining the property.

47. In light of her evidence that she did not contribute financially to the property, the introduction of the receipt will not affect the results on the question of her financial contribution and as a result her final percentage contribution because the court has given regard and assessed her non-financial contribution and worked her share out. There is no cross-appeal on the question of the courts' findings of her non-financial contribution and what it equates to in percentage.

48. I must further say that when Mr. Goenka prepared that affidavit, the counsel for the appellant wanted to cross-examine him. The counsel for the respondent objected to producing the witness in Court. Although the records do not show what the ruling was in respect of the application and the objection, it is clear that Mr. Goenka was not produced by the respondent to be cross-examined. This makes me presume that the ruling was in favour of the respondent that Mr. Goenka should not be allowed to be cross-examined.

49. The appellant's counsel had a right to cross-examine the maker of an affidavit where he deposes facts which are contentious. I fail to understand why that right was not allowed and why the respondent now wants to produce the same witness to establish further matters on her behalf. She did not allow the witness to be called to be cross-examined initially.

50. The court record at page 312 in its first 3 sentences state as follows:

"Counsel submits that they wish to interview Gavin Butler. And Atul Rajiv Masla Goenka.

Counsel for lady say they have objection".

51. The above clearly shows that the respondent's counsel did not want the appellant to be afforded an opportunity to clarify matters to which he has made depositions regarding and extract further information from him. If Mr. Goenka was produced, the possibility would be that he would be cross-examined on pertinent issues and that he would have testified on this receipt and the payment made by him.

52. I do not think it is procedurally fair by the appellant to be denied cross-examination of this witness initially and then the respondent be permitted to recall this witness to tender additional evidence on her behalf. The respondent vehemently denies that any application to cross-examine Mr. Goenka was made. I find this to be contrary to the records and I will accept what is available in the records.

53. At the trial, the respondent had always questioned the source of the deposit without asserting that she has made any deposits. The court then correctly found at paragraph 31 that the source of the contribution, in particular, whether it was lawfully acquired was not necessary. The court was to assess who contributed the money and it found that the appellant did. The introduction of the receipt therefore will not change this finding of the court.

54. Even now the respondent does not assert that the monies paid by total construction were her contribution or a gift on her behalf. If it was, she would have known about it and given evidence regarding that at the trial. What then is the purpose of introducing the receipt? It will only be evidence of no probative value.

55. I therefore disallow the application to introduce the receipt as fresh evidence.

(ii) Voice Recording of conversations between the Parties

56. It is clear that the parties met without their counsel for the purposes of settling how they would work out their shares as ordered by the Court. They met in absence of their lawyers. The purpose of the discussion was to settle the matter finally.

57. Settlement talks between the parties are on without prejudice basis and contents of the settlement talks are not admissible in court. The purpose of the settlement and mediation is to encourage the parties to resolve their dispute without reference to the Court.

58. If discussions held during mediation and settlement talks were to be disclosed to Court, the parties will never come to the negotiating table. They will vehemently guard their positions and not open up with mediators and with each other to resolve the matter.

59. In family cases, generally all parties with matters regarding children and property undergo conciliation at one stage. It is not rare for parties to meet on their own. Any such discussion during conciliation and mediation are not matters to be included in the evidence.

60. S. 162(5) (a) of the FLA imposes on the Court an obligation not to make an order regarding the property of the parties unless the parties have attended a conference with the Registrar of the Family Division. There are certain exceptions when this obligation will not apply.

61. The purpose of the parties in attending the conference is to enable them to settle the matter at an early stage and resolve the issues between them. S. 162(6) prohibits the discussion or conversation to be used in proceedings. The section clearly reads:

"Evidence of anything said or of any admission made at a conference…or at any conference with a registrar in proceedings is not admissible in any court or in proceedings before a person authorized by law, or by consent of parties, to hear evidence"

62. The purpose of the above section is very clear. This section allows the parties to a property dispute to freely and without fear discuss settlement so that they need not have to resort to court to impose an order on any one of them. The communication with each other and the Registrar is privileged in that regard.

63. It would be absurd for the court to hold that other settlement talks or discussions between the parties to resolve the property issue is not privileged and discussions admissible in evidence. The rule on inadmissibility extends to all settlement talks and I would find this provision useless if it was to apply to discussions with the Registrar only.

64. The rule makes it clear that no form of recording is allowed because it disturbs the notion of free and fair discussion. I would be guilty of instilling the fear in every litigant that their settlement conversations can be recorded in court and used against them. By allowing the settlement discussions to be used as evidence in court, I will also be sabotaging the intent of the legislature and the modern day concept of encouraging parties to consider mediation of their dispute. On this basis alone the

recording of the discussion between the parties must be disallowed. However I need to address some other legal and factual issues in this case.

65. The respondent's contention is that the recording shows that the appellant has lied at several places and that would affect the result of the trial. First of all the recording cannot be used in evidence and even if it could be, the appellate court cannot attach any probative value to the allegations unless that evidence is tested and tried in Court. There has to be a full blown hearing on the evidence sought to be introduced. This Court would then step in the position of a trial court to analyse the new evidence and revisit the existing evidence to make new orders for distribution on appeal. The appellate court will throw upon it the responsibility of examining the probative value of the further evidence sought to be introduced.

66. The appellate court is always in a disadvantaged position compared to that of the trial Court. The appellate Court will not be in a position to assess the demeanor of the parties as most of the evidence is heard by the lower court. What probative value should be attached to the new evidence with the existing one is an issue that should properly be left for the trial court.

67. There is a specific provision in the FLA being s. 163(1)(a) which clearly states that in cases of one party giving false evidence, the matter should revert to the original trial court to decide whether it will change or vary or set aside its original order and substitute it with a new one. The provision reads:

" If, on application by a person affected by an order made by a court under section 161 in proceedings with respect to the property of the parties to a marriage or either of them, the court is satisfied that –

(a) there has been miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;

the court may, in its discretion, vary the order or set aside and, if it considers appropriate, make another order under section 162 in substitution of the order so set aside"

68. The respondent did not make any application to set aside the judgment based on the fact that false evidence was given by the husband. The issue has only been raised in the appeal which is not the proper forum as identified by the above provision of the law.

69. It is clear that the respondent recorded the discussion for the purposes of using the same in court. Her tone, her insistence that she loved the appellant, that she has been betrayed, that the appellant has lied in court, and that she is under financial difficulty is her attempt to ask the court to revisit the evidence.

70. The respondent did not ever inform the appellant that she was recording the conversation to use it in court. The appellant knew that she was recording the same and said that he played along with the drama to reveal her dramatic side. Even if the appellant knew that the recordings were being done, he does not consent for the same to be used in evidence in court. The discussions could be made part of the proceedings by consent and not otherwise.

71. The conversation of the appellant shows that he was genuinely interested in finding a way to settle the matter without having to sell the house. I cannot say the same for the respondent.

72. The respondent says that there are two reasons why the recordings should be allowed. The first is that it would show that her relationship started well before middle of 2008 as claimed by the husband. She says that the recordings confirm that they started courting in 2004. She also says that the appellant admits that they met in 2003 and that he celebrated her 21st birthday.

73. This evidence of the respondent regarding her courting the appellant from 2003 was already before the court. The respondent had tendered a photograph showing that the appellant had attended her birthday party and that she was sitting on his lap. Her evidence was supported by Mr. Goenka and Mr. Gavin Butler. This conversation is not new evidence before the Court.

74. Even if the conversation is admitted, it will not affect the finding that from 2004 to the time of separation, the respondent did not contribute financially to the acquisition and improvement of the properties. Her contribution was only non-financial. The appeal can therefore be argued with the existing evidence.

75. The house was purchased in 2009 and the vehicle in 2011. The sale and purchase agreement was executed in September 2008. Obviously the discussions to buy the house would have started in 2008. Therefore the introduction of the evidence regarding when the parties started courting will not have any impact on the judgment. The respondent can argue about her contribution from 2008 when the negotiations regarding the purchase of the house was taking place and not prior to that. Even if her contribution is counted from the day the property was acquired, the parties lived in a relationship for not more than 4 years. That is a short-lived relationship. I therefore find that any introduction of the voice recording is not going to seriously affect the findings of the court.

76. The respondent also contends that the conversation shows that the appellant has lied at several places. She does not identify the discrepancies. If she is entitled to adduce the settlement discussion in evidence, she ought to have made an application for setting aside of the orders on the grounds of false evidence leading to miscarriage of justice. She is not able to establish miscarriage of justice at this stage in her application for leave.

B. Husband's Evidence

(i) Draft Sale and Purchase Agreement

77. The draft sale and purchase agreement was always available with the appellant. He himself says that it was kept in his old cabinet. If he had attempted to find it, he would have got this document. I find it strange that he only stumbles upon it post trial when he was going through his old cabinet. I find that there was no diligent search made for this document and if it was it could have been obtained easily.

78. That brings me to examine the draft sale and purchase agreement and see whether it can be relied upon and whether it is apparently a credible document. Apart from the notation on top of the document indicating the faxed date, there is no confirmation of whom the document was faxed to and whether the notations are correct. It is strange that when it comes to sale and purchase agreement, a draft is finalized in 7 months. The notation on the draft is therefore questionable on the aspect of the date on which the same was faxed.

79. The appellant's contention is that although he bought the property in September 2008, he started negotiating the aspect of buying the same on his own in February 2008 without any involvement of the respondent.

80. The appellant tendered the final sale and purchase agreement in court. The draft has a notation on top of the document which shows that the same was faxed from Mr. Mustafa Razak's office to a number 3303823 in February 2008. Apart from that it does not substantiate as to who all were involved in the negotiation of buying the property.

81. One cannot presume that the person to whom documents are faxed is the only one who negotiates the deal. There are so many aspects involved in buying and selling of the property. It ranges from decision making, to inspecting the property, to agreeing to finances, to applying for finances, to negotiating on which solicitors to engage, and so many things. This document which indicates a fax date of the agreement prior

to execution does not substantiate any evidence on contribution of the parties and I do not find that the results of the court's verdict would change based on this.

82. The appellant was free to testify orally as to when he started negotiating the buying of the property and how he was involved alone in the same. In any event the Court has made a finding that the wife's contribution was only non-financial, that is, her contribution was confined to buying of the groceries and managing the house. Even if this document is accepted, the appellant's contribution would not be increased in any way.

(ii) Cyclone Certificate

83. The cyclone certificate was always available with the appellant. He chose not to produce it to the Court and he has to accept the way his counsel chose to run the trial for him. He cannot decide after the judgment to introduce documents which he feels would be relevant to his case. In this way there will never be an end to litigation. Parties can always stumble upon and suddenly discover documents which they should have found with reasonable diligence.

84. It is always important that at the pre-trial stage, every effort is made to extract all the possible documents to disclose to the other party and tender to Court. The trial should never be a place to suddenly attack and take parties by surprise. It deprives the other part a right to prepare his or her case.

85. The authenticity of the cyclone report and the purpose for which it is being used is highly questionable. The cyclone report was prepared when one Mr. Vilikesa Koroi and Mrs Selina Koroi were the owners. The date of the cyclone report is on 12. 05. 2006. Subsequently on 30 May 2006, the property was transferred to one Vicky Narayan from which the appellant bought the property. It therefore does not make sense that when one Mr. Vicky Narayan was trying to buy the property, the appellant was also negotiating to purchase the same.

86. If this evidence was so material, there were other ways to prove that the appellant was negotiating to buy the property since 2006 and the same would be evidence from either Vicky Narayan or the previous owners Mr. and Mrs Koroi.

87. What also alarms me is that if the appellant was buying the property, he could not then provide an engineer's certificate in regards the same property because then the authenticity of the report is questionable due to the conflict of interest. This in itself makes the evidence of the appellant that he started negotiating the aspect of buying the house in 2006 incredible.

88. I do not find that this document is any reliable to adduce in evidence and that the appellant is attempting a second bite at the cherry to adduce more evidence than he initially did.

D. Final Orders

89. In the final analysis, I refuse the appellant and the respondent's application for leave to adduce further and fresh evidence at the appeal. The applications of both the parties are dismissed with an order that each party bears their own costs of the appeal proceedings.

90. The substantive appeal will be heard on the evidence that was adduced at the trial. A hearing date of the substantive appeal shall be fixed in consultation with the parties and their counsel.

Anjala Wati

Judge

31.01.2018

To:

1. ***R. Patel Lawyersfor the Appellant.***
2. ***Shelvin Singh Lawyers for the Respondent.***

3. File: Appeal 15 of 2015.