

IN THE COURT OF APPEAL AT FIJI
APPELLATE JURISDICTION

Civil Appeal No. ABU 66 & 67 of 2019
[On Appeal from decision delivered on 22nd
April, 2014 in Civil Action No. 276 of 2007]

BETWEEN : **SURUJ KUAR** c/o Quality Shop, Nadi Town Arcade, Nadi Town,
Nadi.

APPELLANT

AND : **VIJAY NAND SHARMA** of 15 Foster Street, Suva, trading as
SHARMA ARCHITECT a.k.a **SHARMA ARCHITECTS**
DESIGN GROUP

RESPONDENT

Coram : **Prematilaka, RJA**

Counsel : **Ms. R. Fa for the Appellant**
Mr. M. Chowdhury for the Respondent

Date of Mention : **09 June 2025**

Date of Ruling : **16 June 2025**

RULING

- [1] The appellant's counsel has filed an application for substitution of Suruj Kuar (died on 10 September 2021) with one of her sons Mahenjit Prasad supported by the affidavit of Mahenjit Prasad in relation to ABU 66/2019 and 67/2019. The Respondent is opposing the application.

[2] The substantive application for enlargement of time to seek leave to appeal and file notice of appeal (filed on 07 August 2019 by Suruj Kuar, his mother) relates to the High Court ruling delivered on 07 November 2017¹ where orders were made in favour of the respondent. This interlocutory ruling has been delivered following the main judgment dated 22 April 2014² to the effect that the respondent (plaintiff) is entitled to specific performance of the Sale and Purchase Agreement of 29 April 2004, upon payment of \$391,500.00 by the respondent and Suraj Kaur (first defendant) must pay the respondent costs of \$3,000.00 summarily assessed. In the Ruling sought to be challenged the High Court judge states that:

'I make order that upon the removal of the caveat in HBC Action 413 of 2004:

- (a) The Chief Registrar of the High Court of Fiji shall convey to the plaintiff, the property described as Lot 1 and 3 on DP No. 1312 in CT No. 6739 known as Waibola (part a), having an area of 2 acres, 3 roads and 35 perches presently and comprised in the sale and purchase agreement, upon the payment by the plaintiff to the credit of this action, the balance sum of \$391,500.00;*
- (b) The Registrar of Titles shall dispense with the requirement of the production of the duplicate instrument of title for CT No.6739 for the purpose of registering the instrument of transfer in the Register of Titles;*
- (c) The plaintiff's costs of \$3,000.00 shall be deducted from the balance purchase price of \$391,500.00 and paid to him;*
- (d) Any applicable capital gains tax, charges, or outgoings in respect of the property such as outstanding city rates payable by the first defendant as 'Vendor' be deducted from the balance purchase price of \$391,500.00 and paid to the relevant authorities with the balance sum (if any) held by the High Court of Fiji.*
- (e) Each party shall bear their own costs.*

[3] Both parties in the appellant's extension of time application in ABU 66/2019 and ABU 67/2019 have complied with the directions of the court and both matters were ready to proceed to hearing until the demise of the appellant on 10 September 2021.

¹ **Sharma v Kuar** [2017] FJHC 855; Civil Action 276.2007 (7 November 2017)

² **Sharma v Kuar** [2014] FJHC 270; Civil Action 276.2007 (22 April 2014)

- [4] Mahenjit Prasad who seek to be substituted as the appellant, is one of the sons of Suruj Kuar (now deceased appellant) and the late Ram Prasad and it is his position, that he is entitled to be substituted in these proceeding as (i) he held a Power of Attorney (30 May 2017) for the deceased appellant to deal with his father's properties, (ii) he is one of the Trustee of the estate of the late Ram Prasad (which includes the subject matter of the appeal – CT No.6739) together with his two brothers Indra Jeet Prasad and Shiu Jeet Prasad pursuant to a court order dated 10/06/2009 and (iii) he and his brothers are the beneficiaries under the Last Will and Testament of his deceased mother Suruj Kuar dated 14 October 2014 and an Executor of her Estate. He intends to apply for Probate of her estate.
- [5] The respondent challenges the *status quo* of Mahenjit Prasad and argues that the Power of Attorney is not of any relevance now as the appellant Suruj Kuar is deceased and therefore by law, the Power of Attorney is now revoked. The respondent also argues that even if Certificate of Title No. 6739 forms a part of Estate of Ram Prasad who is Mahenjit Prasad's father, there is no copy of the court order dated 10/6/2009 that confirms that Mahenjit Prasad together with his brothers, namely Indar Jeet Prasad and Shiu Jeet Prasad are the Trustees of the Estate of Ram Prasad to show that they have any interest in the said property as none of them currently hold a probate for Suruj Kuar's estate. However, at the same time the respondent submits that there are three named Trustees and Executors under the last Will and Testament of the deceased Suruj Kuar tacitly admitting that Mahenjit Prasad is at least one of the trustees and executors (perhaps along with his two brothers) though it is clear that the probate is yet to granted to Mahenjit Prasad in the Estate of Suruj Kuar, his late mother & the deceased appellant.
- [6] Order 15 Rule 8 (1) and (2) of the High Court Rules governs the situation when a party to the proceedings passes away and substitution of another party. It reads as follows:

“Change of parties by reason of death, etc (Order 15, r8)

8. (1) Where a party an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death of bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest of liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that the other person be made party to the cause of matter and the proceedings to be carried on as if he or she had been substituted for the first mention party. An application for an order under this paragraph maybe made ex-parte."

[7] The respondent does not dispute the application of Order 15 Rule 8 (1) and (2) of the High Court Rules to the passing of the appellant but urges caution in the substitution of Mahenjit Prasad in place of the deceased appellant on the following grounds.

- a) Mahenjit Prasad does not hold a probate for the Estate of Suruj Kuar;*
- b) there are 2 other Trustees and Executors under Last Will and Testament of the Suruj Kuar, namely, Indar Jeet Prasad and Shiu Jeet Prasad but there is no Deed of Renunciation provided to indicate that they have given up their rights as Trustees and Executors to apply for probate in the Estate of Suruj Kuar or consent that the proposed substituted party should replace the deceased appellant in this matter; and*
- c) since the death of Suruj Kuar on 10.9.2021, the proposed substituted party has still not been granted a probate for the Estate of Suruj Kuar, which indicates that it is highly probable that the probate proceedings (when it is pursued) will be contentious.*


[8] It is a fact that neither Mahenjit Prasad nor any of his two brothers has so far instituted probate proceedings. Mahenjit Prasad is said to be gathering the documents to that and his two brothers are living abroad. It is also a fact that Mahenjit Prasad has not produced to this court any deed of renunciation provided by his two brothers to demonstrate that any one or both of them have given up their rights as Trustees and Executors to apply for probate for the Estate of Suruj Kuar. Therefore the respondent argues that it is highly probable that the probate proceedings (when it is pursued) will be contentious. The question is whether that assumption alone should deter this court allowing the substitution of Mahenjit Prasad as the appellant in order to prosecute the substantive application for extension of time.

- [9] The cause of action arose between the parties (respondent as plaintiff and Suruj Kaur as 01st defendant and her daughter Raj Mati as the 02nd defendant) for specific performance of the Sale and Purchase Agreement dated 29 April 2004 concerning the property – CT 6739 and the determination to be made by the High Court was whether the Sale and Purchase agreement was valid and enforceable. The 01st defendant's case, as pleaded in her statement of defence was that the 02nd defendant, her daughter overpowered her and fraudulently got her to execute the offer letter and Sale and Purchase Agreement. In her affidavit in reply to *inter parte* summons by the plaintiff for an interim injunction restraining the defendants from sub-dividing, selling or mortgaging the land, the 02nd defendant had taken up the position that the plaintiff is entitled to be transferred the land, in terms of the Sale and Purchase Agreement. The 01st defendant too did not give any evidence that the 02nd defendant fraudulently got her to execute the impugned documents nor did the defence call the 02nd defendant to testify. Thus, the 01st defendant had not pursued her allegation that the 02nd defendant had fraudulently misled her to sign the Sale and Purchase Agreement sought to be enforced by the plaintiff. There was no assertion that the second defendant had benefitted from the transaction either. Eventually, the plaintiff did not proceed against the 02nd defendant with regard to the relief of specific performance, since she was removed as trustee of the estate of Ram Prasad. The High Court gave judgment (22 April 2014) *inter alia* that the plaintiff is entitled to specific performance of the Sale and Purchase agreement.
- [10] Thus, the substitution of Mahenjit Prasad would not alter the High Court Judgment. Nor would it irreparably or irrevocably prejudice the orders made by the High Court in its Ruling (07 November 2017) sought to be appealed in the current proceedings unless Mahenjit Prasad succeeds in his extension of time application and then the substantive appeal itself against the Ruling. Because, by the substitution, all what Mahenjit Prasad could do is to pursue this application and the appeal, if any and nothing else. His substitution would not in any way deprive his two brothers of their rights under the Last Will and Testament of the Suruj Kuar with regard to the property concerned. In my view, the fact that Mahenjit Prasad is at least one of the trustees and executors though it is clear that the probate is yet to be granted to Mahenjit Prasad in the Estate of Suruj Kuar accords sufficient status quo for him to be substituted for the purpose of current proceedings.

- [11] In my view, neither Tirikula v Tirikula³ nor Kumari v Reddy⁴ are applicable and helpful regarding Mahenjit Prasad's application for substitution. Those High Court decisions have been decided in different factual contexts.
- [12] The respondent submits that the application for substitution and subsequently the substantive appeal should be dismissed with costs. The latter is not an issue at this stage at all as there is no appeal on foot to be dismissed. The second application is premature because for the reasons given above, acting under section 20(1)(j) of the Court of Appeal Act read with Order 15 Rule (8) (1) and (2) of the High Court Rules, I inclined to allow Mahenjit Prasad's application for substitution. Thus, I am not inclined to dismiss the extension of time to appeal application at this stage as I am only considering the question of substitution at this stage. I must emphasize that Mahenjit Prasad's substitution has no bearing on the broader substantive rights of parties to these proceedings and his two brothers Indar Jeet Prasad and Shiu Jeet Prasad. Further, this substitution would only be valid and applicable to the current proceedings including a substantive appeal against the Ruling, if any and not to any other proceedings that may happen in the High Court or this court.

Orders of the Court:

1. *Application to substitute Mahenjit Prasad a.k.a Mahen Jeet Prasad a.k.a Mahend Jeet Prasad in place of the appellant Suruj Kuar, is allowed only in so far as these proceedings are concerned.*
2. *The substituted party is directed to amend the caption in all pleadings relevant to the summons for extension of time to apply for leave to appeal and file and serve proposed notice of appeal out of time.*
3. *Costs of this application be in the cause.*


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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Fa & Company for the Appellant
Neel Shivam Lawyers for the Respondent

³ [2011] FJHC 133; HBC374.2008 (3 March 2011)

⁴ [2018] FJHC 1031; HBC227.2012 (19 October 2018)

