

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 160 OF 2015

BETWEEN : **AMI CHAND** of Votualevu, Nadi in Fiji, Farmer.
1ST PLAINTIFF

RITESHNI SHALINI LATA of Votualevu, Nadi in Fiji,
Domestic Duties.
2ND PLAINTIFF

AND : **SUBHAG WATI** of Votualevu, Nadi in Fiji, Domestic Duties as
Executrix and Trustee of the Estate of Chandu Lal.
1ST DEFENDANT

: **AVINESH PRASAD & RAGNI DEVI** of Votualevu, Nadi.
2ND DEFENDANT

: **ITAUKEI LAND TRUST BOARD** a body incorporated under
the iTaukei Land Trust Act Cap 134 with its registered office at
431 Victoria Parade, Suva.
3RD DEFENDANT

Appearances : Mr E. Maopa with Ms R. Varasikete for the plaintiffs
Ms B. Doton with Ms S. Lata for the first defendant
Mr V. Sharma for the second defendants

Date of Trial : 25 August 2017, 5 & 6 December 2017

Date of Submission: 16 March 2018 (plaintiff), 8 May 2018 (second defendants
submission in reply to plaintiff's submission), 22 May 2018 (first
defendant), 24 May 2018 (submission in response to a
submission by the second defendant) and 12 June 2018
(submission in response to a submission by the first defendant)

Date of Judgment : 3 July 2018

J U D G M E N T

Introduction

[01] The plaintiffs instituted this action against the defendants by way of writ of summons, indorsed with the statement of claim. The first and second defendants filed their statement of defence, but the third defendant failed to do so. As a consequence, a default judgment was entered against the third defendant and failed to have the default judgment set aside or defend the action during the trial.

[02] The plaintiff is suing in his personal capacity while the second plaintiff is suing as the Administratrix of the Estate of Mohan Lal, her father. The remedies sought by the plaintiffs are as follows:

- a) A declaration that the last Will and Testament of Chandu Lal dated 3 January 2008 is null and void.
- b) An order that all proceed on the sale of the estate property being Native Lease No. 25971 land known as Navatu No. 5 on ND 4120 having area of 10 A 1 rood and 24 perches be distributed in accordance to the Will of Ram Adhar.
- c) An Order that the sale of the estate property to Avinesh Prasad and Ragni Devi was fraudulent hence such transfer registered on 28 July 2015, unto the name and style of Avinesh Prasad and Ragni Devi revoked and cancelled by the Registrar of Titles forthwith.
- d) An order against the second and third defendants not to deal, sell, transfer or assign whatsoever the Native Lease No. 259741 land known as Navatu No. 5 on ND 4120 having area of 10 A 1 rood and 24 perches.
- e) An Order declaration that the first and second plaintiffs are entitled to 3 acres of land in the estate of Chandu Lal.
- f) Interest.
- g) Cost of indemnity basis.
- h) Any other relief court deems just fit.

[03] At the trial the plaintiff called two (2) witnesses. The first defendant called five (5) witnesses while the second defendant called one (1) witness.

[04] The parties have also filed their respective submissions. I am grateful to counsel for their submissions, which was of great assistance in drafting this judgment.

Background

[05] The plaintiffs and the first defendant once lived together on a piece of land known as Navatu in Votualevu, Nadi (*'the land'*). The first plaintiff's father, the late Ram Adhar, initially was the lessee of the land. He (plaintiff's father) had 5 sons and 6 daughters.

[06] The late Ram Adhar executed his Last Will and Testament to give devise and bequeath his property to his wife, Shiu Kumari, his sons namely Lal Chand, Ami Chand, Shiri Chand and his daughter Bisun Kumari in equal shares and shares alike. He appointed Lal Chand and Shiu Kumari as his trustees and executors.

[07] Ram Adhar passed away but his estate was never distributed according to his Last Will until the lease expired in 2000. Ram Adhar's sons, Ami Chand, Mohan Lal and Chandu Lal continued to live and do cane farming on the land.

[08] A new lease over the land was granted to Chandu Lal, one of the sons of Ram Adhar (not being the beneficiary under the Last Will) for a term of 30 years effective from 1 January 2001.

[09] In 2004, Chandu Lal signed an agreement and thereby he gave authority to his brothers Ami Chand, the plaintiff and Mohan Lal to cultivate their shares of 3 acres of the land. He (Chandu Lal) also executed his Last Will and in 2004, which legates the land as follows:

- *four (4) acres of Native Lease No. 25971 Ref. 4/10/3432 to his wife Subhag Wati together with the dwelling house presently occupied by her;*
- *three (3) acres of Native Lease No. 25971 Ref 4/10/3432 to Mohan Lal together with the dwelling house presently occupied by him and;*
- *three (3) acres of Native Lease No. 25971 Ref. 4/10/3432 to Ami Chand together with the dwelling house occupied by him.*
- *the rest and remainder to his wife Subhag Wati absolutely. (Emphasis is mine)*

- [10] Before this death, Chandu Lal executed a later Will in 2008 (*'the second Will'*). The second Will bequeaths all his property both real and personal unto his trustees and the rest, remainder and residuary of the property to his wife Subhag Wati for her own use and benefit absolutely. He appointed Subhag Wati as his executrix and trustee.
- [11] After Chandu Lal's death Subhag Wati made an agreement dated 3 February 2009, authorising Ami Chand and Mohan Lal to cultivate their three (3) acres share of land and plant sugar cane. Subsequently, she executed her Last Will and Testament in 2009 and bequeath:
- *three (3) acres out of Native Lease No. 25971 Ref.4/10/3432 to Ami Chand together with the dwelling house presently occupied by him.*
 - *three (3) acres out of Native Lease No. 25971 Ref.4/10/3432 to Mohan Lal together with the dwelling house presently occupied by him.*
 - *the rest and remainder of the property in the Estate of Chandu Lal and all her property to Shri Chand s/o Ram Adhar of Edmonton, Canada.*
- [12] As a matter of fact, the Estate of Chandu Lal being Native Lease No. 25971 was sold by Subhag Wati and transferred and registered on 28 July 2015 to the second defendants, Avinesh Prasad and Ragni Devi. Subhag Wati now resides on a different property at Votualevu, Nadi.
- [13] The first plaintiff was evicted from the property. His dwelling house has been demolished by the second defendants. He now resides with his son in law at Solovi, Nadi. The second plaintiff alleges that she was chased out from the property by Subhag Wati and now resides in Legalega, Nadi.
- [14] In this background, the plaintiffs seek remedies as in the statement of claim.

Agreed facts

- [15] At the Pre-Trial Conference ('PTC') held between the plaintiff and second defendant the facts agreed were that:

The second defendants purchased the land known as Navatu No. 5 on ND 412 in the Tikina of Nadi, province of Ba having an area of 10 acres, 1 rood and 24 perches from the first defendant.

[16] As Between the plaintiff and the first defendant, the following facts were agreed upon:

1. *The first plaintiff is the son of Ram Adhar, the initially registered proprietor of the land known as Navatu No. 5 on ND 412 in the Tikina of Nadi, province of Ba having an area of 10 acres, 1 rood and 24 perches.*
2. *The second plaintiff is Ami Chand's niece whose father is Mohan Lal (son of Ram Adhar).*
3. *The first defendant is the sister in law of the plaintiff and widow of Chandu Lal, (son of Ram Adhar).*
4. *The second defendant purchased from the first defendant Native Land property being Native Lease NL 25971 situated at Votualevu, Nadi.*
5. *The first plaintiff and the first defendant resided on the property for more than 30 years or so.*
6. *By Will dated 20 October 1978, Ram Adhar (father of the first plaintiff and father in law of the first defendant) devised and bequeathed all his properties both real and personal and whosoever situates to:*
 - i) *Shiu Kumari (wife) of the testator*
 - ii) *Lal Chand (son) of the testator*
 - iii) *Ami Chand (son) of the testator*
 - iv) *Shiri Chand (son) of the testator*
 - v) *Bisun Kumari (daughter) of the testator*
7. *The Trustee and Executors are Shiu Kumari and Lata Chand, the wife and son respectively of Ram Adhar.*
8. *On or about 1999, the lease over the land being Native Lease NL 25971 situate at Votualevu, Nadi had expired.*
9. *On or about November 2001, Chandu Lal had the new lease issued in his name only from the third defendant being Lease No. NL 25971.*

10. *By Will dated 6 May 2004, Chandu Lal bequeaths 3 acres of land each to Mohan Lal and Ami Chand from Native Lease No. 25971, Ref No. 4/10/3432 and 4 acres to Subhag Wati.*
11. *By the second Will of Chandu Lal dated 03 January 2008 he devise and bequeath all estate both real and personal to his wife Subhag Wati only. Chandu Lal died on 26 April 2008.*

The issues

[17] The issues to be determined between the plaintiff and the first defendant include:

1. *Whether the estate of Ram Adhar was distributed by the Trustees and Executors of the Last Will & Testament of Ram Adhar in accordance to his Will of Ram Adhar.*
2. *Whether the first plaintiff and Mohan Lal along with Chandu Lal, the first defendant's husband jointly made application to the third defendant for a renewal of the lease in their names as tenants in common with the remaining beneficiaries (Bisun Kumari and Shiu Chand) renouncing their shares in favour of the Applicants.*
3. *Whether the lease issued in the name of Chandu Lal on or about November 2001 is the same land being part of the Estate of Ram Adhar.*
4. *Whether the first plaintiff and Mohan Lal renounced their interest in the said property.*
5. *Whether the third defendant had a duty of care and fiduciary duty to the plaintiff and the late Mohan Lal.*
6. *If there was a breach of duty, was there a breach of this duty by the third defendant which caused the plaintiffs to suffer loss and continue to suffer loss and damage such as:*
 - i. *Loss of proprietary in the land.*
 - ii. *Loss of use of land.*
 - iii. *Loss of income to be derived from the land.*
 - iv. *Delays in payments of any income from the land.*
7. *Whether by agreement dated 6 May 2004, the late Chandu Lal agreed to allocate 3 acres of the land to the first plaintiff and Mohan Lal as their share in the property.*

8. *Whether under the agreement dated 3 February 2009, the first defendant agreed to allocate 3 acres of land each to the first plaintiff and late Mohan Lal as their shares of the property.*
9. *Whether the agreements dated 6 May 2004 and 3 February 2009:*
 - i. *Are statures barred?*
 - j. *Are share farming agreements only?*
 - k. *Were breached by the plaintiff and late Mohan Lal?*
 - l. *Were breached by the late Chandu Lal?*
 - m. *Require consent of ITaukei Trust Board?*
 - n. *Are null and void and unenforceable?*
10. *Whether the defendant breached the said agreements (dated 6 May 2004 and 3 February 2009) by:*
 - i. *Evicting the second plaintiff out of the allocation for Mohan Lal?*
 - ii. *Selling the said whole property to the third party?*
 - iii. *Failing to allocate and distribute and transfer such 3 acres of land to Mohan Lal and Ami Chand as their share of the property?*
 - vi. *Failing to consider Mr Mohan Lal and Ami Chand interest of the land?*
 - v. *Failing to consider payment for compensation to the said Mohan Chand and Ami Chand?*
11. *Whether the last Will and Testament of Chandu Lal dated 3 January 2008 was made fraudulent.*
12. *Whether the first defendant in her personal capacity has devised and bequeathed 3 acres of land each to late Mohan Lal and first plaintiff from NL 25971 together with the dwelling house they respectively occupy.*
13. *Whether the plaintiff suffer loss and damages?*
14. *Whether [the] plaintiff is entitled to the prayers sought?*

[18] The following issues are to be determined for the second defendant:

1. *Whether the second defendant is a party to the fraudulent transfer of the land from the first defendant with the consent of the third defendant to the dealing?*
2. *Whether the second defendant is a Bona fide purchaser from the first defendant for value and without any notice of interest by the plaintiff?*
3. *Whether the second defendant has significantly improved on the property after the purchase as particularized in paragraph 7 of the Counterclaim?*
4. *Whether the second defendant is also paying for [the] mortgage on the land?*
5. *Whether the second defendant has a cane contract on the land?*
6. *Whether the by way of not giving vacant possession to the second defendant the plaintiffs have caused them losses and damages? If so, what is the quantum?*
7. *Whether the plaintiff ought to give vacant possession or have [an] equitable interest in the said property?*
8. *Whether the successful parties are entitled to cost? If so, what is the quantum?*

Agreed Documents

[19] Agreed bundle of documents tendered at the trial contains each party's list of documents.

The Evidence

Plaintiff's evidence

[20] The plaintiff called two witnesses, i.e. 1. Ami Chand, the first plaintiff (PW1) and 2. Riteshni Lata, the second plaintiff (PW2).

[21] PW1 in evidence states:

- a) He is a farmer by profession. His level of education is class 5. He was working himself.
- b) He was assisting his father in the farm. His father got ill and stayed home. I started farming with other brothers. We work on the farm. His father passed away on 4 November 1978 (*ABoD Tab 3*).
- c) His father made a Will dated 20 October 1978 (*Tab 2, Para 2 & 3 counsel reads...*).
- d) After the father's death, the property was distributed. A piece of land was given to him by his mother and his brother – 2 acres allocated to him. The sister was not allocated. She got married and left. The land was 17 acres. It was for cane proceeds.
- e) The lease expired in 2000. We went to the Mataqali and discussed. They offered a lease to my brothers – Chandu Lal, Mohan Lal, Ami Chand but the Lease came under my brother, Chandu Lal (*New lease. Tab 1 – lease 25971*).
- f) We were not aware of the lease was given under my brother. He was engaged in getting the lease. He said lease has come to his name and we can work together. The lease fee was paid by three brothers. The Lease should have come under all brothers name. We were staying on the same land.
- g) His portion he had to cultivate. Mohan Lal resided just beside.
- h) In 2004, Chandu Lal made an agreement to continue with my cultivation (*Tab 4 – P/Ex (4)*). That year Chandu Lal's health was not good – asthma. Chandu Lal made a Will in 2004 (*Tab 5, counsel reads...*) He said: '*Chandu Lal allocated to me by this will PE (5). I am cultivating 3 acres.*'
- i) Chandu Lal passed away on 26 February 2008. Subhag Wati (first defendant) (Wati) took out a probate (*Tab 7 – P/E 6*). He was not aware of the probate.
- j) He was unaware of Chandu Lal's second Will (*Tab 6*). At that time he was very sick. He (Chandu) was admitted to the hospital. He did not know how long he was in the hospital.
- k) Wati made a Will (*Tab 8*). His brother came from Canada and gave this document, Will ("*PE 7*").
- l) Wati made an agreement with him about the land (*Tab 9*).

- m) Wati was trying to sell the property. He was not aware of it. Avinesh (second defendant) came to cultivate. Then he got to know that she has sold it. He met Avinesh on the farm. Avinesh told him: 'I have purchased the land for \$120,000.00' he came to my house one afternoon. Actually, Avinesh had bought 10 acres for \$550,000, and now he says \$120,000.00.
- n) Wati did not tell him that she is going to sell the land. Avinesh did not tell me he is going to buy the land. Wati did not tell she is selling for \$70,000.00.
- o) They did not offer any proceeds of the sale. Sale proceeds went to his (PW1's) sister-in-law. His brother Mohan also did not receive the proceeds of the sale and the cane proceeds.
- p) When they bought the property, he was still on the property. Now he resides at his daughter in laws house, Nadi. We received court notice to vacate we respected the court order. After he vacated the house, what had happened to the house. His house is valued at \$80,000.00 which is a cement house with 4-5 bedrooms, laundry and kitchen. Avinesh did not compensate me.

[22] In cross- examination by the first defendant PW1 states:

- a) Mohan Lal and Chandu Lal are not beneficiaries.
- b) The father was ill and could not work. He died on 4 November 1978. Father signed the Will dated 20 October 1978.
- c) Original lease expired in 1999. There was a signature for lease for me before expiration. I did not receive a separate lease. We were cultivating Chandu Lal's cane farm after expiration. We jointly made an application for renewal. We don't have a document. Chandu Lal only paid? No, we contributed. No doc. We gave money to our brother. He told me we can work together. He allowed me to continue with cultivation (2004 agreement, *Tab (4) – 6/5/04*). When brother was alive we use to receive cane proceeds. Now there is no cultivation from 2000. Sister in law did not sign the form. I was doing my cultivation. Will of Chandu Lal – 6/5/04. Chandu Lal was sick. Chandu Lal was coughing. We did know what his medical condition was. You never visited Chandu Lal in the hospital? I visited.

- d) In 2005, you fought with Chandu Lal about the land? Fought as casual. We were not in talking terms. I visited him at the hospital.
- e) 2nd will – I found out about it when the land was sold. 2009 agreement by S. Wati? Yes. (Tab (9) you forced S. Wati to sign? No. she signed herself. The agreement was not given to TLTB.
- f) You requested notice to vacate R S Lata? No.
- g) S. Wati offered a portion for free, you refused? I declined. I wanted to live where I was allocated. She did not tell she's going to sell the land. She offered the house area, you refused? No.
- h) No application to revoke the probate? Finally, I did not want to contest. She should have told us about the probate. I have interest in the property according to the Will.

Cross examination by the second defendant

- i) Second defendant (D2) has bought the land from D1? Yes. Wati sold it and received money. The land is registered under D2's name? Yes.
- j) Did you stop the transfer? I told S. Wati to stop. I have the Will of my brother. I don't have a document to suggest that. I stopped verbally. Did you stop the second Defendant? No.
- k) D2 has no knowledge of your interest? S. Wati knows. D2 was a *bona fide* purchaser? I was not aware.
- l) D2 is in possession? Yes, after the purchase. I was evicted by order of the High Court. I can't recall the date I vacated. (Order Shown). You vacated in September? I was served with an Order.
- m) D2 is developing the property commercially? I don't know.
- n) You were sleeping on your right? I had instructed my lawyer. The case is still going on.

[23] PW1 in re-examination states as follows:

- a) I claim fraud against D2. I was on the land. \$70,000.00 is the consideration for 10 acres. When D2 worked in the land, he told me he has purchased the land in 2015. I told him of my interest and my share. I don't know when D2 came into possession.

[24] PW2, Riteshni Shalini Lata in her evidence states that:

- b) Ami Chand is my uncle, younger brother of my father, Mohan Lal, deceased. I have a probate for my father (LoA- PE10). My father was staying in Votualevu, beside A. Chand. I was staying with my father. My father was cultivating sugar cane, receiving money for his livelihood. I was 20 years old at that time. There were houses: 1- Ami Chand 2- Mohan Lal 3 - Chandu Lal, family house. My father had a share on the farm – land and house. Before my father died, there was an agreement. They had their own share (3 acres) and they have to cultivate [PE4].
- c) PE9 allocates 3 acres to my father. S. Wati did not honour the agreement.
- d) We came to know the land has been sold to A. Prasad. S. Wati did not provide any proceeds. She did not consult us. I am staying with my in laws, Votualevu. When my father passed away, I asked Wati my share. She said: ‘you have nothing in this property and you ask from your in laws.’
- e) S Wati did not tell us she is selling the land.
- f) I am claiming my father’s share. I claim Mr A. Prasad for fraud. When the lease expired it was jointly renewed. The lease came under one person - Chandu Lal.
- g) Chandu Lal made a Will making my father as trustee. We were cultivating our share without any problems. Prasad was aware that A. Chand was occupying the land. Knowing that he purchased the land. I don’t know about the Sale and Purchase agreement.

Cross-examination by D1

[25] In cross-examination by the first defendant (D1), PW2 states:

- a) My father had no interest in the property under the Will of Ram Adhar.
- b) There is an authority to cultivate.
- c) My father passed away on 30 December 2009. I claim under my father’s estate – under my father’s probate.
- d) I’m aware that my father had an interest in the property. It was a family problem. We were told that we don’t have any interest or lease for the property. I engaged Counsel where we came to know the land has been sold. I did not take action it was a family problem. I took action when our lawyer told us that land has been sold.
- e) Q: Ami Chand drove you away? A: No.

- f) My father told us that he was going for the renewal of the lease with his brothers. No other evidence put from this.
- g) Q: You were not in touch with my client after your father passed away and up until you left the property? A: No

Cross-examination by D2

[26] PW2 was also cross examined by D2. During cross-examination by D2, PW2 states:

- h) Doc. 6 Will of Chandu Lal? I have no knowledge of the Will. Probate has been given and it has not been set aside? Not aware. D1 is the owner and he can transfer? Not aware. She is the sole trustee? Not aware. Probate was advertised? I don't have any knowledge
- i) The land has been sold? Yes. The money would have been paid. D2 paid money to D1. I don't know. Did you notify of your interest to A. Prasad? I have not met him. I did not notify him.
- j) D2 was a bona fide purchaser? No. at that moment I was not on the piece of land.

[27] PW2 in re-examination states: Wati transfer of the property to A. Prasad and Ragni Devi effected when these proceedings were initiated? Not sure. HBC 160/15 – this action was in motion when the transfer was effected? Yes.

First defendant's evidence

[28] Subhag Wati, the first defendant (1DW1) testified that:

- a) Chandu Lal's her husband. After the marriage, she lived in Votualevu with her husband and his family, his brothers and sisters.
- b) Ami Chand's her husband's brother. Ami Chand was with us. Mohan Lal is Riteshni's father. She also lived with us. When they vacated she sold the property. Mohan Lal passed away in 2009 or 2011. He was living in Votualevu in other house. There were 2 other houses. We occupied one house. Another house was for visitors.
- c) Ami Chand & Mohan Lal were staying separately in their houses.
- d) Her husband was looking after the property. She had to cultivate. They were looking after their own houses.
- e) She was unaware of the TLTB's consent. Her husband did the paper work. He never discussed the property. She was not aware of the Will.
- f) (*Doc 7, PBOB* was read) The Lease was under her husband's name.

- g) She said she can't identify the Will as she has a vision problem.
- h) She was aware of the agreement about cultivation between Mohan Lal and Ami Chand to cultivate sugar cane and harvest it.
- i) After her husband's death, she told Riteshni that she has nothing in the property. She left the property in 2013/14.
- j) Her husband passed away in 2008 due to asthma and short breath. He had no other sickness. He used to go to the hospital almost every day. His leg got swelling. He understood what was happening. He was in his mid-70. After her husband passed away she was alone in the house. She had to hire labourers to cultivate.
- k) Ami Chand assisted. There was an agreement with him (*PE 9*). She made that document. There was no TLTB's consent. They were not cultivating. The land was lying idle. She told Ami Chand about her intention to sell the land. He swore at me. I was given a piece of land. I got sick. Ronald David, a boy staying in my room.
- l) The Lease was about to expire. Cultivation expenses increased. So, she decided to sell. She did not advertise. They enquired and came to buy. Avinesh (2D) came to buy. She did not engage a lawyer to assist the sale. (*SAPA Tab 9* was shown and identified). It was made at the lawyer's office (Counsel who is present in court made). A. Ram made this. Shiu Narayan took me to the lawyer. Shiu Narayan is her brother-in-law.
- m) The purchaser (2D) took the pictures. They did not talk about Ami Chand. He (purchaser) saw the house. Ami Chand was there. I told him to stay and that piece of land where the house was will be given. The purchaser was also given that piece of land.
- n) She sold \$70,000.00 She received \$70,000.00.
- o) She did make a will. They were on good terms with me that's why she made the Will.
- p) After her husband's death, Ami Chand, M. Chand did not claim interest. Riteshni (P2) also did not claim an interest in the land.

[29] During the cross-examination by the second defendant, 1DW1 states that: She admitted that there was no survey. She intended to sell the entire land. Riteshni had already vacated the property. She did not say anything about the eviction of Ami Chand.

[30] In the cross-examination by the plaintiff, 1DW1 states:

- a) After selling the house, she was staying with Shiu Narayan but denied living with Shiu Narayan before selling the house.

- b) She said Shiu Narayan helped her to sell the house. He told her to sell the property.
- c) She and Shiu Narayan went to solicitor's office and she signed SPA before the solicitors. The price was \$70,000. Her solicitor did not advise to have a valuation. \$70,000 was the price offered to buy 10 acres. She accepted that. Her lawyer told her \$70,000 was not sufficient for 10 acres.
- d) Her lawyer did not explain the content of the sale and purchase agreement (PE 8 was shown and agreed).
- e) She said she signs two type of signatures (PE 9 was shown and admitted).
- f) She admitted that she normally writes her name when sign.
- g) She admitted that she was giving a piece of land.
- h) To the question that: you gave 3 acres to A. Chand & 2 acres to M. Lal upon your husband's death? She answered: 'I can't recall.'
- i) She agreed to M. Lal to cultivate 3 acres each.
- j) When suggested that: You failed to honour that agreement? She said they did not honour. They did not cultivate and work.
- k) There was no police report about Ami Chand's swearing at her. Police advised not to go to his house.
- l) She gave Ami Chand & Riteshni the piece of land. They did not work.
- m) She said 'no' when put that she chased Riteshni.
- n) Before her husband passed away, he used to get admitted to the hospital almost every day.
- o) She said she can't read small letters but can read big letters. She did not have any medical report to confirm her eye problem. She did not bring her pair of glasses to court.

[31] 1DW 2 (Roland David) gave evidence on behalf of the first defendant. He in his evidence states that: 'Subhag Wati gave me a lease in 2010. I was helping her in planting cane. Living beside her, 10 meters away. Moved away in 2015. Ami Chand I know. He's Wati's brother in law. He was 40m away from me. 2014 we went together and her intention to sell the property and told him he has taken ½ acre. He swore at her mother and stopped. She didn't want to go to the police. He was annoying her talking rudely. He was threatening her when someone came to see the property. Riteshni, she was staying 40m away from me. I can remember the day she left. I heard 2 ladies swearing at each other. After selling the property she gave me time to leave, about a month.

[32] Under cross-examination by the plaintiff, 1DW2 states: he was staying free. The swearing incident occurred. He admitted talking to Subhag Wati yesterday (the day before he was giving evidence). She said Shiu Narayan used to come not

very often. Before the sale of the property, Shiu Narayan used to come and visit Wati. After the sale of the property, they went together. She (Wati) went to Shiu Narayan's house. Shiu Narayan comes and assists her.

[33] 1DW2 was not re-examined.

[34] 1DW3, (Shiu Narayan) in his evidence states: 'I am helping people solving the conflict in the village. Chandu Lal – I knew him since birth. Ami Chand and his brother, we staying in the same village. I know Wati, she's my sister in law. I drafted a letter to DO regarding a conflict. I advised Chandu Lal. Chandu Lal's Will. It was read out to him (P/E 5 was shown and recognize). I just signed. He told why he's making a Will. He confirmed the Will. He made the secured Will. (P/E-7 was shown). It was prepared by one of the clerks. I signed the document and explained. It was his will he wanted it. He did not ask any question. He was not sickly at the time. After Chandu Lal died, I used to visit Wati over or 2 times a week. When he died, I was at home. He passed away in the hospital. I admitted him to the hospital. I visited Wati after Chandu Lal passed away. I financially assisted her. Assisted her in cultivation. Probate was taken according to the Will. Brother took out the probate. Shiu Chand, Chandu's brother – he consulted with me when he applied for probate. I told him there was another will. I don't have, Mr Chandu know all probate. Ami Chand's agreed for cultivation. I signed the agreement. (PE 9 was shown) – I was not present on the day the agreement was made. Another document I signed for Wati. In 2009, I signed a document for Chandu Lal. (Tab 4 was shown) – I signed it. They have to cultivate the land. (Tab 9 was shown again) Wati came to get advice to Growers Council. She made it for cultivation. Chand worked before 2010. After that, he did not. The land was idle. Wati's share I was following. Wati told me she wanted to sell the land. I advised her to tell Ami Chand and give him his share. I don't know whether she influenced him. 3 people came to inspect the property. They were offering lesser amount - \$50,000, \$55,000 and \$60,000. The second defendant- I know. They reside in the same village. They told me they are buying the property. I advised her to go to a lawyer, Hari Ram. She went to him. Agreement prepared. (SPA was shown and identified) I was present. Avinesh, Ragni & Wati were present on the day of signing. I was not there.'

[35] In cross-examination, 1DW3 states:

- a) His wife passed away in 2004. Since then he is single.
- b) Avinesh stays where he stays. He knows him as a businessman.

- c) Avinesh, Wati and he agreed for \$70,000. He is an advisory counsellor. It was agricultural land. The price of the agricultural land depends on the nature of land and the title.
- d) He drafted the first Will of Chandu Lal. Chandu Lal and he signed. Krishna Mani also signed. He also drafted the second Will and he signed. In 2008, Chandu Lal was sickly and taken to the hospital. He did come to the office (to the clerk). I signed it also. I was present, signed at Growers office, Nadi.
- e) When it was put to him that in 2008, Chandu Lal cannot walk, he said 'No' came to the office. Chandu Lal died after a month he signed the Will.
- f) He made the first Will. He made the agreement (*Tab 9*) in 2009. He also made the Will for Wati.
- g) He said he is not aware of Wati's level of education. He said Wati's instructions were taken and prepared accordingly.
- h) PE7, the will of Chandu Lal gave the whole property to Wati.
- i) He admitted that he was assisting Wati in 2008.
- j) Chandu Lal died in hospital. He died that day. He was sick on the last day. He does not have a medical report.
- k) He did not take Wati to Ram's office.
- l) He gave advice that the document should be read and explained to her.
- m) He received the settlement price of \$70,000. After that, she (Wati) came with him. He has a portion of land for her.

[36] 1DW3, Reijeli Suzie Seru, the Secretary at Sugar Cane Growers Council, in her evidence she states that: Chandu Lal was a Registered Grower, Legalega Sector. He instructed to draft a Will in 2004. He had come with his wife to give instructions. He wanted to give the whole property to his wife. We read out and explained, he agreed and signed. He wanted a simple Will. Explained in the Hindi language. He understood what he was signing for. The Will was kept in our office. Shiu Narayan- he was present. He kept the original in his office. Chandu Lal was fit and fine when he came to the office.

[37] Under cross-examination, 1DW3 states that when *Ex (5)* (6 May 2004) was shown, she said she did not sign that will.

[38] 1DW4, Unaisi Tabuakuro, Estate Officer, TLTB in her evidence states: Chandu Lal's application in 2000 with the consent of the LOU – 3 March 2000. No other application was received of the lease, 30 years for Agricultural purposes. Consent

of Mataqali was obtained before the application. No consultation was done with the LOU (*Tendered D2*). The inspection was carried out on 13 July 2000 as identified by Chandu Lal. There was an improvement. No others were claiming. (She tendered Chandu Lal's letter marked as 1D5 and the offer letter marked as 1D6). There is consent to the mortgage. The land has been transferred to Avinesh and entered on the memo.

- [39] During the cross-examination, 1DW4 states that: TLTB was aware of Ami Chand and M. Lal's occupation. No consultation was done in the case after the lease had expired.

Second defendant's evidence

- [40] Avinesh Prasad (2DW1) gave evidence on his own behalf. In his evidence, he states that: *"I wanted a commercial block. People were telling me that 10 acres of land in Votuavevu was on for sale. I went to Wati for discussions and offered \$70,000. We went to Ram Law's. Wati did not tell me about Ami Chand and Riteshni. Shiu Narayan took us to Ram's Law. The clerk did not explain the content of the document. Naicker also signed. Naicker told me that the sale was for entire land, A10 RI. If anyone occupying we can vacate. Wati told me that 2 people, one Ronald and Ami Chand. Wati did not inform me that she had obtained consent to transfer from TLTB. After purchasing, I did some development, 7 acres. I bulldozed the buildings. I purchased a tractor for the cultivation of sugar cane. I did cultivate in 2016 and 2017. I gave the notice to vacate through my lawyer. I asked 1 acre for commercial purposes. He told me to go to a surveyor. He gave me an approval letter. After that TC's approval, I went to TLTB and paid \$100. Q. Was it a fraudulent transferred? A: Not true."*
- [41] Under cross-examination, 2DW1 states that: *"The purpose of buying the land for \$70,000.00 was to develop. Q: You were trying to sell property of \$550,000? A: Yes. I told Wati that we will buy for \$70,000. I went to her lawyer's office. Q: She told you that her brother-in-law is living on the property? A: She did not. I was aware some people are occupying. Ram's Law was Shiu Narayan's lawyer. I paid my legal fees. Wati paid hers. I know Shiu Narayan. I discussed with Wati. Mr Shiu Narayan was there. Wati agreed for \$70,000. She said we will go to Shiu Narayan and he will give legal advice. Shiu Narayan is not a lawyer. He agreed that he had mortgaged the property with BSP (2DBoD). Q: You bought an agricultural lease? Yes. Q: You want to continue it? Yes. Q: You were selling at a higher price? No. Q: Certificate of Grower has been granted? Yes. Q: You have planted any plants? I have 281 tonnes. I don't have the document. Q: You bought the lease for under value fraudulently? A: No, that's a lie."*

Discussion

The second Will

[42] To begin with, let me decide the second Will made by the late Chandu Lal (*Chandu Lal*) on 3 January 2008 (*the second Will*). The primary issue, in this case, is whether the second Will was executed fraudulently to defeat the interests of the plaintiffs in the property. By his second Will, Chandu Lal devises and bequeaths all his property both real and personal unto his wife, Subhag Wati (the first defendant) and appointed the first defendant as the sole executrix and trustee of his Will (*PEx 7*).

[43] Previously, before the second Will, Chandu Lal had executed a Will dated 6 May 2004 (*the first Will*). The first Will devises and bequeaths all his property both real and personal as follows:

- *four (4) acres of Native Lease No. 25971 Ref. 4/10/3432 to his wife Subhag Wati together with the dwelling house presently occupied by her;*
- *three (3) acres of Native Lease No. 25971 Ref 4/10/3432 to Mohan Lal together with the dwelling house presently occupied by him and;*
- *three (3) acres of Native Lease No. 25971 Ref. 4/10/3432 to Ami Chand together with the dwelling house occupied by him.*
- *the rest and remainder to his wife Subhag Wati absolutely. (Emphasis is mine)*

[44] The property covered by the first and second Will is a Native Lease No. 25971 Ref. 4/10/3432 containing 10 acres of agricultural land together with the dwelling houses (*the property in dispute*). Initially, the late Ram Adhar was the registered proprietor of the property in dispute. The late Ram Adhar left a Will behind him. His Will dated 20 October 1978 (*PEx2*) devised and bequeathed all his properties both real and personal (the property in dispute) as follows:

- i) Shiu Kumari (wife) of the testator*
- ii) Lal Chand (son) of the testator*
- iii) Ami Chand (son) of the testator*
- iv) Shiri Chand (son) of the testator*
- v) Bisun Kumari (daughter) of the testator*

- [45] The Trustees and Executors are Shiu Kumari and Lal Chand, the wife and son respectively of Ram Adhar. The estate of the late Ram Adhar was never administered. In 1999, the lease over the land being Native Lease NL 25971 had expired. As a result, in November 2001, Chandu Lal was issued with a new lease in his name only by the iTLTB, the third defendant being lease No. NL 25971 (*PEx3*). According to the first plaintiff, that was the arrangement that Chandu Lal would get the new lease in his name and distribute the property as their father's Will (*Ram Adhar's Will*). Even though the lease was registered under Chandu Lal, he allowed and authorised his brothers, the first plaintiff and Mohan Lal to cultivate their shares of 3 acres of land each with their cane proceeds to be distributed by cane payment from Fiji Sugar Corporation (FSC). The aforesaid authority dated 6 May 2004 (the same day Chandu Lal executed his last Will, (*PE5*) was signed by Chandu Lal and witnessed by Shiu Narayan and Hari Prasad (*PEx4*).
- [46] The late Chandu Lal was sickly and suffered from asthma prior to his death. He passed away on 26 February 2008. The first defendant was granted probate (*PEx6*) for Chandu Lal's second Will.
- [47] The question before the court is that of the two Wills of Chandu Lal, which one is the true and valid Will.
- [48] It was not in dispute that the late Chandu Lal executed the first Will devising and bequeathing the property in dispute to his wife (*DW1*), Ami Chand (*PW1*) and Mohan Lal (Riteshni's (*PW2's*) father).
- [49] Shiu Narayan (*DW3*) confirmed that he witnessed the first as well as the second Will of Chandu Lal. It is apparent that at the time when he witnessed the second Will, *DW3* knew very well that Chandu Lal's first Will as he is one of the attesting witnesses to that Will. *DW3* in evidence he made (drafted) the second Will for Chandu Lal. *DW3* had developed a relationship with *DW1* after the death of her husband and now she is residing with him (*DW3*) in his compound.
- [50] Execution of the second Will by Chandu Lal casts doubts in my mind for the following reasons:

- a) The testator's on the second Will appears to be different from the first Will.
- b) Chandu Lal's second Will does not say anything about the first Will he made in 2004. If the testator's intention was to cancel his first Will, he would have stated so because he knew that he had made a Will previously.
- c) The attesting witness for both the Will (DW3) had a personal interest in the property. This is established by evidence given by the plaintiff as well as defendant witnesses. DW3 himself admitted in his evidence that he visited DW1 in order to assist her, but not too frequently. Now DW1 is residing with DW3 in his house. Moreover, DW3 had involved in the making of the Wills and the agreements and the sale of the property to the second defendant. All of this shows that he had a personal interest in the property.
- d) Chandu Lal was sickly and was hospitalised almost every day. DW3 was fully aware of his (Chandu Lal's) sickness and his health condition. Chandu Lal died on 26 February 2008 (PEx6) some 7 weeks after the second Will was executed on 3 January 2008. The first defendant did not lead evidence to prove that the late Chandu Lal was capable of fully understanding of the contents of the second Will and understood what he was signing for.

[51] In *Bidesi v Public Trustee of Fiji* (1975) FLR 13 (1975) FLR (1975) 21 FLR 65 (25 July 1975), McMillin J.A, on the issue of proving the testator's understanding of the Will said this:

"The law on this question is set out in Theobald Wills, 13th Edition, p. 43:

"No will can be valid of which the testator does not know and approve the contents. A testator cannot, therefore, delegate his testamentary power to another person; that is to say, he cannot adopt and execute a will made for him without knowing its contents."

Williams & Mortimer, Executors, Administrators and Probate, p. 147 state the law to be as follows:-

"A party who puts forward a document as being the true last will of the deceased must establish that the testator knew and approved of its contents at the time when he executed it. The testator's knowledge and approval of the contents of the will are part of the burden of proof assumed by everyone who propounds a testamentary document."

- [52] The second Will of Chandu Lal was executed at a time when he was seriously sick. It is doubtful whether he was able to understand what he was signing for. It was executed under suspicious circumstances. That leads me to declare that the second Will is not a true Will of Chandu Lal, and therefore it is null and void. As a result of this declaration, the probate obtained on the basis of the second Will will also become null and void.

Agreements

- [53] The plaintiffs have produced two agreement executed by Chandu Lal and Subhag Wati (DW1). The first agreement was signed by Chandu Lal on 6 May 2004 (PEX4). By his agreement, Chandu Lal gave authority to Ami Chand and Mohan Lal to cultivate their shares of 3 acres of land each and plant cane and collect their payment for cane proceeds from FSC. After Chandu Lal's death, DW1 reconfirmed this arrangement by her agreement dated 3 February 2009 (PEX9). Since Chandu Lal is the registered lessee, PW1 and Mohan Lal (Chandu Lal' brothers) did not have a cane contract with FSC. In (PEX9), DW1 also recognises the custom by allowing both her brother-in-law to continue their occupation and cultivation of sugar cane on their portion of the land.
- [54] Ms Doton, of counsel for the first defendant submits that the plaintiffs were in occupation and had an agreement to cultivate a certain portion of the land that the plaintiffs had required the consent of the TLTB because this became dealing in the land. I disagree with this submission. The first plaintiff and the second plaintiff's father were in occupation with the consent and approval of Ram Adhar, their father who was the registered lessee of the property. This was their father's arrangement. The second plaintiff continued to occupy the property even after her father's death until evicted by the first defendant. Thereafter, they became beneficiaries under Ram Adhar's last Will. These agreements (PEX4 &

PEx9) are family arrangements between family members for a share farming only. The property was never transferred by these agreements.

- [55] A share farming agreement does not require the consent of the Board (see *Genda Singh v Balak Ram* [1963] 9 FLR 163. In *Manadan v Kulamma* [1965] FJ Law Rp 25; [1965] 11 FLR 141 (16 July 1965) Fiji Court of Appeal held:

"1. The phrase "deal with" in the context of the Ordinance implies that the land or part of it or an interest in it must be the subject-matter of the dealing. No interest in land passed under the share-farming agreement and the agreement was therefore not a dealing within the meaning of section 12."

- [56] It is important to consider the facts of each particular case determining whether the agreement in question offends section 12. The agreements/arrangements between the family members do not pass interest in the land. The agreements, in my view, did not offend section 12. Therefore, I reject the argument that the agreements required the consent of the TLTB by virtue of section 12 of the Native Land Act. Presumably, even if the consent of the TLTB was required, the first defendant cannot rely on this illegality as she was also to be blamed for not obtaining the consent for the agreement before she signed (PEx9).

Sale of the property

- [57] The first defendant has sold the property to the second defendant for the sale price of \$70,000.00.
- [58] In their statement of claim, the plaintiffs allege that the second defendants purchased the land from the first defendant with full knowledge that the plaintiffs and the first defendant were related and living on the said property. The second defendants are now party to the fraudulent transfer of the land from the first defendant with the consent of the third defendant to the dealing of the property (see para 4 of the amended statement of claim).
- [59] The second defendants in the statement of defence state that the second defendant purchased the land on good faith and as a *bona fide* purchaser, and for the sum of \$70,000.00. At the time of transfer, the second defendant was not aware of the plaintiff's interest (as alleged) and they were not given any notice of any claims, and after the purchase of the property, the second defendant has

significantly improved the property (see paras 6 & 7 of the second defendants' statement of defence).

- [60] The first defendant (*DW1*), Shiu Narayan (*DW3*) and the second defendant (*2DW1*) negotiated the sale of the property and agreed on the sale price of \$70,000.00. *DW1* in evidence stated that \$70,000.00 was the highest offer that she decided to sell the property to the second defendants.
- [61] *DW1*, *DW3* and *2DW1* visited Ram's Law office. *DW3* advised *DW1* to go to Ram's Law and he took her to Ram's Law. Ram's Law drafted the sale and purchase agreement (*PEx12*) (SPA). Section 12 consent was not obtained for the SPA. It shows it has been executed so hastily.
- [62] It is significant to note that *DW1*'s signature on the SPA is totally different from her usual signatures that appeared in *PEx8* and *PEx9*. She said that was her second signature. Her education level was up to class 4. I agree with the plaintiffs' submission that a class 4 education level person is able to have 2 different signatures at the age of 66 years old is doubtful. It is strange that a 66-year-old *DW1* with class 4 level of education having two signatures. I cannot believe the *DW1* having two different signatures. On the evidence, it is possible to infer that the *DW1*'s signature has been forged on the SPA. So do I.

Consent issue

- [63] The land in issue is a Native Land. The SPA required the consent of the TLTB by virtue of section 12 of the iTaukei Land Trust Act 1940 (TLTA), which reads:

"Consent of Board required to any dealings with lease

12 (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing affected without such consent shall be null and void, provided that nothing in this section shall make it unlawful for the lessee of a

residential or commercial lease granted before 29 September 1948 to mortgage such lease.

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee".

- [64] The making of the payments pursuant to the schedule in the sale and purchase agreement an acceptance of those payments by the Appellant constituted a dealing with the land by sale and required the prior consent of the Board (see *Pralad v Sukh Raj* (1978) 24 FLR 170).
- [65] The SPA has been performed without the consent of the TLTB as required in section 12. The second defendant admitted that the SPA was never consented by the TLTB. Undoubtedly, the SPA contravenes section 12 as it has been performed without the prior consent of the TLTB. Therefore, the dealing pursuant to the SPA is null and void from *ab initio* (from the beginning). On the evidence, I declare that the SPA (1DE1/2DE1) is null and void. As a result, the subsequent transfer of the property based on that SPA is also null and void and it passed no title to the second defendants.

Defence of bone fide purchaser

- [66] In the statement of defence, the second defendants state that: they deny having any knowledge of fraud and being a party to a fraudulent transfer. The second defendant is a bone-fide purchaser of the subject land. They purchased the land in good faith for value without any notice of any claims by the plaintiff (see para 2 of the second defendant's statement of defence).
- [67] The second defendant had purchased the subject land with a full knowledge of the plaintiffs' claim. At the time, when the second defendant purchased the land, the first plaintiff was in possession and the second defendant had entered into the SPA subject to the occupation of the first plaintiff, the first defendant's brother-in-law (Ami Chand). The recital in the SPA (clause B) clearly states that:

"Whereas the Vendor has advised the Purchasers and the Purchasers are fully aware the vendor's brother in law is also residing on the land and the Purchaser in buying the Land subject to his occupation. (Emphasis supplied)

[68] There is undeniable evidence in court that the second defendants were fully aware of the first plaintiff's residing on the land and they purchased the land subject to the first plaintiff's occupation. Also, the second defendant had purchased the property at a lower price. This leads to the conclusion that the second defendants had acted dishonestly in their deal with the first defendant and they had acted fraudulently against the interest of the plaintiffs in the property. Therefore, I reject the second defendants' defence that they purchased the land in good faith for value without notice of any claims by the plaintiffs.

Demolition of the house

[69] The second defendants brought summary eviction proceedings against the first plaintiff and obtained an order for eviction against the first plaintiff. They evicted the first plaintiff from the land he was occupying for more than 30 years or so and demolished his house. The second defendants' transfer deed has now been declared illegal as it was procured by fraud. The subsequent acts on the strength of the illegal transfer were also illegal.

[70] The first plaintiff stated in evidence that the second defendants demolished his (first plaintiff's) house worth \$40,000.00. The second defendant admitted that he demolished the house. The value of the house, according to the first plaintiff, is \$40,000.00. The value given by the plaintiff for the house was not disputed. Therefore, the first plaintiff is entitled to claim the sum of \$40,000.00 from the second defendants with post judgment interest, which I set at 6% per annum payable for the period between the date of the writ of summons and the date of the judgment.

Indefeasibility of title does not apply

[71] The transfer deed transferring the subject land to the second defendants by the first defendant does not pass the title to the second defendants as it was tainted with illegality and actual fraud.

[72] In Fiji, the Torrens system of land registration operates (see ss. 39-42 of the Land Transfer Act). Under such system, the title of the registered proprietor is indefeasible unless actual fraud is proved (see *Subramani v Sheela* [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982)).

[73] In *Subramani*, the Fiji Court of Appeal (per Gould V.P, Marsack, J.A., and Spring J.A.) states as follows:

*“The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is *Fels v. Knowles* 26 N.Z.L.R. 608. At page 620 it is said:*

“The cardinal principle of the statute is that the register is everything, and that, except in case 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.””

[74] The above decision was reaffirmed by the Supreme Court in *Star Amusement Limited v Navin Prasad and Others* Civil Petition No. CBV 0005 of 2012, where the Supreme Court reiterated that fraud is an exception to indefeasibility of a registered title.

[75] Section 41 of the Land Transfer Act says: any instrument of title or entry, ... 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.

[76] The transfer deed (second defendant’s BOD page 12) and subsequent entry in the register has been procured or made by fraud with the intention to defraud the plaintiffs. Therefore, such a transfer is void as against the plaintiffs and the second defendant cannot take any benefit therefrom. I would, therefore, order the Registrar of Title to cancel the entry of the transfer of the subject land to the second defendants. The Registrar of Title must do all things necessary to cancel that entry.

Limitation issue

[77] The first defendant has raised an issue that the plaintiffs’ claim is statute barred pursuant to section 10 of the Limitation Act (*LIM*), which provides:

“Limitation of actions claiming personal estate of a deceased person

10 Subject to the provisions of section 9(1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due.”

- [78] Counsel for the first defendant argues that: the plaintiffs allege that they have a claim in the Estate of Ram Adhar who died on 4 November 1978 and therefore the plaintiffs ought to have filed the proceedings herein on or before 4 November 1990.
- [79] The plaintiffs’ action is based upon the fraud of the defendants. Where the action is based upon the fraud upon the defendant the period of limitation shall not begin to run until the plaintiff has discovered the fraud (see LIM 15).
- [80] It is the first plaintiff’s evidence that they came to know about the transfer of the subject land to the second defendant when he was told about it in or about May 2015. Therefore, the plaintiffs’ action has been brought to court well within the limitation period. Additionally, the plaintiffs claim an interest in the land pursuant to the first Will of Chandu Lal executed on 6 May 2004, and not under the Estate of Ram Adhar as argued by the first defendant. Chandu Lal died 26 February 2008. The plaintiffs had filed their claim on 18 September 2015. As such, the plaintiffs had brought the action well within 12 years as required in LIM 10. I would, therefore, reject the limitation issue raised by the defendants as untenable.

Objection to jurisdiction

- [81] Counsel for the first defendant also submit that the application herein cannot be determined by this court because the application to declare the Will null and void ought to have been filed at the principal probate registry in Suva since to declare the second Will null and void would in effect also declare the Probate null void.

[82] It is noted that the dispute as to jurisdiction is raised by the first defendant after the conclusion of the trial and in the written submissions.

[83] Order 12, Rule 7 of the HCR explains how dispute as to jurisdiction must be made. In order to challenge the jurisdiction of the court to hear and determine the matter, the first defendant had to make an application for a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action, pursuant to R 7. She ought to have applied for such a declaration within the time limited for service of a defence after giving notice of intention to defend the proceedings. Having failed to comply with R 7, the first defendant is not entitled to dispute the jurisdiction of the court after the conclusion of the trial of the matter. Assumingly, even if the court had no jurisdiction to hear and determine the matter, the first defendant cannot dispute the jurisdiction of the court as she has submitted to the jurisdiction. Therefore, I reject as baseless the jurisdictional challenge advanced by the first defendant.

Plaintiffs' interest in the Estate of Chandu Lal

[84] The plaintiffs claim that they are entitled to 3 acres of land each in the Estate of Chandu Lal. Chandu Lal's first Will clearly bequeaths 3 acres of land out of the subject land to Ami Chand (the first plaintiff) and 3 acres of land out the subject land to Mohan Lal (the second plaintiff's father). The second plaintiff's claim is founded upon her father's interest in the land by virtue of the Chandu Lal's Will.

[85] The execution of the first Will by Chandu Lal was not challenged. Therefore, on the evidence, I declare that the plaintiffs are entitled to 3 acres of land each in the Estate of Chandu Lal.

Injunction

[86] The plaintiffs seek a permanent injunction against the second and third defendants not to deal, sell, transfer or assign whatsoever the subject land. Since they have interests in the land, I would grant the injunction they seek. I feel such an injunction is necessary for the protection of their interests in the land.

Second defendants' counterclaim

[87] The second defendants claim against the plaintiffs as follows: a. Renovating and improving 2 buildings on the site at a cost of \$40,000.00, b. buying of tractor and farming implements at a sum of \$35,000.00 for use on the farm and c. Farm improvements, landscaping (bulldozing), cleaning, planting cane, at a cost of \$40,000.00.

[88] The second defendants cannot claim any damages for the alleged improvements because they are also part of fraudulent transactions designed by the first defendant to defeat the plaintiffs' interests in the land. The second defendants are not entitled to counterclaim against the plaintiffs for their alleged improvement. I would, therefore, dismiss and strike out the second defendants' counterclaim.

Costs

[89] As a successful party, the plaintiffs are entitled to a costs order. I take all into my consideration and summarily assess the costs at \$5,000.00, which the defendants shall jointly and severally pay to the plaintiffs.

Conclusion

[90] On the evidence, having been satisfied on the balance of probability, I hold the plaintiffs succeed in their claims and they are entitled to the relief they seek.

Final Outcome

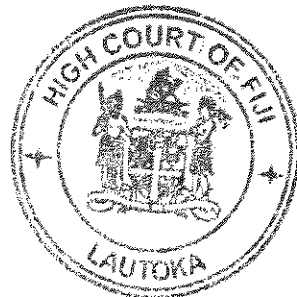
1. There will be a declaration that the last Will and Testament of Chandu Lal dated 3 January 2008 to be null and void.
2. The sale of the estate property to Avinesh Prasad and Ragni Devi (the second defendants) and the transfer registered in their names be revoked and cancelled. The Registrar of Titles shall do all things to cancel and revoke the transfer registered in the second defendants' names.

3. The second and third defendants shall not deal, sell, transfer or assign whatsoever the Native Lease No. 25971 land known as Navatu No. 5 on ND 4120 having area of 10 A, 1 rood and 24 perches.
4. The second defendants shall pay the sum of \$40,000.00 to the plaintiffs with post judgment interest at the rate of 6% per annum from the date of the writ of summons (18 September 2015) till the date of this judgment (3 July 2018).
5. There will be a declaration that the first and the second plaintiff are entitled to 3 acres each of land in the Estate of Chandu Lal.
6. The defendants shall jointly and severally pay the summarily assessed costs of \$5,000.00 to the plaintiffs.

M. H. Mohamed Ajmeer
3 July 2018

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

3 July 2018

Solicitors:

M/s Babu Singh & Associates, Barristers & Solicitors: for the plaintiffs

M/s Ram's Law, Barristers & Solicitors: for the first defendant

M/s Ravneet Charan Lawyers: for the second defendants