IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 144 of 2015

BETWEEN : **SUNIL GUPTA SEN** of Wailailai, Ba, Fiji, Businessman.

PLAINTIFF

AND : **RAIDU BHIM KRISHNA** of 21106 Tenker Avenue, Torrance CA 90501, United States of America and **RAMESH RAIDU** of 67 Whitford Road, Hinchinbrook, 2168 NSW Sydney, Australia as Executors & Trustees of the **ESTATE OF KRISHNA RAIDU** late of Wailailai, Ba.

DEFENDANTS

Appearances : Mr. N. Padarath for the Applicant/Intended Appellant
: Mr. E. Maopa for the Respondent
Date of Hearing : 16 December 2025
Date of Ruling : 03 February 2026

R U L I N G

INTRODUCTION

1. The background to this case is set out in my Judgement dated 01 October 2025 by which I had dismissed the plaintiff's claim and upheld the defendant's counter-claim (see **Sen v Krishna** [2025] FJHC 699; HBC144.2015 (1 October 2025). Mr. Sunil Gupta Sen (**"Sen"**) (now the intended appellant) wishes to appeal the said judgement. He seeks a stay Order of this Court.

2. Meanwhile, the defendant, Mr. Raidu Bhim Krishna (**"Raidu"**) has applied under the Slip Rule (**Order 20 Rule 10**) to add the following relief:

   (i) a declaration that Sen has no interest in Lot 1.

   (ii) a declaration that Lot 1 is part of the estate of the late Krishna Sami Raidu (**"Krishna"**).

   (iii) an Order against Sen not to interfere with the estate's rights over Lot 1.

BACKGROUND

3. Krishna owned freehold land in Ba. This is comprised in Certificate of Title No. 20584. In 1981, he planned to subdivide the land into ten lots under DP 55563. Six of the lots were to go to his wife and children. The other four he intended to sell.

4. In 1981, Krishna executed a sale and purchase agreement (**"Agreement"**) over one of those four plots with one Deo Narayan and Raj Deo (deceased). The plot was delineated on DP 55563 as "Lot 1". Narayan and Deo were to purchase this plot jointly.

5. At the time, the subdivision of CT No. 20584 had not commenced. Lot 1 was still comprised within the parent title.

6. The key features of the Agreement are as follows (paragraphs 29 to 31 of the Judgement is reproduced below):

Table 2

Purchase Price	**<u>$12,250 – 00</u>** (twelve thousand two hundred and fifty dollars only)
Amount already paid by purchasers (Clause 1 (a) and (b))	**<u>$1,000</u>** (by Raj Deo on 05/03/79) **<u>$5,000</u>** (on execution (i.e. $2,000 by Raj Deo and $3,000 by Deo Narayan).
Balance outstanding as @ execution (Clause 1 (c) subclauses (a) to (e))	**<u>$6,250</u>** (to be paid in yearly instalments of $1,000 i.e. $500 each per annum between Deo Narayan & Raj Deo)
Due date of Last Instalment (Completion Date) (Clause 1 (c) and subclause(f))	**31 January 1987**

30. Clause 5 of the Agreement provides:

The possession of the land shall be given by the vendor to the purchasers upon the execution hereof and the purchasers shall have full right to use and occupy the said land.

31. Clause 3 places the obligation on **PW2**/Raj Deo to pay for stamp duty (no longer applicable now) and also the costs of transfer and survey relating to the dealing. Clause 6 requires **PW2**/Raj Deo to pay for the survey of Lot 1.

7. In 1986, Deo Narayan (<u>not Raj Deo</u>) purportedly assigned his interest in the Agreement to one Bal Ram Naidu for a consideration of $6,000. In 1996, Bal Ram

Raidu then assigned that interest to one Shees Ram for a consideration of $6,000. Shees Ram then assigned that interest to Sen in 2003 for $9,000 (see Table 1 at paragraph 16 of the Judgement).

THE RULING

8. In my Ruling, I reasoned as follows:

(i) Deo Narayan and Raj Deo, the original parties to the 1981 sale and purchase agreement with Krishna, did acquire an equitable interest in the piece of land in question (Lot 1) – based on the Agreement and on the fact that they had, together, paid a deposit of $6,000-00[1].

(ii) However, the availability of the equitable remedy of specific performance to Narayan and Deo, must depend on the extent to which they had complied with the Agreement[2].

(iii) Specific performance was not available to them for the following reasons:

(a) the agreed total purchase price was $12,250-00. Narayan and Deo had paid a deposit of $6,000[3] to Krishna. However, there was no evidence that they ever settled the balance of $6,250 -00[4].

(b) the Agreement required Narayan and Deo to settle the balance by the stipulated completion date, which was **31 January 1987**[5]. The subdivision effort, clearly, was anchored in the expectation of full payment.

(c) Narayan and Deo had not paid for Stamp Duties & Survey Costs either, as per the Agreement[6].

(d) the Agreement was subject to the Director of Town & Country Planning's approval DP 55503. There was no evidence of that approval having been obtained[7].

(iv) Hence, assuming it really did happen, what, in fact, Narayan and Deo assigned to Bal Ram Raidu in 1986, for a consideration of $6,000, was the <u>burden</u> of completing the performance of the Agreement, rather than any enforceable right of purchase. To make the Agreement specifically enforceable, Raidu had to

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[1] As per paragraph 43 of Judgement.

[2] As per paragraphs 45 to 59 of the Judgement.

[3] As per paragraphs 43 of the Judgement.

[4] See paragraph 47 (i) to (ix); paragraphs 48 (i) to (iii) and 49 of the Judgement. See also paragraphs 58 and 59.

[5] As per paragraphs 29 and 66 of the Judgement.

[6] As per paragraphs 50 to 52 of the Judgement.

[7] As per paragraphs 53 to 59 of the Judgement.

complete performance. This applies equally to all purported assignees down the chain.

(v) This means that, all that was passed along the chain of equitable assignments from 1981 to 2003 - was a burden[8].

(vi) However, the assignment of a burden cannot be valid unless done with the prior consent of the non-assigning party. This is usually achieved by novation[9].

(vii) All the purported assignments along the chain from Narayan/ Deo through to Sen, were not consented to by Krishna (or his estate) or by novation. Nor did any of the purported assignees ever try to complete performance of the Agreement. In fact, Krishna (his estate) were oblivious to any of the purported assignments until Sen filed these proceedings. Sen only filed these proceedings following the estate's efforts to evict Sen at the Ba Magistrates Court.

(viii) Hence, what Sunil Gupta Sen has ended up with is a purported interest which he cannot enforce against Krishna's estate[10] because of:

(a) lack or privity.
(b) defective assignment.

9. All that I have said above is premised on the assumption that the purported chain of assignments, defective as they were - were really ever attempted. In other words, if they really did happen, as claimed, then all that Sen finally ended up with, is an inchoate interest which is not enforceable in any event against the estate of Krishna.

10. The absence of privity is decisive in the circumstances. Even if any of the successive assignees had tendered the balance of the purchase price to the estate of Krishna and sought to discharge all obligations under the Agreement, the estate was under no contractual duty to give effect to that Agreement.

11. In any event, as I noted in paragraph 66 of the Judgement, the Agreement required Narayan/ Deo to settle the balance of the purchase price by 31 January 1987. This was essential to the deal. The subdivision effort was anchored in the expectation of full payment.

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[8] As per paragraphs 75, 76, 81, 84,91 of the Judgement.
[9] As per paragraphs 88, 89, 90, 91 of the Judgement.
[10] See paragraph 92 of the Judgement.

12. Having said that, I did express some misgivings in paragraph 78 subparagraphs (i) to (iv) as to whether the assignments really did happen.

13. I noted that the consideration required of every purchaser down the chain was less than what was originally agreed between Krishna and Narayan/ Deo in 1981 (i.e. $12,500 cf. $6,000)[11].

14. Why would Narayan (Deo was not involved) only ask for $6,000 from Bal Ram Raidu, the first assignee, when the sale value of Lot 1 in 1981 according to the Agreement was $12,250 (**"original value"**)? Why did all the purported assignees down the chain only pay a fraction of the original value?

15. At best, this would tend to suggest that the full purchase price was never paid to Krishna and that all that Narayan had sought was to recover whatever he actually paid[12]. Alternatively, it may reflect that the assignees knew that what was being assigned was not a secure right to buy Lot 1 - but an uncertain interest, weakened by the lack of privity and the unfinished subdivision, and without any guarantee that Krishna or his estate would complete the sale.

16. Sen asserted that he is the assignee of the benefit of the Agreement. This was transmitted through successive equitable transactions.

17. The evidence, however, disclosed that only Narayan, who testified, participated in the purported initial assignment to Bal Ram Raidu. No evidence was led to establish that Raj Deo or his estate ever consented to that assignment, or to any of the other assignments down the chain.

18. It follows that, even if the assignments were to be upheld as conveying a specifically enforceable interest (which I held they were not), the subject matter would extend no further than Deo Narayan's half interest in Lot 1.

19. As I note in paragraph 71 of the Judgement:

> *DW1 said Raj Deo did try to build a house on Lot 1 but later ran out of cash and could not complete it. He later emigrated to the US in 1987 following the coup. Notably, that would have been about a year or so after PW2 purportedly sold the benefit of the 1981 Agreement to Bal Ram. Incidentally, this does raise the question as to whether PW2 possessed any authority to sell the purported beneficial interest under the 1981 Agreement to Bal Ram*

[11] See Table 1 at paragraph 16 of the Judgement.
[12] See paragraph 47 (ii) to (v) of the Judgement.

without the consent of Raj Deo who, arguably, held 50% of the beneficial interest in Lot 1.

THE PRINCIPLES

20. The principles which are applicable in an application for stay pending appeal are set out in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004 [18 March 2005]

21. Prematilaka RJA in V**eitala v Home Finance Company Pte Ltd (trading as HFC Bank)** [2025] FJCA 71; ABU012.2023 (25 April 2025) revisited the principles[13].

22. During argument, Mr. Padarath highlighted that the defendants/respondents have, in 2023, extracted title over Lot 1 (CT No. 446398) following a subdivision carried out in that same year pursuant to a new Deposited Plan (not DP 55563). I

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[13] Prematilaka R JA said:

> [3] The matters that should be considered by this Court in an application for stay pending appeal were discussed in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004 [18 March 2005]. It is of course not always necessary to consider all seven matters as their relevance will often depend upon the nature of the proceedings and the orders made by the court below. A stay should not be granted unless the Court is satisfied that there are good reasons for doing so. Whether there are good reasons established will be determined by reference to the principles set out by this Court in the **Natural Waters of Fiji**.
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> [4] In the case of money judgments, generally a successful litigant should not be deprived of the fruits of successful litigation by withholding funds to which he is otherwise entitled, pending an appeal. For this Court to interfere with that right the onus is on the appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are mostly taken into account of course among others by court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay. The power to grant a stay conferred by section 20 of the Court of Appeal Act gives the court a wide discretion to grant a stay when the interests of justice so requires.
>
> [5] This Court is required to consider the bona fides of the appellant in the prosecution of the appeal (which is often taken to be a reference to the chances of the appeal succeeding) and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail. It is usually sufficient if an appellant has an arguable case. If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application for stay should be refused.
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> [6] It should be noted at the outset that this is not an appeal against a money judgment. Nor is it an appeal against a judgment concerning a commercial property upon which a business is being actively carried on. As for money judgments, since the decision of this Court in **Attorney-General of Fiji and Ministry of Health v Dre** [2011] FJCA 11; Misc. 13 of 2010 (17 February 2011), the ability of the appellant to recover the judgment amount in the event a stay is not granted is not decisive and is only one of a number of factors that must be considered.
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> [7] In my view the most relevant considerations in this matter are (a) whether, if a stay is not granted, the applicant's right of appeal will be rendered nugatory (this being not determinative), (b) whether the respondent will be injuriously affected by the stay, (c) the status quo bona fides of the appellant as to the prosecution of the appeal i.e. the prospect of success in the appeal and (g) the overall balance of convenience.

was aware, as per paragraph 73 of the Judgement, that the defendants had embarked on a new subdivision plan.

23. Mr. Padarath said this was carried out despite an injunction which was in place since 2018 by Mr. Justice Nanyakarra.

24. Mr. Maopa argued that Nanyakarra J had dismissed the action in 2020, following which the matter was taken up on appeal where it was reinstated and reverted to the High Court for trial. The injunction was never reinstated.

25. Perhaps Mr. Padarath should pursue committal proceedings if he is adamant.

26. Mr. Padarath also argues that there is an important question of law in this case which ought to be properly raised on appeal.

27. These are: (1) whether or not a burden under a sale and purchase agreement can be assigned without novation or without the consent of the non-assigning party (especially the vendor), and (2) whether my finding that the Agreement had been repudiated or abandoned, mutually, by conduct (as per paragraphs 64 to 74 of the Judgement) is sustainable, on the evidence.

28. Mr. Maopa submits that section 59(d) of the Indemnity, Guarantee and Bailment Act was not complied. I did not deal with this directly as the point is linked to the conclusion that the purported assignments were not consented to, let alone brought to the prior attention of the estate of Krishna. In that regard, they were vitiated by a lack of privity. Also, it is linked to my general observation that, in the absence of any valid consent or novation, a contractual burden may not be validly assigned.

29. Mr. Padarath argues that while it is generally true that a burden cannot not run with land or contract without consent/novation, equity there recognises exceptions where fairness demands it. I accept that this, generally, makes sense.

30. Where then does equity or fairness lie in this case? Before that is even considered, it is foremost a matter of evidence. Is the evidence sufficient to establish Mr. Padarath's case theory? Where land is concerned, a purported equitable assignment effected without novation or the prior consent of the non-assigning party must be approached with caution. While equity may in certain circumstances recognize an enforceable assignment, these cannot be permitted to erode the integrity of the Torrens register. The insistence upon clear and cogent

evidence is not merely a matter of proof. It is also a matter of policy to safeguard the certainty and reliability of land titles under the Land Transfer Act.

CONCLUSION

31. I am not inclined to grant stay. Mr. Padarath of course may pursue it before the Fiji Court of Appeal.

32. While the Orders which Mr. Maopa seeks under the SLIP RULE go without saying in terms of the Judgement, I will pronounce them in any event, if only for his client's comfort – and I do so hereinbelow:

    1. I declare that Sen has no interest in Lot 1 (now CT 446398).
    2. I Order that Sen not interfere with Krishna's estate's rights over Lot 1 (now CT 446398).
    3. I declare that Lot 1 (now CT 446398) is part of the estate of the late Krishna Sami Raidu.

33. Costs to the Respondent which I summarily assess at $1,000 – 00 (one thousand dollars only).

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Anare Tuilevuka
JUDGE