

IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No: CBV 0019 of 2018
[On Appeal from Court of Appeal No: ABU 0029 of 2017]

BETWEEN : 1. BYEONG BAK KWON
2. EUI TAE KIM
Petitioners

AND : 1. PHUL WATI
2. NAZIR HUSSAIN
3. ACTING REGISTRAR OF TITLES
4. ATTORNEY GENERAL OF FIJI
1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

Coram : Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyasath Gerard Dep, Judge of the Supreme Court

Counsel : Ms. N. Choo for the Petitioners
Mr. A K Singh with Mr. A. Nand and Mr. S. Niubalavu for
the 1st Respondent
Mr. J. Sherani for the 3rd and 4th Respondents

Date of Hearing : 07 April 2022

Date of Judgment : 27 May 2022

JUDGMENT

Gates, J:

[1] I have read in draft the judgment of Dep J. I concur with it and with the orders proposed.

[2] Nazir, the second respondent and also the first respondent's son, had not taken any part in these proceedings, nor paid over the purchase price to his mother for the sale of her

Fiji property. His conduct appears to have been dishonest as against his mother. Much of the focus had been on the son's deception of the mother. The evidence, however, has not established that Mr. Kwon, the first named petitioner was part of this fraud. Dep J has dealt in his judgment with the validity of the power of attorney held by the son and the grant of a power to sell property. Mr. Kwon is to be treated as a bona fide purchaser and accordingly he is entitled to be registered as the owner of the property.

Aluwihare, J:

[3] I have had the advantage of reading the judgment of Dep J in draft and the concurring judgment of Gates J. I agree with the reasoning and conclusions of both judgments and the orders proposed by Dep J.

Dep. J:

Introduction

[4] Phul Wati also known as Feroza Bibi, is the plaintiff in the High Court, Appellant in the Court of Appeal and the 1st Respondent in this Leave to Appeal Application. She will be for convenient sake hereinafter referred to as Phul Wati or as the 1st Respondent. She is the owner of the premises situated at Vere Road, Laucala Beach Estate, Nasinu. This property was originally owned by her husband and after the death of her husband she inherited the property. Thus, she became the registered owner of the property. The Certificate of Title No.16922 is in respect of Lot 21 on Deposited Plan 4058 consisting of 1 rood and 4 perches. She has four children namely, Shainaz Hanif, Nazir Hussain, Mohamed Riaz Hanif and Shabnam Suliman. Nazir Hussain, the eldest son, is the 2nd Defendant in the High Court and the 2nd Respondent in the Court of Appeal and in this Court. The daughter Shabnam figured as a material witness in the High Court.

[5] Phul Wati, after the death of her husband went to New Zealand to live with her daughter Shabnam. As she was unable to look after the property, she gave a power of attorney to her daughter Shabnam to look after the property and collect rent. This power of Attorney No 38808 dated 27th November, 2001 was attested by Suresh Chandra,

Solicitor, Commissioner for Oaths and Notary Public, and was registered on 5th December, 2001.

[6] Nazir Hussain, the 2nd Respondent, in the meantime moved to Australia and used to come to Fiji. Phul Wati and daughter Shabnam were living in New Zealand. As Phul Wati and Shabnam were living in New Zealand Nazir Hussain the 2nd Respondent agreed to manage the property. When Phul Wati visited Fiji in March 2006, the 2nd Respondent requested Phul Wati to grant him a power of attorney so that he could manage the property. Phul Wati granted a power of Attorney to Nazir Hussain, the 2nd Defendant. This power of attorney bearing No. 45175 dated 27th March, 2006, was prepared by the same Solicitor Suresh Chandra and submitted for registration to the office of the Registrar of Titles on 4th April, 2006 and was registered on the same day. It was drafted using a standard form. Unlike in the power of attorney given to Shabnam, this power of attorney had given to the grantee a power to sell. It is the position of Phul Wati that she did not instruct Solicitor Suresh Chandra to include a power to sell. On the other hand, Suresh Chandra states that Phul Wati did instruct him to include the power to sell. This is the bone of contention in the case.

[7] Nazir Hussain, the 2nd Respondent by using the power of attorney entered into a Sale Purchase Agreement dated 28th April, 2006 with the Petitioner Byeong Bak Kwon who will be hereinafter referred to as Kwon or as the Petitioner. Nazir Hussain, the 2nd Respondent executed necessary documents to complete the transaction. Petitioner Kwon paid the full consideration of \$130,000 in two instalments. He paid \$40,000 initially in cash and the balance was paid by electronic transfer of funds from Korea to 2nd Respondent's account in Australia. The proceeds of sale were taken by the 2nd Respondent Nazir Hussain, and Phul Wati, the owner did not receive any money. When Phul Wati came to know of this transaction she contacted Solicitor Suresh Chandra and instructed him to revoke the power of attorney. Suresh Chandra drafted a revocation of power of Attorney and send it to New Zealand for her to sign and forward it to him. Phul Wati after placing her thumb impression on the revocation of the power of attorney sent it to Solicitor Suresh Chandra. This revocation of power of attorney was submitted to the Registrar of Titles for registration and was returned due to certain omissions. After rectifying the omissions Solicitor Suresh Chandra on 2nd May, 2006

lodged revocation of power of Attorney with the Registrar of Titles. Phul Wati, through her Solicitor Suresh Chandra, by the letter dated 8th September 2006 informed Registrar of Titles not to register the transfer deed.

- [8] Kwon, the Petitioner attempted to register the deed of transfer but could not do so in view of the complaint made by Phul Wati to the Registrar of Titles who is the 3rd Respondent to this application.

Proceedings in the High Court

- [9] Thereafter Phul Wati, the 1st Respondent, by way of writ of Summons commenced action in the High Court. She sought interim relief to restrain the Petitioner Kwon and the 3rd Respondent from registering the deed of transfer. The High Court after hearing the application issued an interim injunction. After granting of the interim injunction, the Plaintiff, the 1st Respondent filed an Amended Statement of Claim dated 27th January, 2009, by which she sought the following reliefs;

1. A restraining order restraining all the Defendants from registering the purported transfer lodged on 22 June 2006,
2. A declaration that the transfer executed by Nazir Hussain, the 2nd Defendant was void and or fraudulent,
3. An order that all the proceeds of sale of property be paid to the Plaintiff Phul Wati (1st Respondent) directly, or in the alternative 1st Defendant (Petitioner) pay to the (plaintiff) the best market price of the property,
4. The first defendant Kwon (Petitioner) to pay to the plaintiff Phul Wati (1st Respondent) mesne profits of \$1000.00 per month until the determination of the action.
5. An order preventing the 3rd Respondent (Registrar of Titles) from registering the transfer of the subject property in the name of the 1st named Defendant (Petitioner).

- [10] In addition to what was contained in the first Statement of Claim, the Appellant's Amended Statement of Claim contained the following additional averments containing particulars of fraud:

“9. (a) The First and Second Defendant (sic) together conspired against the Plaintiff and acted in a deceptive and fraudulent manner to defeat the

Plaintiff's interest in the property and the proceeds of the sale of the property.

PARTICULARS OF FRAUD

- a. *The First Defendant was fully aware of the ownership of the property to the Plaintiff and Second Defendant as attorney only at the time of the transfer.*
- b. *The First named Defendant and Second named Defendant knew each other for over number of years and were business partners in New Zealand before the sale of the property by the Second Defendant to the First Defendants.*
- c. *The First named Defendant and Second named Defendant became acquainted when the First Defendant came from Korea to Fiji worked for Dong San Construction Company in Fiji when the said company was constructing roads near Tailevu in 1990.*
- d. *The First and Second Defendant were together business partners in Auckland, New Zealand in the company named Feeka Panel beating & Mechanical Repairs Limited before First Defendant occupied the property at Laucala Beach, Nasinu.*
- e. *The First named Defendant and Second named Defendant who knew the Plaintiff well and without any reference to the Plaintiff failed and or neglected to pay the consideration sum to the Plaintiff instead purportedly paid to the Second Defendant.”*

[11] As regards to the particulars of fraud pleaded by the Plaintiff in the amended statement of claim, the 1st Defendant Kwon in his statement of defence to the amended Statement of claim denied sub paragraphs 9 b and e. This denial is contradicted by the evidence of the Plaintiff (Phul Wati), Shabnam as well as the 1st Defendant himself. The 1st Defendant admitted the averments in paragraphs, 9.c, and 9.d. of the Appellant's Amended Statement of Claim.

[12] The Plaintiff sought an order to serve the Statement of Claim on the 2nd Defendant Nazir Hussain by substituted service. Nazir Hussain was evading and could not be traced, and a default judgment was entered against him.

[13] At the Pre-Trial Conference the following facts were recorded as agreed facts:

1. *The son of the Plaintiff, Nazir Hussain, obtained a Power of Attorney No. 45175 on 27 March 2006 from the Plaintiff including the powers to sell the property.*

2. *MC Lawyers acted for Nazir Hussain and the Plaintiff in preparation of Power of Attorney No. 45175.*

Summary of Evidence

- [14] In the trial before the High Court, Plaintiff Phul Wati, (1st Respondent) giving evidence stated that she did not instruct the Solicitor Suresh Chandra to include a power to sell in the power of attorney granted to her son Nazir Hussain (2nd Respondent). When she came to know that his son sold the property, she contacted the Solicitor Suresh Chandra to take steps to revoke the power of attorney. She got a revocation of power of attorney papers send by Suresh Chandra attested in New Zealand and send it to Solicitor Suresh Chandra to file it in the Office of the Registrar of Titles. Subsequently she sent a letter to the Registrar of Titles not to register the deed.
- [15] Registered Valuer Sanjay Kirpal testified to the effect that he was retained by Shabnam in 2006 to prepare a Valuation Report for the property and according to his valuation, the value of the property at the time was \$296,000, and its present value would be more than \$500,000.
- [16] Solicitor Suresh Chandra testified that the Power of Attorney in favour of the 2nd Respondent was prepared by him, and the Plaintiff Phul Watt instructed him to include a power to sell in the Power of Attorney given to the 2nd Respondent and he explained it to Phul Wati. He said that his firm, had also prepared the revocation of the Power of Attorney and sent to Auckland for execution by Phul Wati in the presence of a qualified witness. It was signed in Auckland and returned to his firm and was lodged for registration on 2nd May, 2006.
- [17] Deputy Registrar of Lands Torika Goneka and Shabnam, the daughter of the Plaintiff Phul Watti, (1st Respondent) gave evidence for the Plaintiff.
- [18] The Defendant Kwon (Petitioner) in his evidence stated that he had known Phul Wati's entire family from the time he came to Fiji in April 1990 and they treated him as a member of the family, and her children referred to him as 'brother'. He was aware that after the death of Appellant's husband, she migrated to New Zealand. He stated that on

26th April, 2006, the 2nd Respondent Nazir Hussain came to his office with his mother Phul Wati. As Phul Wati was so sick to come up to his office he came down and met her in the car park. He was meeting Phul Wati for the first time after she left to New Zealand in 2001. She told him that she was ill and need to undergo an operation without delay. He said that “however they could not communicate much as Phul Wati “did not know much English and he did not know much Hindustani”. [Phul Wati under cross examination admitted that she and Nazir Hussain went to Kwon’s office to meet him] A short while later he and Nazir Hussain went to the iLTB office to meet a prospective buyer. They met a person from whom Nazir Hussain (2nd Respondent) demanded a deposit but the prospective buyer refused to pay a deposit and the deal did not materialize. On the way back to his office Nazir Hussain, 2nd Respondent told him that they were trying to sell the house and asked him to purchase it and that he would sell it at a ‘special price’ because they need money urgently. However, he told him that he was not ready to buy the house. Few days later both met and agreed on a price of \$130,000 of which he paid a deposit of \$40,000 in cash to Nazir Hussain. Thereafter they communicated by telephone, and on 28th April, 2006 they went to the office of lawyers ‘Lateef and Lateef’ and entered into a Sale Purchase Agreement (“SPA”), which had been prepared by Lateef and Lateef. He testified that he gave \$40,000 to the 2nd Respondent as a deposit. He stated that the balance \$90,000 was paid on 19th May, 2006 via electronic transfer from South Korea to the 2nd Respondent’s bank account in Australia. He stated that he attempted to register the deed with the Registrar, but it was not registered due to the objections raised by the Plaintiff. He denied the allegation of fraud levelled against him.

Judgment of the High Court

- [19] Justice David Alfred delivered the judgment on 3rd March, 2017. In his judgment regarding the granting of power of attorney he stated that the power of attorney given to Nazir Hussain is validly and properly granted to him, and that as attorney of the Plaintiff, he has validly and effectively conveyed the property to the first Defendant who having paid the full consideration as shown by the Sale Purchase Agreement (SPA) and Nazir Hussain’s Statutory declaration is entitled to have the Registrar of Titles to register him as the proprietor of the property free from all encumbrances.

[20] As regards to the allegation of fraud he stated that ‘In the result I find no evidence of fraud with regard to the obtaining of the power of attorney No. 45175 and no evidence of any conspiracy or fraud between the First and the 2nd Defendant. Thereafter he proceeded to dismiss the Plaintiff’s action with costs.

[21] In his judgment he stated that the evidence of Solicitor Suresh Chandra cut across the evidence of the Plaintiff Phul Wati. He censured the conduct of the Solicitor for appearing for the Plaintiff whilst having a conflict of interest. The Solicitor Suresh Chandra drafted the Power of Attorney and got it registered, his legal firm settled the pleadings and he appeared and led the evidence of the Plaintiff. After the Judge repeatedly informed him of his conflict of interest he withdrew from the case and subsequently gave evidence.

[22] In his judgment he refers to the attestation clause of the power of attorney where the executant certified to the following effect:

“AND I HEREBY FURTHER DECLARE that this Power of Attorney remain in full force and effect until due notice of our death or other revocation shall be actually received by my attorney and that no person or persons or corporation or corporations dealing with my attorney shall be concerned to see or enquire as to the propriety or expediency of any act deed matter or thing which my attorney may do execute or perform or purport to do execute or perform in my name be(sic) virtue of these presents”

[23] The Plaintiff being dissatisfied with the judgment of the High Court filed a Leave to Appeal Petition in the Court of Appeal.

Court of Appeal

[24] The Petitioner Phul Wati in her Leave to Appeal Application raised the following grounds of appeal:

- 1. That the Learned Trial Judge erred in law and in fact in allowing a continuation of hearing without ordering fresh hearing upon realising the conflict-of-interest issue against the Appellant original Solicitor, Mr Suresh Chandra, which was prejudicial to the Appellants’ case;*
- 2. That the Learned Trial Judge erred in law and in fact in holding that the second Respondent had validly and effectively conveyed the property to*

the first Respondents when the Power of Attorney in question was validly revoked by the Plaintiff, registered at the Registrar of Deeds Office and without considering the undisputed letter dated 30th June 2006 to the First Respondents from Maharaj Chandra Associates;

3. *That the Learned Trial Judge erred in law and in fact in holding that the second Respondent has the power to sell the property without considering the undisputed evidence of abuse of power, bad faith, inconsistent act, fraud against the 2nd Defendant, without strictly construed the Power of Attorney and without taking into account Section 115 of the Property Law Act;*
4. *That the Learned Trial Judge erred in the law and in fact in not considering the doctrine of indefeasibility of title of the Appellant under the Torrens System;*
5. *That the Learned Trial Judge erred in law and in fact in relying and accepting the Sale and Purchase Agreement and statutory declaration of the Second Respondent as evidence of sale, without an opportunity for the Appellant to cross-examine the Second Respondent on the statutory declaration;*
6. *That the Learned Trial Judge erred in law and in fact in not taking into account Judgment previously entered against the Second Respondent and finding no evidence of fraud with regard to the obtaining of the Power of Attorney No. 45175 and no evidence of conspiracy or fraud between the First Respondents and the Second Respondent.*
7. *That the Learned Trial Judge erred in law and in fact in not allowing the counsel for the Appellant to cross-examine the First named Respondent on the Receiving Order advertisement disclosed in the Plaintiff's Bundle of Documents and the e-mail of 19 September 2006 from Mere Tabuya disclosed as Documents No. 3 on the First Respondents Bundle of Documents;*
8. *Such further grounds of appeal as may be added upon receipt of record/ judges notes of the court.*

Decision of the Court of Appeal

- [25] The Court of Appeal in its conclusions held the conduct of the 1st and 2nd Respondents amounted to fraud. The Power of Attorney given to the 2nd Respondent was obtained fraudulently and the said Power of Attorney did not correctly reflect the instructions of the Appellant. The Appellant did not intend to grant the 2nd Respondent the authority to transfer the property. The 1st Respondent did not acquire legal title upon tendering the

transfer document for registration on 22nd June, 2006. As a result of this court holding that the Power of Attorney given to the 2nd Respondent was obtained by fraud and is void and of no force or avail in law, the transfer and the registration of the said transfer effected after the conclusion of the judgment of the High Court dated 3rd March, 2017, is also declared null and void and of no force or avail in law. The Appellant's title remains unaffected and is good and valid. For the foregoing reasons the appeal is allowed.

The Orders of the Court are:

[26] The appeal is allowed.

1. *The Power of Attorney No. 45175 dated 27 March 2006 is declared null and void.*
2. *The Sale and Purchase agreement /Deed of transfer executed by the 2nd Respondent to the 1st Respondent is declared null and void and is set aside.*
3. *The registration of the subject property in the name of the 1st Respondent is declared null and void and set aside.*
4. *The 3rd Respondent is directed to remove the registration of the transfer of the subject property, in the name of the 1st Respondent, within one month from the date of this judgment, from the Register of Titles.*
5. *The 1st Respondent is ordered to vacate the subject property within three months from the date of this judgment.*
6. *The 1st Respondent is ordered to pay mesne profits in a sum of \$1000 per month from 1st June 2006 until the date on which the property is vacated.*
7. *The 1st Respondent shall pay to the Appellant a sum of \$5000 as costs of this appeal, and \$2500 as costs in the court below.*

Leave to Appeal Petition in the Supreme Court

[27] The criteria for granting leave to the Supreme Court is provided under Section 98(4) of the Constitution of the Republic of Fiji read with section 7(3) of the Supreme Court Act of 1998. Section 7(3) of the Supreme Court Act states:

“In relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant special leave to appeal unless the case raises –

- a. *A far-reaching question of law;*
- b. *A matter of great general or public importance;*
- c. *A matter that is otherwise of substantial general interest to the administration of civil justice.”*

[28] The Petitioner in the affidavit filed seeking leave and in his written submissions while elaborating the grounds raised in the Petition submits that it raises far reaching question of law and matters of great general or public importance.

Petitioners Grounds of Appeal:

- (i) *That the Order for Mesne Profit made by the Court of Appeal was a serious error of fact and law and that the First Respondent was only seeking an Order for the property to remain in her ownership.*
- (ii) *The findings of the Court of Appeal relating to the Power of Attorney was contrary to the evidence before the High Court. At the time when the Sale and Purchase Agreement was signed, and the transaction completed the 2nd Respondent held a valid power of attorney. The Trial Judge in the High Court had made a finding of fact that even as late as 8 September 2016 the 2nd Respondent had still not actually received any notice of the Revocation of the Power of Attorney. This was confirmed by the fact that the 1st Respondent’s letter to the Registrar of Titles had confirmed that they were unable to directly communicate with the 2nd Respondent. However, by this time the Petitioners had already fully paid the purchase price to the 2nd Respondent.*
- (iii) *The finding of fraud by the Court of Appeal cannot be sustained in this case because Mr. Chandra the Solicitor for the 1st Respondent had prepared the Power of Attorney and admitted that he had acted on her instructions and explained the terms and conditions of the power of attorney to her. In fact, it was completely erroneous for the Court of Appeal to hold that the Power of Attorney was fraudulently obtained when in fact it was prepared by the 1st Respondent’s own Solicitor on her instructions – paragraph 50 and 51 of the High Court judgment.*
- (iv) *The Court of Appeal erred in fact and in law in impeaching the sale of the Petitioner’s because if Mr. Chandra was negligent in preparing a general Power of Attorney, then the right of recourse lay with against Mr. Chandra and if the 2nd Respondent had acted contrary to his discussions with the 1st Respondent and had sold the property at an undervalued price then recourse lay against the 2nd Respondent.*
- (v) *The Petitioners are innocent victims here in that they purchased the property for value, they paid the money and they have spent thousands of dollars in renovating and repairing the property only to have the Court of*

Appeal give ownership back to the 1st Respondent. The Petitioners have no right of recourse against the 2nd Respondent who has absconded from Fiji and lives in Australia.

[29] The main issues raised in this case are regarding the validity of the power of attorney executed by Phul Wati, the 1st Respondent and the validity of the sales purchase agreement entered into between the Petitioner and 2nd Respondent Nazir Hussain based on the power of attorney and the transfer effected.

[30] The Petitioner in his written submissions stated that *‘that this appeal has raised far reaching question of law in that the sale of the property was undertaken and completed by a person who held a valid Power of Attorney at the relevant material time when the Sale and Purchase Agreement and Transfer was executed and who had no notice of any revocation of Power of Attorney but the Court of Appeal judgment has now changed the law to the extent that even though a person may enter into a transaction based on a valid Power of Attorney that transaction can be set aside just because the person giving the Power of Attorney comes to Court subsequently and says that her instructions to the Attorney were to only maintain the property and not sell the same.’*

[31] It is the submission of the Petitioner that the judgment of the Court of Appeal has changed the law pertaining to the validity of a power of attorney and this appeal has raised a far-reaching question of law.

[32] Therefore, at this stage it is necessary to examine the relevant law pertaining to granting of power of attorney, power of the attorney and revocation of the power of attorney. This Court must consider whether the judgment of the Court of appeal is consistent or contrary to sections 114 and 115 of Property Law Act.

[33] Section 114 of the Property Law Act deals with Powers of Attorney and in its subsection 114 (1) refers to ‘Execution by attorney in his own name’ It reads:

114. -(1) The donee of a power of attorney may execute or do any assurance, instrument or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power; and every assurance, instrument and thing so executed and done shall be as effectual in law to all intents as if it had been

executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

Section 115 refers to the continuance of the power of attorney until notice of death or revocation received. It reads thus:

115.-(1) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, the power shall, so far as concerns any act or thing done or suffered thereunder in good faith, operate and continue in force until notice of the death of the donor of the power or until notice of other revocation thereof has been received by the donee of the power.

(2) Every act or thing within the scope of the power done or suffered in good faith by the donee of the power after such death or other revocation as aforesaid, and before notice thereof has been received by him, shall be as effectual in all respects as if that death or other revocation had not happened or been made.

[34] In this case Phul Wati executed a power of attorney attested by Suresh Chandra, Solicitor and Notary Public and duly registered it. She appointed her son Nazir Hussain, the 2nd Respondent as her attorney (donee). Therefore, it is a valid power of attorney given to her son Nazir Hussain. Phul Wati after she came to know that the property was sold took up the position that she did not instruct Solicitor Suresh Chandra to include a power to sell in the power of attorney. Whereas Solicitor Suresh Chandra stated that she instructed him to include the power to sell in the power of attorney. This conflict of evidence is not sufficient to invalidate the power of attorney already granted and in force. If at all Phul Wati's remedy is against the Solicitor Suresh Chandra for including a power to sell in the power of attorney without her instructions.

[35] Although Phul Wati revoked the power of attorney it was done after the Petitioner and the 2nd Respondent entered into a sales purchase agreement and subsequent transfer of the property and before tendering it to the Registrar of Titles for registration. Notice of revocation could not be served on the attorney as required by section 115 of the Property Law Act for the revocation to be effective.

[36] As far as the public is concerned there was a validly executed and attested power of attorney which was duly registered and the persons who are entering into agreement

within the scope of the power of attorney should be protected. It is not open to the donor of the power of attorney to subsequently state that she did not instruct the Solicitor to include a power to sell and move to invalidate the power of attorney to the detriment of persons who have acted in the belief that the power of attorney is valid and continue to be in force.

[37] Therefore, I find that the power of attorney granted by Phul Wati to her son Nazir Hussain, the 2nd Respondent is a valid power of attorney, and it was in force during the material time when the sale purchase agreement was entered into between the grantee of power of attorney Nazir Hussain and the Petitioner Kwon and the subsequent transfer of the property.

[38] The second ground is regarding the validity of sales purchase agreement and the subsequent transfer of the property. It is the submission of Phul Wati, the 1st Respondent that the sales purchase agreement and the transfer of property is invalid due to fraud. Following grounds are urged to establish fraud:

- (a) *There was collusion between the Petitioner Kwon and the 2nd Respondent Nazir Hussain. They are long standing friends and had worked together in various organisations in the past.*
- (b) *That the property was purchased at an undervalued price which is less than half of the price according to the valuation report prepared by Sanjay Kirpal at the request of witness Shabinam, the daughter of Phul Wati.*
- (c) *Petitioner Kwon could not explain as to how he obtained funds other than saying that finance supporter advanced money for the deposit and relied on the statutory declaration of Nazir, the 2nd Respondent.*
- (d) *The Petitioner Kwon had deposited the balance of the purchase price to Nazir's account in Australia instead of paying it to the owner Phul Wati.*

[39] This Court has to consider whether these factors taken together could establish fraud. For this purpose it is necessary to examine the evidence and submissions of the Petitioner Kwon and the submissions of the 1st Respondent Phul Wati.

- [40] It is admitted that the Petitioner Kwon had a long-standing association with Nazir Hussain. Nazir Hussain is the son of Phul Wati and according to her she granted a power of attorney to manage the property which is the subject matter of this case. Thereby Nazir Hussain became her authorized agent and thus had the power to act on her behalf. Associating with the authorized agent of Phul Wati and acting on the power of attorney granted to him cannot be construed as an incriminating factor. Phul Wati herself had implicit trust and confidence in Nazir Hussain and granted the power of attorney to him to manage the property but according to her did not intend to grant the power to sell.
- [41] As regards to purchasing of the property at an undervalued price it is not itself sufficient to establish fraud as undervaluing is not a ground to rescind the sale. The Roman Law and Civil Law doctrine of *laesio enormis* is not a part of the Fijian Law. It is the submission of the Petitioner that bargaining is not a wrongful act, and it is permissible. It is the position of the Petitioner Kwon that the 2nd Respondent was in urgent need to sell the property and he first declined to purchase it but subsequently agreed. It is significant to note that two days before the transaction Phul Wati with Nazir Hussain visited his office and Nazir Hussain went with him to a nearby office to meet a prospective buyer.
- [42] As regard to the consideration, he paid to Nazir Hussain, the authorized agent of Phul Wati as per the power of attorney is tantamount to paying it to the principal.
- [43] The Court of Appeal dealing with question of fraud referred to the Judgment in *Assets Co Ltd. v Mere Roihi* [1905] AC 176 at 210, where the Privy Council, in explaining the meaning of 'fraud' in early New Zealand Torrens Registration held that:

“By fraud is meant actual fraud, that is, dishonesty of some sort, not what is called constructive or equitable fraud- an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, the fraud which must be proved in order to invalidate the title of the registered purchaser for value ... must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not

affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.” (Emphasis added)

- [44] The Court of Appeal while placing emphasis on last three sentences and referring to the judgment in *Young vs Hoger* (2001) Q Conv R 54-557 at 11 added that “wilful blindness” to the presence of a fraud-an abstention from inquiry for fear of learning the truth-is tantamount to actual fraud”.
- [45] The Court of Appeal based on these judgments arrived at a conclusion that there was fraud. In this case there was a valid power of attorney given to Nazir Hussain and there was no reason for the Petitioner to entertain a suspicion. I hold that Court of Appeal erred in law and facts when it held that fraud was proved.
- [46] Having considered the evidence and submissions of both parties, this Court has to consider whether fraud was proved or not. In order to arrive at a conclusion, one has to consider the meaning of fraud and standard of proof required to establish fraud. The word fraud defies a precise and an all-inclusive definition. It includes mental elements such as cheating, deceit, deception, dishonesty, misrepresentation which induce a person to act in detriment to the rights or interests of others. However, these mental elements are not exhaustive.
- [47] According to the facts of this case this court has to consider whether or not the Petitioner Kwon acted dishonestly and secure an unfair gain and deprived Phul Wati of her property rights. There is no doubt that in a criminal case fraud must be proved beyond reasonable doubt. However, in a civil case standard of proof is on preponderance of evidence. As fraud amounts to an act involving moral turpitude the law expects a high degree of proof even in a civil case.
- [48] I have examined the evidence and the submissions made by both parties and having considered the elements of fraud and the standard required to establish fraud, I hold that

there is no sufficient material to establish fraud on the part of the Petitioner Kwon. Therefore, the sales and purchase agreement and the deed of transfer are valid in law and the Petitioner is entitled to register the deed in the office of the Registrar of Titles.

Conclusions

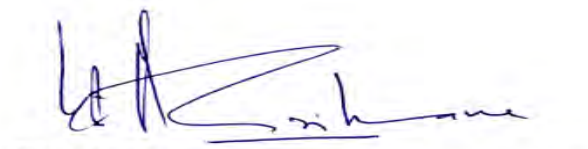
[49] This Court holds that the power of attorney executed by the 1st Respondent Phul Wati and attested by Solicitor Suresh Chandra is valid in law. It was in force during the relevant period the Petitioner Kwon entered into a sales purchase agreement with the 2nd Respondent Nazir Hussain and during the subsequent transfer of property. There was no fraud established to invalidate the sales purchase agreement and transfer of property. This Court holds, that the Petitioner Kwon is a bona fide purchaser for valuable consideration, and he is entitled to register his deed with the Registrar of Titles. For the aforesaid reasons leave to appeal granted and the appeal is allowed.

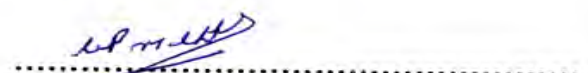
Orders of the Court are:

1. Leave to appeal granted. The Appeal allowed.
2. The Judgment of the Court of Appeal dated 05 October 2018 is set aside.
3. The 1st Respondent Phul Wati ordered to pay a sum of \$1,000 as cost of this appeal and a sum of \$1,000 as the cost in the Court of Appeal and a further sum of \$1,000 as the cost in the High Court to the Petitioner Byeong Bak Kwon.




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Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court


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Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court


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Hon. Mr. Justice Priyasath Gerard Dep
Judge of the Supreme Court