

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 025 of 2020**  
**(High Court Civil Action No. HBC 161 of 2018)**

**BETWEEN** : **NIHAL WANIGASEKERA**  
*Plaintiff / Appellant*

**AND** : **1. ANEESH SHARMA**  
**2. ASHEEKA DEVI**  
*Defendants / Respondents*

**Coram** : Almeida Guneratne, P  
Jitoko, VP  
Basnayake, JA

**Counsel** : Mr. R. Charan and Ms. J. Bhauna for the Appellant  
1 and 2 Respondents in person

**Date of Hearing** : 4 May 2023

**Date of Judgment** : 29 September 2023

**JUDGMENT**

**Guneratne, P**

[1] I agree with the judgment of His Lordship, Justice Basnayake.

**Jitoko, VP**

[2] I concur with the judgment of Basnayake JA that the appeal be dismissed and the judgment of the Court below be affirmed.

**Basnavake, JA**

- [3] This is an appeal filed by the Plaintiff/Appellant (Plaintiff) to have the judgment (pgs. 4-16 of the Record of the High Court (RHC)) dated 26 February 2020 set aside. By this judgment the learned Judge had dismissed the Plaintiff's claim and the Defendant's counter claim. The Defendants did not appeal against the dismissal of the counter claim.
- [4] The Plaintiff in an amended statement of claim (pgs. 19 - 22) seeks *inter alia* judgment against the Defendants in a sum of \$195,000.00 and alternatively a declaration that the Defendants hold the land and iTLTB agreement for lease No. 4/7/39616 and vehicle bearing registration No. JL 158 on constructive trust for the Plaintiff, and an order that the Defendants transfer the land and the vehicle to the Plaintiff.
- [5] The Plaintiff is a resident of Australia. The Defendants have been residing in Fiji. The Plaintiff states that he had known the Defendants for a long time. The Plaintiff states that the 2<sup>nd</sup> Defendant is a relative of the Plaintiff's wife. The Plaintiff averred that at the request of the Defendants for money to construct a house on a land belonging to the 1<sup>st</sup> Defendant, the Plaintiff loaned a sum of \$ 165,000.00 from September 2016 to October 2017. The repayment was to be done on the maturity of the 1<sup>st</sup> Defendant's two insurance policies in 2018. In paragraphs 5 and 6 of the statement of claim as well as the amended statement of claim the Plaintiff states that the Defendants would repay the money once the insurance policies matured in 2018.
- [6] The Plaintiff avers that upon agreement the Plaintiff gave money to the Defendants in the following manner:

September 2016	:	\$20,000.00
January 2017	:	\$45,000.00
May 2017	:	\$50,000.00
October 2017	:	\$50,000.00

The Plaintiff also averred that he bought household material worth \$12000.00 which was a gift. This was to justify that the other monies were not gifts but loans.

- [7] The Plaintiff said that these monies were taken from his savings and although the Plaintiff requested and demanded payment the Defendants failed and refused to pay. In January 2018 when the Plaintiff asked the money back the Defendants gave a statutory declaration (S/D) on 13 January 2018 (pg. 51) acknowledging the receipt of a sum of \$165,000.00 from the Plaintiff (S/D which is reproduced in paragraph 35).
- [8] The Plaintiff avers that he visited Fiji in March 2018 and decided to purchase a vehicle for himself. As he did not have enough time to look for a suitable vehicle, he had left \$30,000.00 with the Defendants for safe keeping to purchase a vehicle in his name. The Plaintiff learnt that the Defendants had bought a vehicle bearing registration No. JL 158 under the 2<sup>nd</sup> Defendant's name with that money. The Plaintiff avers that the Defendants unjustly enriched themselves at the expense of the Plaintiff.
- [9] The Defendants (pgs. 60-63) aver that the monies were given as charity and not by way of loan. The Defendants also denied agreeing to settle the money received on the maturity of the insurance policies. The Defendants aver that the statutory declaration was obtained in the pretext of using it for tax purposes in Australia. The Defendants stated (paragraph 19 at page 62) that the Plaintiff had an intention to get legally married to the 2<sup>nd</sup> Defendant. Upon the denial of the proposal the Plaintiff required the Defendants to provide the S/D. The Defendants state (para 21 at pg. 62) that, the Plaintiff forced the Defendants into receiving cash and accessories. The Defendants state that the monies given were to be treated as gifts. The Defendants in a counter-claim prayed for a sum of \$11,700.00 for humiliation and unreasonable duress and expenses incurred in the filing of documents.
- [10] The Defendants denied and disputed the averments of the Plaintiff in the amended statement at paragraph 10 that the Defendant failed, refused and/or ignored to repay the Plaintiff any money despite being requested and demanded by the Plaintiff.
- [11] The Plaintiff in evidence said that he had known the Defendants for a long time. He said that he got to know the Defendants through his former partner. He said that his relationship with the Defendants was very close. "*We always visited them, we spent time with them. It was a very friendly*" (pg. 158). To a direct question as to, "*what did the Defendants ask you*

for?" he said in 2016 they showed a TLTB agreement and asked whether he could lend some money to build a house. When he asked as to whether the money could be paid back he was told that it would be paid back in two years' time when the insurance policies matured in January. However he said that he did not know the kind of insurance and that he had not seen the policies. He also said that he left some money with them for him to buy a car. However the 2<sup>nd</sup> Defendant had bought a car with that money and got it registered in her name. He said when he asked for the money the Defendants sent him an affidavit saying that they borrowed the money. The agreement was to repay the money once the insurance matured. He said that he requested a couple of times to return the money after March 2018. He said that a demand notice was sent through his Solicitor (marked P-5 at pg. 56). The letter demanded \$195,000.00. (165,000.00+30,000.00).

[12] Answering to a question by the 2<sup>nd</sup> Defendant with regard to what he meant by the word befriending the Defendants and having a close relationship, he said; (pg. 171)

*A. Close relationship with that we know I was so friendly with you that what I meant that we had a close relationship.*

*Q. Very close relationship?*

*A. Yes.*

*Q. What do you mean by very close relationship?*

*A. Well as a family that's what it is we in the sense as a family we very close. Any family when they can't be close we can be because that's the way it is. There is nothing wrong with that very friendly.*

*Q. The close relationship between you and was having affair with me. You were sleeping with me?*

*A. Never happened.*

*Q. You have sleep with me?*

*A. Well you can accuse me of anything but I never did.*

*Q. You did have an affair with me?*

*A. No, I never had.*

*Q. O.K. without that affair how could you give that money to me?*

*A. I didn't give the money with affair I just lend the money to you all to build the house.*

Q. *So you didn't have a sexual relationship with me?*

A. *I never did.*

.....

Q. *Without having the relationship how can you give that such a big amount of money without any agreement or just or verbal agreement?*

A. *Of course I trusted you because I lend the money to be returned and since I got the document saying that you borrowed the money so I was happy with it.*

[13] The 2<sup>nd</sup> Defendant was not allowed to show a photograph to the Plaintiff to identify himself in the photograph as this photograph was not part of the bundle of documents. The 2<sup>nd</sup> Defendant said that this photograph was to prove the relationship with the Plaintiff. The 2<sup>nd</sup> Defendant was not allowed to show this photograph as she had not stated anywhere in her statement of defence of having had a sexual relationship with the Plaintiff. Answering to court the 2<sup>nd</sup> Defendant said that she did not mention it as she was afraid. The 2<sup>nd</sup> Defendant was prevented from questioning the Plaintiff on sexual affairs as they did not arise from pleadings. In the pleadings the Defendants aver that the 2<sup>nd</sup> Defendant declined to marry the Plaintiff. This has to be considered along with the Plaintiff's claim that he befriended the 2<sup>nd</sup> defendant and had a very close friendship. Was it this close friendship that culminated in the proposal to marry and the sexual relationship as claimed by the 2<sup>nd</sup> defendant?

[14] With regard to the statutory declaration the Plaintiff said that he never asked for a document. The Plaintiff said that the statutory declaration was given two years after the money was given. Without seeing the insurance policies and without any written agreement he said the money was given on trust. He said if he did not trust the 2<sup>nd</sup> Defendant he would have got a document before giving the money (Pg. 173). It was suggested to the Plaintiff that the statutory declaration was written by the Defendants as per the instructions given. The 2<sup>nd</sup> Defendant suggested that words such as 'on availability' and 'installment' were written as told by the Plaintiff. The Plaintiff said that he "*never asked the Defendants to write anything. It's just how you gave me the document on this was it. It was done by you all and sent to me*".

(pg. 174) Q. *Isn't it that you made us sign the statutory declaration as in for tax claim back in Australia?*

A. *No. I never did.*

Q. *You, sure you never did?*

A. *I never did.*

The plaintiff denied that he wanted this document in order to evade tax in Australia.

[15] The following questions were asked with regard to sending money on 25<sup>th</sup> February to buy a car.

(pg. 174) Q. *The statutory declaration was signed on January 13 (2018) and you gave me the money on 25<sup>th</sup> February on which trust? You know we can't give you the money, how can you give another \$30,000?*

A. *On trust I gave \$165,000.00 to build a house so that it could be return back so the \$30,000 was for safe keeping for me to buy the car?*

Q. *That was not a trust, it was a lust?*

A. *It was trust that I was going to purchase the vehicle that's why I left the money with you.*

He said (pg. 175) categorically when he was asked as to why he gave money to Aneesh (1<sup>st</sup> Defendant) that he didn't give money to Aneesh and the money was given to the 2<sup>nd</sup> Defendant. At page 176 the following question and answer was given.

Q. *He gave the money to me and he knew that I was not working I do domestic duties. I doesn't work. On which trust he gave me such a big amount of money?*

A. *Verbally when you told me there was insurance matured on 2018 on Aneesh's on both that's what it is and I trusted you what you have said.*

[16] Thereafter the Plaintiff was questioned as to the purpose of sending the money.

Q. *I would like Nihal to see this money sent to me by Western Union...Can you tell me..... reason for transfer?...reason why you sending me the money....Can you read these words gift?*

A. *Yeah well when you send money my Lord you had to state why you sending....we need to state as to why because normally when you send it through foreign currency then need to know why you sending*

*the money for what reason. So I just put it as gift as long as you state or what the reason is.  
(pg. 177)*

*Q. But its written there its gift that's what I know that why I took that money. I know it was a gift. I don't know it was a loan?*

*A. Well you've given me a document saying that you borrowed the money that's all I know and I am happy that you got documents saying that you borrowed the money \$165,000.*

*Q. You said that statutory declaration was for tax purposes. If I would have known that I would have never written that statutory declaration?*

[17] The Plaintiff made use of the S/D to prove that the Defendants were given \$165,000.00 by the Plaintiff. It was the Plaintiff's case that the Defendants were given \$165,000.00 and the statutory declaration attested before a Justice of Peace on 13 January 2018 is proof. The Defendant's position is that as requested by the Plaintiff and on instructions received the statutory declaration was prepared for \$165,000.00 by a Justice of Peace to be made use of by the Plaintiff for tax purpose in Australia. The 2<sup>nd</sup> Defendant questioned the Plaintiff with regard to sending \$165,000.00.

(pg. 177)

*Q. You said January 2017, you gave me \$45,000 and in May 2017 you gave me \$50,000 and in October 2017 you gave me \$50,000 again? Do you have any proof of that money?*

*A. The prove (proof) is the document that you have given me as S/D. (pg. 178) A. Your honour all that I got to say is all this money was given and I got that document from them saying that they borrowed the money that's all I know but the money was given to them and they agreed and they gave me the document saying they borrowed the money so that's all I know.*

[18] The Plaintiff produced several bank statements to show that monies were drawn from his accounts in Australia. It appears that these bank statements are not for the purpose of proving payments claimed to have been made to the Defendants by the Plaintiff. The sole document the Plaintiff is relying on is the S/D to prove the payment of \$165,000.00.

*Q. Mr. Nihal I read the statutory declaration I just know about this money. 9<sup>th</sup> April I know \$27,000 I picked up from Mayur. 25<sup>th</sup> April \$12,000 I picked it from Joyti, 14.5.17 \$16,250 I picked it from Mayur, 18.5.17 \$5,364, 15.6.17 \$4000, 21.6.17 \$3000, 29.6.17 \$7,537.98 through Western Union, 25.2.18 you gave me \$30,000 I never picked it from you I picked it from Joyti. You never claimed this money in your affidavit in your claim. You never claim that money. You claimed \$50,000, \$45,000 and another \$50,000? I only know about this money I don't know about this money? So this money was given to me.*

The answer to this question is that, "*I remember the total that's all I know*".

[19] Thereafter the Plaintiff was questioned about the Plaintiff's bank accounts.

*Q. Can you on those two different bank accounts, can you prove the claims you have made in statement of claims in para 7 (para 7 states. "That upon agreement the Plaintiff gave money to the Defendants in the following manner:*

- a. In September 2016...loaned the Defendants first \$20,000.00.*
- b. In January 2017...\$45,000.00.*
- c. In May 2017...\$50,000.00*
- d. In October 2017...\$50,000.00.*

The 2<sup>nd</sup> Defendant's position is that she has no record of these figures as the Plaintiff never gave those monies.

(pg. 179)

*Cri. You have no record of the money he gave to you in 2016 right? 2016 when he visited Fiji he gave you \$20,000 you have no record of that.*

*2D. I don't have because he never gave me that money.*

*Cri. Yeah but what about the other record. You have all other record.*

*2D. Because the money I got I already wrote. The day, date I already write. But the money I don't know I never write. Because I know it was a gift. I just know it, it was a gift. I never loan the money from him, I never loan the money. (pg. 183)*

[20] The 2<sup>nd</sup> Defendant claimed that the Plaintiff wanted the 2<sup>nd</sup> Defendant to buy a land and since that was taking time the Plaintiff wanted the 2<sup>nd</sup> Defendant to persuade the 1<sup>st</sup> Defendant to transfer the 1<sup>st</sup> Defendant's land to the 2<sup>nd</sup> Defendant.



Q. *Nihal was helping me to buy that land but since it took time so he wanted Aneesh to transfer me that land. He was buying that land for me because he wanted to help me (pg. 183).*

.....  
A. *I never bought any land....*

.....  
A. *As I said I gave the money to you because you were part of family at that time.*  
(pg. 184)

[21] Re-Examination

.....  
Q. *And how did you give this lump sum. Was it one payment?*

A. *Not in one payment as such I said I just put in one particular month may be in that period but the total which I just mention...*  
(pg. 186)

Q. *And how was this money to be paid to you?*

A. *As I said it was to be paid after 2018 of the 2 insurances they claimed.*

.....  
A. *I have not seen the policies. I just took their word for granted.*

The Plaintiff said it was after 2018 March that he found that the Defendants were neglecting to pay back.

Q. *When did you discover they are neglecting to pay you back the amount?*

A. *That was after 2018 after March I think when I found that the car was transferred to their name.*  
(pg. 187)

Q. *How was this whole sum paid to the Defendant?*

A. *In part. Some of the money was given by me some money was given through friends.*

The Plaintiff was questioned in re-examination as to what has happened after March 2018 as follows:

Q. *So what happened in March 2018?*

A. *When I came back to Fiji because they already said that they have seen the car when I visited in March they have bought the car and it was under their name then only the alarm bell rang they did a fraud on me.*

Evidence of the 1<sup>st</sup> Defendant (pgs. 189-199)

- [22] The 1<sup>st</sup> Defendant said that he did not know anything with regard to this money. He said the money was not given to him. (It is to be noted that the Plaintiff too said the money was given to the 2<sup>nd</sup> Defendant. At page 175 the Plaintiff while answering a question by the 2<sup>nd</sup> Defendant as to why the Plaintiff gave such a vast amount of money to the 1<sup>st</sup> Defendant when the Plaintiff knew the 1<sup>st</sup> Defendant only very briefly, for one or two months, he said that *"I didn't give to Aneesh (1<sup>st</sup> Defendant) I gave it to you (2<sup>nd</sup> Defendant)...I lend the money to you because I knew your family that's what it is."* Again at page 184, the Plaintiff said, *"As I said I gave the money to you...you (2<sup>nd</sup> Defendant) took the money."*
- [23] The 1<sup>st</sup> Defendant said that there was no mention that the money was to be repaid. He said the Plaintiff did not mention anything about documents either. With regard to the insurance policies he said that he never informed the Plaintiff about the policies or the dates of maturity. He said the house was constructed in 2017 and was ready in August 2017 when they went to reside. The Plaintiff has visited them. Once he said the Plaintiff quarreled with the 2<sup>nd</sup> Defendant and slept outside the house in his vehicle FZ 307. He said that when the Plaintiff came to the house he (The Plaintiff) used to spend time with the 2<sup>nd</sup> defendant. Whenever the 2<sup>nd</sup> Defendant was in the kitchen, the Plaintiff too used to be in the kitchen. If the 2<sup>nd</sup> defendant was in the front section, the Plaintiff too used to be in the front section. The 1<sup>st</sup> Defendant said that at that time the 1<sup>st</sup> Defendant did not know that the Plaintiff had a relationship (sexual) with the 2<sup>nd</sup> Defendant.
- [24] The 1<sup>st</sup> Defendant said that he learnt about a relationship only when the 2<sup>nd</sup> defendant informed court of having an affair with the Plaintiff in the injunction application. He said most of the time the Plaintiff used to communicate with the 2<sup>nd</sup> Defendant. He said that he met the Plaintiff for the first time in 2016.

[25] With regard to the statutory declaration the 1<sup>st</sup> Defendant said that the Plaintiff wanted a document for tax purposes and after speaking with Elvin Raj who is a J.P. a document was drafted obtaining the signatures of the Defendants. He said in March 2018 the Plaintiff came and stayed with the Defendants. Thereafter the Plaintiff's wife came and started a quarrel. He had called the police and the police had requested the Plaintiff's wife to leave. He said the Plaintiff did not leave. He said the following day the Plaintiff's wife and her sisters came to the village and spread rumors that the 2<sup>nd</sup> Defendant was having an affair with the Plaintiff and that was the reason for the Plaintiff to build a house for the Defendants. This evidence was not challenged. He said the Plaintiff also started using JL 158 until the Plaintiff left for Australia. He said the Plaintiff had abandoned the vehicle on the roadside due to mechanical problems. When it was found the engine could not be started as the engine had ceased due to an oil leak. The 1<sup>st</sup> Defendant said that they received a demand notice thereafter.

[26] Under cross examination the 1<sup>st</sup> Defendant said that the house was built with the money received from the Plaintiff. (pg. 194)

*Q. So you admit the total lump sum has been around \$165,000?*

*A. I am not sure.*

*Q. Isn't it true Mr. Aneesh when this matter was for injunction hearing before the Judge you had received that amount?*

*A. Yes as a help I said.*

*Q. But you admitted receiving the amount?*

*A. Not the amount on the statutory declaration.*

*Q. And before a Judge you said this is true what you have written here?*

*A. I informed the Judge my Lord that these documents drafted for tax purposes.*

(pg. 197)

*Q. It was paid part payments?*

*A. Yes it's shown in the schedule my Lord and as per documentation of the money transfer my Lord.*

*Q. Now isn't it Mr. Aneesh that when you were not paying him on time and this is when you provided him with his written document to pay off the loan?*

A. *At the beginning of 2018 my Lord, we were informed by the Plaintiff to make such document for his tax purposes.*

[27] He said the vehicle was bought with the Plaintiff's money.

(pg. 198)

Q. *To sum it up Mr. Aneesh, Mr. Nihal had lent you money. He had lent the money to you in the sum of \$165,000 through part payments. You had promised him to return his money through your insurance agent isn't it?*

A. *No.*

Q. *And you were to return this money upon your insurance policy being matured?*

A. *No*

### **2<sup>nd</sup> Defendant**

[28] The 2<sup>nd</sup> Defendant said (pg. 201), *"I never thought of standing in court my Lord. If I knew that Mr. Wanigasekera (Plaintiff) would bring me in the court today I would have never had any relationship with him. Firstly he made me friends on Facebook. That was in 2016 and in the same year my Lord my first child passed away on 1.1.16....near 2016 my Lord he told me that he has been admiring me from 2014 and he pestered me for me to have a relationship with him and have sexual intercourse and not to inform his wife. What my situation my Lord because of that and because of greed of money I had a relationship with him. We had a healthy relationship my Lord. He told me my Lord not to rent he is going to build a house for me and I can go and stay in that house".*

[29] She said when Mataquali did not consent for leasing a land he asked the 2<sup>nd</sup> Defendant to persuade Aneesh (1<sup>st</sup> Defendant) to transfer his piece of land in the name of the 2<sup>nd</sup> Defendant. She said, *"Afterwards my Lord the construction of the house began, and the relationship was also good my Lord". "Everything was going well my Lord and after aunty or Plaintiff's wife came to know our relationship. the*

*Plaintiff's wife force the Plaintiff if the money or the land/property can be transferred....".*

[30] She said on 26 February (2018) the Plaintiff sent \$30,000 through someone to buy a vehicle. She said he offered her gold, clothes and money. She said that she went with the Plaintiff visiting places in the vehicle that was bought. After the Plaintiff's wife had come to Fiji and had a quarrel with him the Plaintiff had left the Defendant's house. Thereafter the Plaintiff tried to communicate with the 2<sup>nd</sup> Defendant through 'Viber' and the 2<sup>nd</sup> Defendant had told the Plaintiff that she does not want to communicate with him.

[31] She said (pg. 202), *"I admit my Lord that he gave me monies because he was having sexual relationship with me"..."My Lord I admit that these monies were given to me and I also want to give the reasons why he gave those monies and...the statutory declaration was made....for tax purposes...those monies were given to me as a gift"*.

[32] Under cross-examination

*Q. Then in 2016 your families started getting close to each other?*

*A. Yes.*

.....

*Q. So you admit you did receive money \$165,000 in part payments.*

*A.....*

*Q. But you did receive that amount?*

*A. Yes.*

.....

*Q. You built a concrete house with this money?*

*A. ....*

*Q. Did you purchase a car with Nihal's money?*

*A. He sent me a birthday gift.*

*Q. Did you purchase a car with Nihal's money?*

*A. Yes.*

*Q. Now Mr. Nihal is saying that you have borrowed all this money isn't it?*

*A. No.*

*Q. This money was to be paid through insurance policy?*

*A. No.*

*Q. When you have not paid in March 2018 that when Nihal has started asking for the money to be paid?*

*A. No*

*(At pg. 205) Q. But he is asking you to return \$165,000 isn't it?*

*A. Yes he is demanding those monies after we had ended our relationship.*

*A. The monies he is claiming my Lord is the same monies he has given to me as a gift. That's the only money not the other monies.*

*Q. Ms. Devi you admit receiving the amount \$165,000 from Nihal?*

*A. Yes.*

*A. That \$165,000 was a gift. This \$165,000 my Lord was given to me to build a house and to buy whatever I want to. It was a gift.*

Referring to the statutory declaration PEX 4.

*Q. So in this document you admit taking the money the total sum of \$165,000?*

*A. I admit.*

*Q. It was made in part payment to you?*

*A. Yes.*

*A. I can't return the gift. Gifts can't be returned.*

*Q. Ms Devi how could you expect the person to give \$165,000?*

*A. Because he was having the sexual relationship with me that's why.*

*Q. According to the Plaintiff this money was to be repaid through your life insurance?*

*A. I don't have an insurance policy my Lord. He admitted that he gave me the money. He knows me.*

*A. He gave me the money my Lord and he admitted that he gave me the money.*

*A. I didn't have any insurance policy my Lord. He gave the money to me....*

*A. All the monies were sent to me my Lord and dealings were done between me and Nihal (Plaintiff) nothing to do with my husband. That's why my Lord we had sexual relationship and that why he was dealing with regard to anything*

*with me. He used to pay this monies for me to have sexual relationship with him my Lord. Now I am asking him if he could return these monies. Can he do that?*

.....  
*A. These monies were not borrowed my Lord. What is all stated in the declaration is just for tax purpose my Lord and it was written by the JP himself not us. Mr. Nihal had asked for the contact details of the JP. I furnished the same to Mr. Nihal.*

[33] The next witness was Abneet Sharma (pgs. 210-211). He said in evidence that the Plaintiff is now staying with the wife of this witness. He stated that his wife got to know the Plaintiff through Facebook and that the Plaintiff used to send her money and is now living with her.

#### **Judgment of the High Court**

(A portion of the judgment is reproduced verbatim sans the numbering 19-43 contained in the judgment for convenience).

[34] *“The plaintiff claims the return of \$195,000.00, the monies he sent or gave to Asheeka Devi over a period of time. The basis of the claim is that the money was given to her as a loan to build a house. The pleaded causes of action were breach of agreement/misrepresentation/fraud and unjust enrichment. In order to substantiate his claim of loan, he relied on the statutory declaration given by the defendants. Devi denied receiving the monies from the plaintiff as a loan. She maintained that the monies were given by the plaintiff to her as a gift as he was having an affair with her. The first named defendant, Aneesh Sharma has nothing to do with the exchange of money between the plaintiff and Devi, his wife, except for receiving some money sent by the plaintiff on behalf of Devi.*

#### *Statutory Declaration*

[35] *On 13 January 2018, the defendants had executed a statutory declaration before a JP. It reads:*

*We Mr Aneesh Kumar Sharma and Mrs Asheeka Devi of Teidamu, Lautoka solemnly and sincerely declare that we borrowed one hundred*

*sixty five thousand dollars (\$165,000.00) from Mr Nihal Wanigasekera of 21 Rubicon Crescent, Kuraby 4112 Brisbane Australia to build our house at the Teidamu, Lautoka. The money we have borrowed will be paid back to him in installment on availability without any interest .....*

- [36] *Under cross examination, the plaintiff admitted that the remittance advice indicates the transaction as 'gift' but he maintained that he cannot send money otherwise than gift. The plaintiff was sending money to Devi from September 2016 till October 2017. He gave monies to Devi through his friend or agent in Fiji and sometime via money transfer directly to Devi. In 2016, the plaintiff and Devi became Facebook friend. Thereafter, he was used to visit Fiji and stay with Devi at her house. According to the plaintiff, he befriended with Devi. She met the plaintiff as an underprivileged girl. She did not have any property at that time. It is notable that at the time when the plaintiff started to send money to Devi there was no agreement or arrangement that she would return the money back to the plaintiff. Devi appears to have received the money from the plaintiff without any obligation to return it. She did not know the plaintiff was giving the money as loan to build a house. Even the plaintiff did not tell her that he was giving the money as a loan.*
- [37] *Devi said in evidence that the plaintiff was pressuring them to execute a statutory declaration for tax purposes in Australia; and that she did comply with his request and execute the document jointly with her husband, DW1. Devi's evidence was coherent, consistent and straightforward. I had the opportunity to observe her demeanour while giving evidence, and I noticed that she was unshaken and answered the cross-examination questions without any hesitation or pause. Despite the risk of destroying or damaging the wide relationship between her and her husband (Aneesh) if she discloses her sexual ties with the plaintiff, she said the plaintiff was used to stay at her house and sleep with (meaning have sex) her whenever he visits Fiji. I, therefore, find her as a truthful witness, and I accept her evidence. The plaintiff did not look at Ms Devi's capacity to repay the sizable money he was giving to her. He did not ask her to execute a statutory declaration or any agreement to repay at the time when he gave money to her. He was giving money to Devi over a period of one year starting from 2016. During this period there was no talk of the loan to build the house and the statutory declaration.*



[38] *The idea of statutory declaration was an afterthought one. It appears that the plaintiff came out with this idea when his wife got to know about his sexual ties with Devi. Devi had just done what the plaintiff was telling her to do. It has been executed by the defendants without any independent legal advice. I accept the defendants' evidence that it was executed for the plaintiff's tax purposes at his request. I would, therefore, disregard the statutory declaration signed by the defendants.*

*Loan or gift*

[39] *The plaintiff claims the monies given to Devi as a loan. In his amended statement of claim he says that he agreed to lend the money to the defendants on the basis it would be repaid to him, and that it was agreed between both parties that the plaintiff would provide the fund to the defendants to enable them build the house and the defendants would repay the money once the insurance matures. It was the plaintiff's evidence that the defendants asked him if he could lend some money to build a house and he agreed when they said they would repay in 2 years when the insurance matures. Devi had no insurance policy. However, her husband Aneesh (DW1) had 2 insurance policies. DW1 said in evidence that he did not have enough money in the insurance for him to take that amount of loan. Mr Wanigasekera knew of his (DW1's) family conditions.*

[40] *Was there any promise or arrangement by the defendants that they would repay the monies they receive from the plaintiff? The monies were given to Devi without any security or promise to return it. Devi simply received the monies without any obligation to repay it because she had an affair with the plaintiff. A large amount of money had been exchanged between the plaintiff and Devi, without any promise on the part of Devi. On the evidence, I find that the defendants did not request the plaintiff to lend money to build a house. At the time when Devi received the money, she did not give any promise that she will return it in about 2 years' time when the insurance matures. I reject the plaintiff's evidence that he lent the money to the defendants upon their promise that they would repay it when the insurance matures. There is no evidence that the defendants misled, or misrepresented the plaintiff or unduly influenced the plaintiff into giving the monies to them.*

[41] *Gift, in law, a present or thing bestowed gratuitously. The term generally restricted to mean gratuitous transfers inter vivos (among living) of real or personal property. One cannot really give somebody a gift for no reason because you do have a reason for giving the gift. You are bringing attention to yourself by giving a gift, so the reason is to get attention. In this case, the plaintiff had hidden agenda for giving gift. The hidden agenda was to have an affair with Devi. He got Devi's attention to himself by giving monies. The donor (the plaintiff) and the donee (Devi) had full capacity to give and receive gift. I should emphasise that there was no evidence whatsoever demonstrating that Devi unduly influenced the plaintiff into giving monies. Given the fact that the plaintiff had sexual ties with Devi, he was giving monies to Devi without any obligation to return it so that she had accepted the money as gift.*

#### *Conclusion*

[42] *On the evidence, and for the reasons I have set out above, I find that the monies given by the plaintiff to Devi was gift and it was not given as a loan. I would, therefore, dismiss the claim. I would not make an order for costs as the defendants had appeared and defended the claim in person. However, the defendants had failed to lead sufficient evidence in respect of their counterclaim. As such, I would dismiss their counterclaim as well without costs" (paragraphs 19-43).*

#### **Salient features in the High Court Judgment**

[43] The learned Judge found that at the time when the Plaintiff started to send money to the 2<sup>nd</sup> Defendant there was no agreement or arrangement that she would return the money back to the Plaintiff. The 2<sup>nd</sup> Defendant appears to have received the monies without any obligation to return it. She did not know that the Plaintiff was giving it as a loan to build a house. The Plaintiff did not tell her that he was giving the money as a loan.

[44] When the Plaintiff gave the money he did not ask to execute the Statutory Declaration or any agreement to repay. There was no talk of building a house. The idea of Statutory

Declaration was an afterthought and was executed for the Plaintiff's tax purposes in Australia. Hence the Statutory Declaration was disregarded by the learned Judge.

**Loan or gift**

[45] The Plaintiff's case is that the money was given to the 2<sup>nd</sup> Defendant to build a house and to repay once the insurance policy matures. The 2<sup>nd</sup> Defendant did not have an insurance policy. The 1<sup>st</sup> Defendant had two insurance policies. The value of those policies were not sufficient to meet the amounts received. The Plaintiff knew the family conditions of the Defendants (destitute).

[46] The 2<sup>nd</sup> Defendant received money because she had an affair with the Plaintiff. On the evidence the learned Judge had found that the Defendants did not request the Plaintiff to lend money to build a house. At the time the 2<sup>nd</sup> Defendant received money she did not give any promise that she will return the money in two years when the insurance matures. (Ps. Insurance to mature in 2033 and not in 2018. The value of the two insurance policies was \$20,000.00 as against the claim of \$195,000.00).

[47] The learned Judge rejected the Plaintiff's evidence that he lent the money upon the promise that they would repay when the insurance matures.

[48] The learned Judge found no evidence that the Defendants mislead or misrepresented the Plaintiff or unduly influenced the Plaintiff into giving monies to them. The Plaintiff was to have an affair with the 2<sup>nd</sup> Defendant. The Plaintiff got attention to himself by giving monies. The Plaintiff had sexual ties with the 2<sup>nd</sup> Defendant. The Plaintiff was giving monies to the 2<sup>nd</sup> Defendant without any obligation to return the same and she has accepted the money as gifts. It was a gift and not a loan.

[49] **Grounds of Appeal**

1. *The learned Judge erred in fact and/or in law in holding that the monies given by the Appellant was a gift and it was not given as a loan.*

2. *The learned Judge erred in fact and/or in law in holding that the Appellant had a hidden agenda for giving a gift when it was never the intention to gift and the series of payments from the Appellant to the Respondents was a loan that had to be repaid.*
3. *The learned Judge erred in fact and/or in law in holding that the Appellant had a sexual and intimate relationship with the second named Respondent.*
4. *The learned Judge erred in fact and/or in law in holding that the monies advanced by the Appellant was the result of free exercise of the Appellant's will when in fact the monies loaned was the result of influence expressly used by the Respondents for the purpose of gaining financial advantage.*
5. *The learned Judge erred in fact and/or in law in failing to raise a presumption that the Respondent had influenced the Appellant in advancing monies and that the Respondent's conduct rise to the level of conscionable conduct.*

#### Analysis

[50] As per the judgment the issue in this case is whether the money claimed was a loan or a gift. The learned Judge rejected the Plaintiff's evidence that the money was advanced on a promise by the Defendants that it will be repaid. Monies were apparently advanced during the period 2016 and 2017. The Plaintiff claims that all the monies were given to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant admits to having received the money. The Plaintiff claims that the monies were given on installments on the promise that the Defendants would repay in two years' time when the two insurance policies of the Defendants matured. The Plaintiff claims in the statement of claim and the amended statement of claim that the monies were paid in the following amounts. In September 2016 \$20,000.00, in January 2017 \$45,000.00, In May 2017 \$50,000.00 and in October 2017 \$50,000.00 totaling \$165,000.00. The Plaintiff states in the statements of claims that the said monies were given, "with the belief that they will repay in January 2018".

[51] Whilst giving evidence the Plaintiff produced Bank statements in proof of payment. However the Plaintiff did not identify any particular withdrawal that linked the payment. The Plaintiff did not give evidence with regard to installments. Although he claimed in the statements of claims four different payments and the months and also produced bank statements, no evidence was adduced to prove the four installments that made up the

\$165,000.00. When the Plaintiff was questioned in cross-examination with regard to the four installments, the Plaintiff said that he only remembers the total amount of \$165,000.00. No questions were put to the Defendants in cross-examination to establish that the monies were paid in four installments in four different months. The Defendants denied that the monies were paid in four different installments as per the statements of claims.

[52] Whilst cross examining the Plaintiff, the 2<sup>nd</sup> Defendant gave the amounts received, the dates and from whom the payments were received as follows:-

<u>From whom received</u>	<u>Dates of payment</u>	<u>Amount</u>
Mayur.	9 April (2017)	27,000.00
Joyti	25 April 2017	12,000.00
Mayur	14 May 2017	16,250.00
Western Union	18 May 2017	5,364.00
	15 June 2017	4,000.00
	21 June 2017	3,000.00
	29 June 2017	7,537.98
Joyti	25 February 2018	30,000.00

[53] The total of these payments is \$105,151.98. The Plaintiff did not deny the suggestion made by the 2<sup>nd</sup> Defendant (pg. 178). Whilst the 2<sup>nd</sup> Defendant gave evidence no questions were put to the 2<sup>nd</sup> Defendant with regard to the details of payments mentioned above. It may be because the 2<sup>nd</sup> Defendant has admitted to having received \$165,000.00 and \$30,000.00. The Defendants appeared in person. However the Plaintiff could have got a clarification with regard to those detailed payments she (2<sup>nd</sup> Defendant) is said to have received without leaving these questions in limbo. If \$165,000.00 was paid in installments of 20,000, 45,000, and two payments of 50,000 where do the payments of 27,000, 12,000, 16,250, 5364, 4000, 3000 and 7537.98 fit in? There is no explanation from the Plaintiff with regard to the payments of 20,000, 45,000, 50,000 and 50,000 and the payments said to have been

received by the 2<sup>nd</sup> Defendant (that is \$105,151.98). The Bank statements did not support the payment of \$165,000.00.

- [54] The Plaintiff got the figure of \$165,000.00 from the Statutory Declaration (S/D). According to the Plaintiff the S/D was something the Plaintiff never asked for. It was sent by the Defendants when the Plaintiff requested payment. That is, when the Plaintiff told the Defendants on a date prior to 13 January 2018 to return the money given, the Defendants, without giving the money, sent the note dated 13 January 2018 acknowledging the debt. The Defendants' evidence is that the S/D was a document prepared by a Peace Officer as per the instructions of the Plaintiff to use in Australia for tax purposes. The Plaintiff would not have given another \$30,000.00 to the Defendants on 26 February 2018 when the Defendants could not honor the Plaintiff's request for payment of \$165,000.00. The learned Judge has rightly rejected the S/D as an acknowledgement of the receipt of \$165,000.00. The learned Judge said that the S/D was an afterthought. When the Plaintiff made a request from the Defendants for a document that would help the Plaintiff in his tax matters in Australia, the Defendants would have promptly responded. At this time the Defendants were in receipt of payments from the Plaintiff and the Defendants would not have been concerned about declaring \$165,000.00 or any other amount in the S/D. The S/D was dictated by the Plaintiff and the amount (\$165,000.00) was part of the dictation. That is the reason why the Plaintiff could not explain how the sum of \$165,000.00 was made up. This was a hypothetical figure. The 2<sup>nd</sup> Defendant appears to have broken-up with the Plaintiff in or about March 2018. Up to that time both parties were getting on peacefully. There was no talk of asking or returning money. If the Plaintiff had ever asked the Defendants to return the money in January 2018 the Defendants would have been careful in accepting more money. The Plaintiff also would not have sent the 2<sup>nd</sup> Defendant another \$30,000.00. The Plaintiff's story of sending \$30,000.00 more when the Defendants were not able to pay back what was already given is incredulous. The 2<sup>nd</sup> Defendant always maintained that she was having a sexual relationship with the Plaintiff and that that is the reason the Plaintiff gave her money. The sexual relationship between the Plaintiff and the 2<sup>nd</sup> Defendant seems apparent throughout this case.

- [55] At the time of payment there was no proof of a promise made by the Defendants to repay. The S/D was not made at the time of payment. The S/D was made after payment. The S/D took the form of a promissory note. Promissory notes are made at the time of transaction and never later. In order to convince the court of the promise, the Plaintiff coupled the promise with the insurance policies. The 1<sup>st</sup> defendant had two life insurance policies. The value of both the policies is about \$20,000.00. The policies were to mature in 2033. The Plaintiff states that the policies were maturing in 2018. The Plaintiff has never seen the policies. It appears that the Plaintiff has made use of the policies to make the court believe the Plaintiff's version of the narrative. The Plaintiff is heavily reliant on the S/D.
- [56] The learned Judge has rejected the S/D as a document made to acknowledge the payment of \$165,000.00. The question is, could a person give \$165,000 on security of \$20,000.00 worth of life policies. It is the Plaintiff who states that the Defendants promised to pay in 2018 on the maturity of the two policies. The Plaintiff states that he trusted the Defendants with regard to the insurance policies. Even if the Defendants mentioned about two policies, the value of the policies according to the Plaintiff was \$20,000.00 as against \$165,000.00. It is clear that the evidence of the Plaintiff with regard to the S/D and the insurance policies are made up stories.
- [57] The Defendants never denied the receipt of money. The 2<sup>nd</sup> Defendant went to the extent of even accepting the receipt of \$165,000.00 when she was pestered. The 2<sup>nd</sup> defendant as a whole did not dispute the fact that the Plaintiff gave her money. However she always maintained that these monies were given as gifts as the Plaintiff was having a sexual relationship with the 2<sup>nd</sup> defendant. The Plaintiff other than just denying the sexual relationship did not dispute the 2<sup>nd</sup> Defendant. A large amount of evidence adduced by both the Defendants on the sexual relationship the Plaintiff had with the 2<sup>nd</sup> Defendant. The learned Judge has even commented on the forthright manner of the 2<sup>nd</sup> defendant's evidence. This is in contrast to the evidence of the Plaintiff.
- [58] It is to be noted that although the Plaintiff has mentioned the details of a land belonging to the 1<sup>st</sup> defendant, this land has not been pledged as security. The Plaintiff rather relied on

the two life insurance policies. This shows the fallacy of the case. The value of the insurance policies is about 10% of the Plaintiff's claim. As per the Plaintiff the policies were to mature in 2018. As per the Defendants the date of maturity is 2033. The Plaintiff has relied on policies that he has not seen. The Defendants said that they have not pledged the policies as against the money taken.

- [59] The Defendants always maintained that the Plaintiff had a love affair with the 2<sup>nd</sup> Defendant and had sexual intercourse with her. The Defendants maintained that the Plaintiff peacefully lived with them in the newly built house until March 2018. Even by March 2018, there was no demand made by the Plaintiff to return any money. The Plaintiff sent to the 2<sup>nd</sup> Defendant \$30,000.00 on 26 February 2018 as a birthday gift to purchase a car. The car was purchased on the same day. It would not have been possible to buy a car unless there was some kind of a pre-arrangement. The Defendants would have been waiting for this money to purchase the car. There is no evidence as to the date of birth of the 2<sup>nd</sup> Defendant. It would have been around the time of the purchase. According to the Defendants the Plaintiff had promised to give a car to the 2<sup>nd</sup> Defendant to transport the 2<sup>nd</sup> Defendant's children to school. According to the Plaintiff the Defendants sent the S/D on 13 January 2018 due to the demand made by the Plaintiff to return \$165,000.00. As per the Plaintiff the Defendants were defaulters. However the Plaintiff was pleased with the S/D. To such defaulters the Plaintiff gave another \$30,000.00. This \$30,000.00 was given again without any security. The Plaintiff says that this money was kept with the 2<sup>nd</sup> Defendant for safe keeping for the Plaintiff to buy a car for himself. When the Defendants do not return \$165,000.00 as promised, would a lender keep another \$30,000.00 with such a borrower for safe keeping? The 2<sup>nd</sup> Defendant stated that the Plaintiff visited places with the 2<sup>nd</sup> Defendant in the newly purchased car. According to the Defendants the dispute arose after the Plaintiff's wife learnt of the affair the 2<sup>nd</sup> Defendant was having with the Plaintiff. The 2<sup>nd</sup> Defendant stated that even thereafter the Plaintiff attempted to communicate with the 2<sup>nd</sup> Defendant and the Plaintiff was told not to communicate with her. Did the Plaintiff make use of the S/D to demand the \$165,000.00 after the 2<sup>nd</sup> Defendant broke off the sexual relationship with the Plaintiff and there was no expectation of reconciliation?



- [60] The Plaintiff's evidence has been rightly rejected by the learned Judge. Firstly the learned Judge refused to believe that the S/D was made as an acknowledgement of payment of \$165,000.00. The Plaintiff knew the Defendants' capacity of their destitute position. The money is said to have been given to the 2<sup>nd</sup> Defendant. There is no dispute on this. The 2<sup>nd</sup> Defendant is not a person who has an income. I am of the view that the learned Judge rightly rejected the evidence of the Plaintiff that the S/D was given in acknowledgement for the monies borrowed. The learned Judge held with the Defendants that the S/D was given at the dictation of the Plaintiff to facilitate the Plaintiff in his tax issues in Australia.
- [61] As per the evidence, up to March 2018 the relations between the Plaintiff and the Defendants were peaceful. The Plaintiff kept on pouring money on the Defendants and when a request was made to send a statement the Defendants obliged. At that time the Defendants would have obliged to mention any amount in order to assist the Plaintiff. If there was a dispute with regard to the non-payment of the Plaintiff's money the Plaintiff would not have come to stay with the Defendants in the newly built house. The Plaintiff would not have given another \$30,000.00 to the 2<sup>nd</sup> Defendant. Also the Plaintiff would not have gone visiting places in the newly bought car with the 2<sup>nd</sup> Defendant. I am of the view that the Plaintiff had decided to make use of the S/D to claim the money back only after the 2<sup>nd</sup> Defendant refused to communicate with the Plaintiff and no other. Therefore the learned Judge was correct in stating that the use of the S/D was an afterthought.
- [62] The defense also called a witness by the name of Abneet Sharma. He said that he was a Pastor and a nephew of the 2<sup>nd</sup> Defendant. This witness said that the Plaintiff got to know his wife through Facebook and sent her money and is living with his wife whom he has divorced. This evidence was not challenged by the Plaintiff. This witness gave evidence on 31 October 2019. The Plaintiff broke up with the Defendant in March 2018. The fact that the Plaintiff was living with the wife of Abneet relates to the conduct of the Plaintiff, how he had been lavishly spending money to get attention and to have a sexual relationship. The learned Judge concluded that the Plaintiff gave gifts to the 2<sup>nd</sup> Defendant to get her attention. Abneet Sharma's evidence strengthens this position.

- [63] The Plaintiff has admitted to sending money to the 2<sup>nd</sup> Defendant through Western Union. The Plaintiff has declared them as gifts. The Plaintiff said that it is the only way the Plaintiff was permitted to send money abroad. Considering all the evidence I am of the view that the learned Judge was correct in concluding that the monies were given as gifts and not loans. The 2<sup>nd</sup> Defendant always claimed that the Plaintiff spent money to have sex with her. The Plaintiff although denied having sex with the 2<sup>nd</sup> Defendant whilst giving evidence did not question the 2<sup>nd</sup> Defendant over the alleged sexual relationship.
- [64] The Plaintiff's case against the Defendants is based on the S/D. The S/D was rejected correctly by the learned Judge. Once the S/D is left out the Plaintiff's case has to fail. The Plaintiff's narrative of the Defendants showing a statutory lease and requesting money to build a house on the promise of returning in two years on the maturity of two insurance policies was rejected by the learned Judge. The story of keeping \$30,000.00 with the 2<sup>nd</sup> Defendant for safe keeping for the Plaintiff to purchase a car when he gets back to Fiji in March 2018 further strengthens incredulous nature of the Plaintiff's stories. This money was given to the 2<sup>nd</sup> Defendant on 25<sup>th</sup> February 2018 and the car was purchased the same day.
- [65] The learned Counsel for the Plaintiff submitted that the central issue for determination is whether the payments were gifts. The learned Counsel submitted that the court should have considered whether the presumption of advancement applies. If the presumption is not satisfied the funds will be presumed to be a loan. When funds are not advanced by a blood relation or between husband and wife or those standing in a father and child relationship it does not give rise to a presumption of advancement and the properties must prima facie be regarded as being held by the Defendant by way of resulting trust for the benefit of the Plaintiff.
- [66] The presumption of advancement is used as a defence. If the parties admit to having received funds a defence could be taken that the funds were advanced as gifts and not loans. This is due to the close relationship between the parties. In this case the presumption of

advancement was not taken as a defence and the learned Judge never considered the presumption in his judgment.

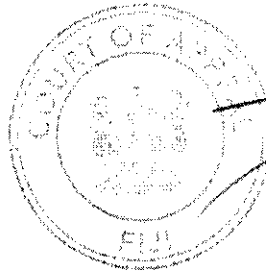
- [67] Professor Evan Mckendrick (Professor of English Private Law in University of Oxford) in Contract Law(Ninth edition-2011 at 284) having mentioned McHugh J in the High Court of Australia in Nelson v Nelson (1995 184 CLR 538 at 609) referring to the case of Tinsley v Milligan [1994] 1 AC 340 “*That the results produced by such a doctrine are essentially random and produced windfall gains and as well as losses*”, states that “*The presumption of advancement and the presumption of resulting trust are outmoded presumptions which no longer reflect modern life see, for example, Silverwood v Silverwood (1997) 74 P & CR 453, 458 and Lowson v Coombes [1999] Ch 373, 385 where the Court of Appeal noted that the presumptions are out of date in modern social and economic conditions. In Lowson it was held that the presumption of advancement did not apply between a married man and his mistress, but it would of course have applied between himself and his wife. Although there is a degree of truth in this argument, it should be noted that it does not deny that the law is presently in an unsatisfactory state (see Collier v Collier [2000] EWCA Civ 1095; [2002] BPIR 1057)*”.
- [68] In this case did the Plaintiff spend money on the 2<sup>nd</sup> Defendant as if he was betting on horses? The Plaintiff was not successful in befriending the 2<sup>nd</sup> Defendant with all efforts. However he was able to win the heart of the 2<sup>nd</sup> Defendant’s nephew’s wife.
- [69] The Plaintiff/Appellant raised five grounds of appeal. The first four grounds relate to facts. I have already dealt on those first four grounds. The fifth ground relates to the presumption of advancement which was never raised in this case. I am of the view that the grounds of appeal are without merit. Hence I answer the grounds of appeal adverse to the Plaintiff and dismiss the appeal.
- [70] The Defendants/Respondents appeared in person at the hearing. Hence I order the Plaintiff/Appellant to pay Defendants/Respondents a sum of \$1000.00 as costs payable within 28 days from the date of this judgment.

**Orders of Court are:**

1. *Appellant's appeal is dismissed.*
2. *The Appellant to pay the Respondents a sum of \$1000.00 within 28 days from the date of this judgment.*



**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**



**Hon. Justice Fillmone Jitoko**  
**VICE PRESIDENT, COURT OF APPEAL**



**Hon. Justice Eric Basnayake**  
**JUSTICE OF APPEAL**