

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL CASE NO. HBC 17 OF 2006

BETWEEN : **VIJAY PRAKASH**, son of Chandra Bhan also called as Chandar-Bhan Singh of Lautoka.
Plaintiff

AND : **USMAN ALI**, son of Sher Ali (Now in New Zealand)
Defendant

Counsel : Ms. V. Lidise for the Plaintiff, on the instructions of M/s. Young & Associates- Solicitors & Barristers.
: Mr. Dhorsami Naidu, for the Defendant, on the instructions of M/s. Pillai Naidu & Associates- Solicitors & Barristers.

Dates of Trial : 5th, 6th and 9th March 2018.

Written Submissions : Not filed by both parties.

Date of Judgment : 13th August, 2018.

Judgment by : Hon. Mr. Justice Mohamed Mackie

JUDGMENT

A. INTRODUCTION

1. This is an action commenced by the Plaintiff, by his writ of summons and the statement of claim dated 26th January 2006, praying for the following reliefs;
 - a. *Declaration that the purported transfer of CT NO 13605 is null and void and be set aside.*
 - b. *Declaration that the property comprised in CT NO 13605 is held in constructive, resulting or implied trust for the use and benefit of the Plaintiff.*
 - c. *Declaration that the Plaintiff has equitable charge on the property.*
 - d. *An order for transfer of CT NO 13605 to the Plaintiff.*
 - e. *Damages.*

f. *Interest under Law Reform (Miscellaneous Provision) (death and Interest) Act.*

g. *Costs.*

2. The Defendant filed his amended statements of defence cum counter claim dated 9th September 2010 and moved for the dismissal of the Plaintiff's action, compensation for Plaintiff's occupation of the property, general damages and costs. The Plaintiff duly filed the reply to defence and defence to counter claim.

B. THE BACKGROUND HISTORY & FACTS IN BRIEF:

3. The subject matter of the dispute in this action is the free hold land and premises No. 02 Sugar Avenue, Shimla, within the City limits of Lautoka, containing 31.85 perches in extent known as "Vitogo" and "Drasa", comprising of a main residential house together with an additional flat, described in CT No. 13605 being Lot 39 on DP 3367.
4. The Plaintiff's Mother late Ms. PAN KUMARI, who had become the owner of the land in suit in the year 1970, had in the year 1979 Mortgaged it to New South Wales Bank in order to obtain a loan facility of \$6,000.00 and the said Mortgage Bond was discharged on a new Mortgage Bond being executed on 23rd July 1985, with the change of ownership occurred on 28th December 1984 from the Plaintiff's Mother Ms. PAN KUMARI unto the Defendant Mr. USMAN ALI, who is, admittedly, her Son in Law and the Brother in Law of the Plaintiff. Both the instruments have been registered on 24th September 1985.
5. The Plaintiff is the only son born to Ms. PAN KUMARI, by her marriage to late CHANDRA BHAN, and he had 7 Sisters out of the said wedlock. In addition to the said siblings, the Plaintiff also had two step brothers and two sisters out of his Father's Marriage with one NAAZMA BEEBI, more or less during the same period of time and all of them lived in the premises in suit as an extended family, into which the Defendant claims to have got added in the year 1979, initially by living together with one of the Plaintiff's own Sister, namely, Ms. CHANDRA KUMARI (now deceased) and subsequently by Marriage with her in the year 1983.
6. The Plaintiff in his statement of claim, among other things, states that his Mother, the aforesaid PAN KUMARI and /or the Defendant Mr. USMAN ALI encouraged him to spend Money in paying off the said Mortgage debt and for the development, extension and/or improvement of the land and premises in suit, by making promise and giving full assurance and /or hope and expectation that the Plaintiff would have half share in the property.
7. He says that he ,accordingly, acted on the encouragement, promise and assurance with the hope and expectation of having a share in the property, spent substantial amount of Money and in return the said PAN KUMARI had bequeathed a half share of the said property in his favor by way of a Last Will, which he failed to produce, in compliance with an unless order embodied in the interlocutory judgment delivered by learned former judge, Hon. Yohan Fernando-J, on 22nd February 2012, after trying 3 preliminary issues raised by the learned Counsel for the Defendant before his lordship.
8. Though, the Plaintiff had made an application by way of summons dated 23rd March 2012, to vary the said interlocutory judgment dated 22nd February 2012, in order to relieve him from the requirement of producing the Last Will as per the unless order (a) therein, Hon. Lal S Abeyguneratne-J, before whom the matter had subsequently come up, by his

lordship's ruling dated 25th September 2013 dismissed the Summons , which resulted in the activation of the unless order to have the effect of striking out of, not only the Plaintiff's statement of claim, but also the counter claim of the Defendant , while there was no fault on the part of the Defendant, on account of the Plaintiff's non-compliance with the unless order.

9. The above ruling dated 25th September 2013 being appealed against by the Plaintiff , the Court of Appeal by its judgment dated 28th May 2015 allowed the Appeal, enabling the parties to assert their substantive rights at the trial before the High Court. However, the part of the said interlocutory judgment, which also paved the way for the striking out of the Defendant's counter claim, not being appealed against by the Defendant, the Court of Appeal abstained from making any finding on the propriety of it.
10. Though, the Defendant made two attempts to file fresh counter claim , the applications were dismissed, the first one by withdrawal and the second one by ruling dated 20th June 2016 made by Hon. Lal S. Abeyguneratne –J. This ruling remains intact. Thus, the Defendant had to face the trial before me in the absence of any counter claim and with the pre-trial conference minutes dated 9th February 2017 formulated to suit the remaining pleadings and to substitute the initial pre-trial conference Minutes dated 6th September 2010.
11. The Defendant, in his amended statement of defence dated 9th September 2010, while admitting his relationship with the Plaintiff, his Mother PAN KUMARI, her previous title and the Mortgage that existed in her name, denied the plaintiff's claim that he had spent Money to repay the Mortgage loan, for the development, extension and improvement of the property in suit, on the, purported, encouragement by him or his Mother in Law Pan Kumari. He also denied the claim of the Plaintiff that there was promise and assurance by him or Pan Kumari to transfer the said property or any part of it unto the Plaintiff. The Defendant vehemently denies the allegation of fraudulent, secretive transfer and use of undue influence on the Plaintiff's Mother during the time material to the execution of the Deed of Transfer.
12. The Defendant also claimed that he has no knowledge of any Last Will of deceased PAN KUMARY, who died in 2004 or about bequeathing the property to the Plaintiff and stated that the said property had been rightfully and lawfully transferred to him by PAN KUMARY during her lifetime in 1984 for valuable consideration and the such a Last Will, even if available, cannot have effect, as she was not the registered proprietor of the property in question as at the date of her death in 2004.
13. It is also averred by the Defendant that prior to the transfer of the property to him , an offer was made to the Plaintiff by his Mother , the late PAN KUMARY, to transfer the property in his name, provided he takes over the debt owed to the Bank and as the Plaintiff failed to undertake the debt, said PAN KUMARI legally transferred it to him for valuable consideration with an independent mind, having obtained independent legal advice and the said PAN KUMARI was looked after, maintained and allowed to remain in the said property until her death on 16th December 2004, as per the undertaking given at the time of the transfer.
14. On the facts pleaded in his amended statement of defence, the Defendant moved that the Plaintiff's claim be dismissed with costs. The defendant could not pursue his counter claim since it had been struck out as stated in paragraphs 8, 9 and 10 above.

C. TRIAL & WITNESSES:

15. The trial in this matter lasted before me for 3 days (5th, 6th and 9th March 2018), wherein Mr. VIJAY PRAKASH (PW-1) and one of his 07 Sisters, namely, Ms. CHANDRA DEVI (PW-2) gave evidence for and on behalf of the Plaintiff. Documents from “PE-1” to “PE-25” were marked on behalf of the Plaintiff, while only the Defendant gave evidence on his behalf, tendering / marking documents from “D-1” to “D-47”.
16. At the end of the trial on 09th March 2018, parties were given 28 days to file written submissions simultaneously, with liberty to file reply, if needed, and same not being filed, on an oral application being made on 24th May 2018, a further 28 days period was given and the matter was fixed for judgment on 2nd August 2018. When the matter came up for delivery of judgment on 2nd August 2018, on a joint application being made, further time was given till 9th August 2018 to file submissions. However, no party filed written submissions till the closure of business on Friday 10th August 2018.

D. DOCUMENTS:

17. On the first date of trial, a bundle containing documents from No. 01 to 37 was tendered on behalf of the Plaintiff, in addition to the bundle that had been tendered in the year 2007 and out of both the above bundles, documents “PE-1” to “PE-25 “ were marked at the trial as aforesaid and rest were admitted by consent.

On behalf of the Defendant, learned counsel relied on the bundle of documents filed on 2nd September 2010, containing documents No. 01 to 39 (pages 1 to 44), and few other documents tendered at the trial, all of which were marked from “DE-1” to “DE-47” as aforesaid. Learned counsel for both the Parties agreed for the said bundles of documents to be accepted and admitted as evidence.

E. AGREED FACTS & ISSUES:

18. The pre –trial conference minutes dated 09th February 2017, sets out the following agreed facts (admissions) and agreed issues to be adjudicated through this judgment.

Agreed Facts

1. *The Plaintiff is the son of Paan Kumari.*
2. *Paan Kumari daughter of Saijada (now deceased) was the registered owner of CT No. 13605 being Lot 39 on DP3367, known as “Vitogo” and “Drasa” (part of) containing 31.85 perches of freehold land (hereinafter referred to as “the property”).*
3. *The Defendant is the son-in-law of Paan Kumari.*
4. *Paan Kumari was the registered proprietor of the property until about 24 September 1985.*
5. *Paan Kumari’s husband died on or about 1st May 1981.*

Agreed Issues

1. *Whether Paan Kumari and/or the Defendant encouraged the Plaintiff to spend money:*

- (i) *To pay off the Bank debt in respect of the property; and/or*
 - (ii) *For the extension and development of the property; and/or*
 - (iii) *To improve the property.*
2. *Whether Paan Kumari promised and assured the Plaintiff that he would receive one half share or, any portion of the property if he spent money on the property as set out in paragraph 1 above.*
 - (i) *If so, whether the Plaintiff relied on and acted on the promise, assurances of Paan Kumari and whether the Plaintiff did in fact spend a substantial sum of money to extend, develop and improve the property.*
3. *Whether the Plaintiff relied and acted upon the promises and assurances of Paan Kumari, in the hope and expectation that he would receive one half share on the property.*
4. *Whether Paan Kumari made a will wherein she devised and bequeathed one-half share of the property to the Plaintiff.*
 - (i) *If so, whether the making of the will resulted in the strengthening, confirmation, encouragement of the promise, hope and expectation that Paan Kumari had given the Plaintiff.*
5. *Whether during the lifetime of Paan Kumari, the Plaintiff:*
 - (i) *Spent any money on the property; and/or*
 - (ii) *Brought about any changes to develop and extend the property;*
 - (iii) *Improved the property.*
6. *Whether Paan Kumari held the property in trust for the Plaintiff, in respect of at least one half share of the property, and if so, whether the Defendant had knowledge and notice of it.*
7. *Whether as a result of the promise and assurances made by Paan Kumari to the Plaintiff, the Plaintiff made the improvements to the property and incurred expenses amounting to a total of \$14,200, as pleaded in the Statement of Claim.*
8. *Whether the Defendant was aware, at all material times, of Paan Kumari's encouragement, assurances and promises to the Plaintiff in respect of the property (as stated in paragraph 1 above) and that Paan Kumari would bequeath at least one half share in the property to the Plaintiff by her will.*
9. *Whether Paan Kumari offered to transfer the property to the Plaintiff, if the Plaintiff took over the debt owed in respect of the property and to look after, provide accommodation and support Paan Kumari for as long as she lived.*
 - (i) *If so, whether the Plaintiff rejected Paan Kumari's offer.*
10. *Whether the Plaintiff failed or neglected to look after, maintain and support Paan Kumari during her lifetime.*

11. *Whether the Defendant obtained the transfer of the property from Paan Kumari to himself:*
 - (i) *Furtively and discreetly;*
 - (ii) *At a gross undervalue;*
 - (iii) *As a result of fraudulent and deceptive conduct on the Defendant's part;*
 - (iv) *Without paying valuable consideration for the property;*
12. *Whether the Plaintiff was unaware of the transfer and only become aware of as of late. (relative to the time of filing of the claim).*
13. *Whether Defendant concealed from the Plaintiff the fact that he had obtained the transfer of the property at a gross undervalued sum.*
14. *Whether the transfer of the property from Paan Kumari to the Defendant is illegal on the basis that the gross undervalued consideration paid by the Defendant was designed to cheat and or deprive the Fiji Government of revenue.*
15. *Whether the property is currently held by the Defendant in a constructive trust, and or, resulting trust and or implied trust in favour of the Plaintiff.*
16. *Whether the Defendant fraudulently, deceptively and by moral turpitude and/or undue influence had the property transferred to his name.*

PARTICULARS OF FRAUD

- (i) *Whether the Defendant used undue pressure on Paan Kumari to put her thumb mark on the transfer instrument without explaining to her the true meaning and effect thereof.*
 - (ii) *Whether Paan Kumari knew nothing about the transfer of the property to the Defendant.*
 - (iii) *Whether the Defendant was aware that all material times. Paan Kumari wanted to transfer the property to the Plaintiff.*
 - (iv) *Whether at all material times, the Defendant was aware that the Plaintiff had spent \$22,000.00 on the property.*
 - (v) *Whether the Defendant had the property transferred to his name by false and/or fraudulent and/or deceptive conduct and/or misrepresentation.*
 - (vi) *Whether Paan Kumari did not receive any independent advice at the time of the execution of the transfer.*
 - (vii) *Whether the Defendant took undue advantage of Paan Kumari's advanced age, ill-health, and illiteracy.*
17. *At the time of the execution of the transfer by Paan Kumari to the Defendant:*
 - (i) *Did Paan Kumari consent to the transfer of the property;*
 - (ii) *Did Paan Kumari have an independent mind;*

- (iii) *Did Paan Kumari receive independent legal advice before executing the transfer?*
18. *Whether the Defendant is estopped from relying on the indefeasibility provisions under the Land Transfer Act as a result of his knowledge, notice and information regarding the circumstances of the transfer of the property (as alleged by the Plaintiff) from Paan Kumari to himself.*
19. *Whether Plaintiff is entitled to following declarations and Orders:-*
- (a) *A declaration that the purported transfer of CT No. 13605 in favour of the Defendant is null and void and ab initio and should be set aside.*
 - (b) *A declaration that the property comprised in CT No. 13605 is held in a constructive, resulting or implied trust for the use and benefit of the Plaintiff.*
 - (c) *A declaration that the Plaintiff has an equitable charge on the property.*
 - (d) *An order for the Transfer of CT No. 13605 by the Defendant to Plaintiff.*
 - (e) *Damages.*
 - (f) *Interest under the Law Reform (Miscellaneous Provision) (Death and Interest) Act.*
 - (g) *Costs.*

F. EVIDENCE:

19. In order to avoid verbosity, I shall not reproduce the lengthy evidence of the witnesses. Instead, having deeply scrutinized the entirety of the evidence led on behalf of both the parties, I shall, during the discussions below, highlight only the relevant parts of the evidence that play the key role and assist me in the resolution of the issues before me.

G. DISCUSSION:

20. Before proceeding to analyze the evidence and answer the issues, it is appropriate to put on record about the action bearing case No. HBC 159 of 2000, which was filed by the Plaintiff hereof in the year 2000, naming his Mother late Ms. PAN KUMARI and the Defendant hereof Mr. USMAN ALI as 1st and 2nd defendants respectively, claiming the reliefs, seemingly, similar to those claimed in this action.
21. The above action did not proceed to see its end result, on account of the Plaintiff's, alleged failure to serve the writ on the 2nd defendant therein Mr. USMAN ALI, who was and is, admittedly, away from the shores of Fiji from 1998. However, the contents of an affidavit dated 10th February 2003, purportedly, sworn by PAN KUMARY and filed in that action, which is now marked as "PE-20" to serve as evidence in support of the Plaintiff's claim in this case and the circumstances under which it is alleged to have been signed, in my view, would throw some light in the resolution of the issues before me in this case.
22. On close scrutiny of the pleadings, and the above agreed issues 1 to 19, I find that the pivotal issues that beg adjudication in this case, can be condensed to (3) main issues and the rest of the issues are more or less identical and/or ancillary in nature and all what is

expected , through the scrutiny of the evidence led before me ,is the ascertainment of the most suitable answers to the main (3) issues reproduced as follows;

- a. *Whether the said late PAN KUMARY and/or the Defendant, Mr. USMAN ALLI, encouraged the Plaintiff to spend money to pay off the Bank debt in respect of the property, and/or for the development, extension and improvement of the property, giving him the promise, assurance and/or hope that he would be given half share in the property?*
 - b. *Whether the Plaintiff relying on the said, purported, encouragement, promise and /or assurance, spent Money in payment of Bank loan and/or for the development, extension or improvement as aforesaid in the hope of getting half share in the property?*
 - c. *Whether the Defendant acted fraudulently, furtively and discretely in obtaining the transfer from said PAN KUMARI, exerting undue influence on her and without the knowledge of the Plaintiff?*
23. The Plaintiff in paragraph 5 of his statement of claim has taken the stance that his late Mother PAN KUMARY had made a Last Will bequeathing one –half share of the property in dispute unto him and thereby strengthened and / or confirmed her encouragement, assurance, promise, hope and the expectation given to him by her. In paragraph 6 he states that she held the property in trust for him at least in respect of half share of it.
24. The claim of the plaintiff about the existence of a Last Will, left behind by his Mother PAN KUMARI, was foiled and stood unfounded, when he failed to produce it as per the unless order (a) embodied in the interlocutory judgment dated 22nd February 2012 delivered by Hon. Yohan Fernando-J as aforesaid. Moreover, his subsequent application to relieve him from the requirement of producing the Last Will, was rejected by the next judge in office, Hon. Lal S. Abeyguneratne-J by his Lordship’s ruling dated 25th September 2013, which resulted the activation of the aforesaid unless order to have the final effect of striking out of his statement of claim together with the counter claim of the Defendant, while there was no fault on the Defendant’s part in the non-compliance of the unless order by the Plaintiff.
25. Though, the Plaintiff succeeded, in the appeal against the said ruling, at the Court of Appeal and had his statement of claim reinstated to proceed with the action, he did /could not bring forth the so called Last Will and do the needful on it in furtherance of his claim. Further, for the obvious reasons, he did not even proceed to apply for a Letters of Administration. Learned Counsel for the Defendant took up the position that even if a Last Will is found to have been executed , as claimed by the plaintiff and same is made available, he could not have included this property into the estate , as it had not been a part of Late PAN KUMARI’S estate at the time of her death.
26. According to the evidence of the PW-1 under examination in chief, he states that his Mother PAN KUMARI, as the Mortgagor, had taken a loan of \$6,000.00 from the New South Wales Bank, for the monthly installment of \$80.00 on the Mortgage Bond No. 167515 (P-13) and his Father and step Mother, Naazma Beebe, were taking care of the loan and after the death of his Father in 1981, he took over the payment of the loan, while his step brother, Sooriya Prakash, looked after the Family. The death certificate of his father Chandra Bhan is marked as “P-14”. (Vide pages 15 ,16 & 17of copy record)

27. During further evidence in page 17 he states, that he paid three or four thousand Dollars (\$3,000.00 to \$4,000.00) on account of the loan and as he failed to continue with the payment, the arrears piled up to \$9,000.00 and as a result notice was received from the Bank. I observe that when the Defendant was under cross examination, the Plaintiff's learned counsel suggested that the Plaintiff paid \$2,000.00 to \$3,000.00, which contradicts the Plaintiff's position in his examination in chief. Further contradiction appears in the so called "P-20" affidavit of PAN KUMARY, where in paragraph 4 thereof she has stated that her Son Plaintiff had spent \$22,000.00 for repayment of the loan and development of the land and buildings. It is to be observed that according to the Plaintiff, in paragraph 7 of his statement of claim, what he spent on the improvement or development of the property was only \$14,200.00. Then, according to PAN KUMARI, the Plaintiff should have paid a sum closer to \$8,000.00 as loan installment for the Mortgage.
28. However, he does not produce a single receipt for such payments by him and the reason he adduces for his failure to produce such receipts is that he gave them to the Defendant Usman Ali on his request. If this was the case, the plaintiff could have easily given notice to the Defendant to produce them at the trial or called witnesses or produced some other acceptable evidence in proof of his installment payment.
29. When he was under cross examination (in page 57), he takes up further contradictory position to the effect that after his Father's demise he and his step brother, Sooriya Prakash started working and paying the installment of \$80.00 by pooling contribution by him , his step brother Sooriya Prakash and step mother Naazma Beebe. It is to be noted that at that stage he was in his early twenties and earning only \$40 to \$50 by working in a Timber Yard, while his step Brother Soorya Prakash was earning only \$35 to \$40 per week as a Bus Conductor and Naazma was earning \$60 .00 to \$ 70.00 per week as a House Girl as per the evidence of the Defendant, which was not disputed by the Plaintiff.
30. I observe that the loan facility as per P-13 Mortgage Bond has been obtained on 13th January 1979 and the Plaintiff's Father passed away on 1st May 1981. The Plaintiff under cross examination, in page 63, stated that his Father was sick for 1- 1/2 years prior to his death while his Sister PW-2 stated that the Father was sick for almost two years. Thus, any payment by his Father for nearly 2 years prior to his death would have been impossible. Had a substantial payment been made by Plaintiff's Father prior to his death in May 1981, with the contribution of Naazma Beebe, and if the Plaintiff too on top of it had paid around \$4,000.00 as stated by him or anything more as stated by his Mother in the said affidavit , with the contribution of Naazma Beebe and Soorya Prakash, the total amount due, on \$6,000.00 principal loan amount, would not have accumulated to \$9,000.00 by the time of the redemption of the Mortgage in July 1985 by the intervention of the Defendant.
31. In paragraph 7 of the statement of claims, the Plaintiff set outs the purported expenditures that he had to incur on improvements to the houses as \$14,200.00 unsupported by documents and without giving specific dates or relevant time period. The Plaintiff was only 21 years at the time of his Father's death and was earning only \$40, 00 to \$50, 00 per week. There is no single receipt or bill for the expenses on the purported developments, extensions and/or improvements or in proof of loan repayment. Plaintiff's mere contradicting oral evidence and that in his Mother's affidavit "PE-20" cannot be accepted and acted upon on this vital issue.
32. While the Plaintiff's Mother was struggling to pay the loan installment of \$80, 00 per month till the final settlement of it by the Defendant in 1985 and when the Bank was all out to recover \$9,000 of arrears by sending notice and making Phone calls informing about the impending Mortgage sale being published in the newspaper , it cannot be accepted that

the Plaintiff's Mother encouraged him to spend such an amount of Money in the development, improvement or extension of the premises in suit and he or anyone in the family was in a position to spend such an amount on it, except for the Defendant.

33. It is undisputed evidence that there are presently two Houses, the main one with 4 bed rooms and the 2nd one with 2 bed rooms. However, there is no clear evidence as to who, out of the Family members, were in occupation of the main house and as to who was the tenant of the 2nd flat, at a given period of time and who collected the rent. The Plaintiff admits in his evidence in chief that the 2nd flat was made by his father when his Father was alive and working. (Vide – page-10). The question as to when the improvements claimed by the Plaintiff were done? Who spent on it and how the Money for same was raised remain unanswered. The Plaintiff's claim that the Money was spent on it on the encouragement of the Plaintiff's Mother and /or the Defendant has not been proved with sufficient and convincing evidence.
34. The Plaintiff for reason best known to him did not proceed with the earlier action No. HBC 159 of 2000, where his Mother was the 1st Defendant. In any event on 10th February 2003, he manages to obtain an affidavit from her (PE-20) during the very late evening of her life, averring certain statement in favor of the Plaintiff, part of which is contradictory to the Plaintiff's evidence with regard to loan repayment, while the circumstances under which it has been signed raises serious doubt. It was for the 1st time, after 19 long years of signing the Deed of Transfer on 28th December 1984; his Mother swears this ill-favored affidavit on 10th February 2003 averring contradictory and some afterthought statements. The evidence of the Plaintiff as to who gave instructions to Mr. G.P.Shanker is obviously contradictory. **Vide the evidence in page 29 of the copy record reproduced in paragraph 47 below.**
35. The Defendant in this case cannot be held accountable for the purported encouragement, the Plaintiff claims to have had from his Mother and for any expenditure claimed to have incurred on account of extension or improvement, unless the Plaintiff proves that there were specific instructions, agreements to that effect or condition/s in his favor attached to the Deed of Transfer signed on 28th December 1984 bequeathing the property in question unto the Defendant. The property in suit now stands duly transferred to the Defendant on 28th December 1984 and it was after 21 years the Plaintiff woke up to file this action on 26th January 2006, with his unsubstantiated claims as above. The previous action against the Defendant, filed in the 2000 under No. HBC 159 of 2000 cannot be treated as an action against him as there was no service of writ on him at all.
36. It is also the contention of the Plaintiff that the Defendant too encouraged him to pay the Bank loan and spend money in the above manner for improvements. It is obvious that the Defendant became the owner of the Land in suit only on 28th December 1984 by way of a transfer, on account of which he signed a new Mortgage Bond on 23rd July 1985 and had both the instruments registered on 24th September 1985, in order to discharge his Mother in Law from the brunt of the Mortgage. This clearly shows that prior to the above events, the Defendant, not being the owner of the land & premises in suit could not have encouraged the Plaintiff to pay the Bank loan or to spend Money for the purported development, extension or improvement as claimed by the Plaintiff.
37. The Plaintiff in paragraphs 9 and 10 of his statement of claim, states that the Defendant obtained the transfer by acting fraudulently, furtively and discretely by exerting undue influence and he was unaware of the transfer until late. He does not specify a date on which he became aware of it. On the other hand he says that he acted on the encouragement of the Defendant and spent money on the Property. Then, the question arises as to how the

Plaintiff could have acted on the, purported, encouragement or promise of a person, whom he did not know to be the owner of the premises in suit.

38. If the Defendant needed any extension, improvement or repair, he could have got it done on his own when he was available in Fiji before his migration 1998 or through his agent after his departure. In fact there are few documents in DOB (documents No.22, 23 &24) to show certain expenses on repairs and maintenance by the Defendant. It is in the Plaintiff's evidence that he was depending on others, namely his brother Soorya Prakash and Naazma Beebe, to pay the loan installments and on the Defendant for the maintenance of his elderly mother and the rest of the family members. PW-2 also has confirmed that the Defendant was contributing for house hold expenses and the maintenance of her Mother. The evidence of the Defendant on this stands un-contradicted.
39. The Plaintiff has not adduced sufficient evidence to prove, either he paid the Bank loan or spent Money on the property as he claims. At least he should have had some correspondences with the Defendant on the purported improvements or development, if he was acting on the encouragement of the Defendant. In this background and for the reasons stated above, it is my considered view that the issues 1 and 2 shown in paragraph 22 above cannot attract favorable answers to the Plaintiff.
40. The next point of contest condensed in the agreed issue No.03 above, is the most crucial one that plays the vital role in the adjudication of the dispute before me, wherein the Plaintiff makes allegation that Defendant acted fraudulently, furtively and discretely in obtaining the transfer from the said PAN KUMARI, exerting undue influence on her and without the knowledge of the Plaintiff.
41. The plaintiff admits in his evidence in chief (pages 19 &20) that once the notice was received from the Bank, they (the Plaintiff, his Brother and Mother) discussed the matter with the Defendant who agreed to help them and thereafter he along with his Mother, his former wife, his step Brother Soorya Prakash and the Defendant went to see the Lawyer. The Plaintiff was in an unsuccessful attempt to paint a picture that the Lawyer they went unto was chosen by the Defendant. But , the fact remained that the Lawyer they went to see was, none other than, Mr. Suresh Maharaj, who was acting for the relevant Bank
42. His further evidence (in page 20 and 21) that he was not allowed going into Mr. Suresh Maharaj's Office and made to sit outside the office is unacceptable. When he was asked as to what his age was at that time , his answer was "18 to 19 years old , my lord" , while he was in fact twenty five plus, having born on 12th March 1960, as evidenced by P-8 birth Certificate. This shows his subtle attempt to show that he was still a minor at that time. He being a matured and employed adult at the age of 25 at that point of time, who claimed to have spent a colossal amount of Money aspiring to be the next owner of the premises in suit and taken part in family meeting, need not have waited outside the Solicitor's office. This makes his evidence tainted and unreliable.
43. His claim that the arrangement was for the Defendant to take the Rental income of the premises in suit for 10 years period in lieu of his Mortgage settlement of \$9,000.00 is wholly irrational and untenable. The main House with 4 Bed rooms was always occupied by the members of the extended family. The Flat No.2 was the only premises that could be rented out and that one too was, admittedly, given to a Police Officer by the plaintiff with no rental for a substantial period. The premises were under his control and he has been at a better position to decide to rent it out or not. If this court decides that the Deed of Transfer in favor of the Defendant is unconditional and impeccable, the question of rental income does not warrant consideration by the court.

44. When a premises is Mortgaged or transferred subject to the condition of re-transferring, after a specific period of time , the burden of paying the Town Rates, utility bills is generally retained by the owner (Mortgagor). In this case the evidence of the Plaintiff that the Defendant was required to pay the rates and taxes in addition to his new monthly Mortgage installment clearly implies that the Plaintiff, his Mother and all others took part in the family discussion, were fully aware that the land in question was to be alienated as an absolute transfer and nothing less than it.
45. The most devastating evidence the Plaintiff relied on for his case, was brought in by the so-called affidavit of his Mother (PE-20). The very contents of this Affidavit and the circumstances under which it was signed, amply demonstrates that this is a concocted document by the Plaintiff on his afterthought, with the motive of defeating the transfer Deed given to the Defendant. The Plaintiff in his statement of claim has taken up a position that at the time of transferring the Land to the Defendant (in 1984) his Mother was not in a proper physical and mental state. But in his reply to the Statement of defence and Counter claim, he has admitted the contrary. Even if it is assumed, for the sake of argument, that she was not in good physical and mental state in 1984, her condition should have been further worsened in the year 2003, when the ill-fated affidavit was, purportedly, signed by his Mother.
46. The credibility of the Plaintiff as a witness and his evidence became highly questionable, when he gave contradictory evidence in page 29 with regard to giving instruction to Mr. G.P. Shankar prior to the signing of the aforesaid affidavit.

Q. Can you describe what happened when you got there?

A. I spoke to Mr. Shanker and told him the entire story and later on, Mr. Shanker called my mum in. Then my mother went in and they talked for almost more than one hour. I saw my mum putting her thumb on two 2 separate papers, but did not see what paper was it.

Q. (by Mr. Naidu) who met Shanker first, you or mum?

A. We went together my Lord.

Q. (by CRT) who discussed with Mr. Shanker first?

A. We went there, told the story.

Q. (by CRT) who told the story?

A. My Mum told the story. Then G.P.Shanker called my Mum inside, we were outside.

Q. (by CRT) who told the story to Mr. G.P.Shanker?

A. My Mum told the story Sir, but we went with Mum- myself and my 2nd wife.

Q. (by CRT) When the story was told were you together with the Mum?

A. I was outside.

Q. (by CRT) Mum only met G.P.Shanker and told the story; not you?

A. Yes my Lord. Not me.

Q were you there?

A. I was there in the front office; I never went to G.P.Shanker's office.

Q. (by CRT) were you able to see your mum telling the story?

A. I can see my Mum from the glass was cut. (all above emphasis mine)

47. The above answers clearly shows that the Plaintiff having told the Court initially that he met Mr. G.P.Shanker first and told the entire story , subsequently tries to change the stance stating that it was his Mother who told the story and he was outside the office . This part of evidence seriously affects the credibility of the Plaintiff. It was on 10th February 2003, his Mother claimed to have signed the affidavit just one year and 10 months prior to her death and the Power of Attorney on 25th November 2003, about 1 year prior to her death. All these have taken place after filing the former case no. H BC 159 of 2000 making her as the 1st Defendant.

48. The Plaintiff has failed to prove that his Mother signed this Affidavit and the Power of Attorney (P-19) on her own free will. I stand reasonably convinced that she has been made to sign these documents during the last stages of her life, in order to be used as evidence in Plaintiff's favor to defeat the Defendant's Deed of transfer. Those are nothing but self-serving documents.
49. There is clear and convincing evidence from the Defendant as to how he was approached by the Plaintiff's Mother offering the Property for him to buy, after making the first offer to the Plaintiff and his brother Soorya Prakash. His evidence with regard to the Family meeting with the participation of the Plaintiff, his Mother, Soorya Prakash and going to Lawyers office with the Plaintiff, his Mother, and his former wife, have been admitted and not contradicted at all.
50. Careful perusal of the transfer deed and the Mortgage Bond clearly shows that these documents have been executed on two clear separate dates. Transfer has been signed on 28th December 1984 subject to the then existed Mortgage of his Mother, for the consideration of \$9,000.00 to be paid on a future date. The new Mortgage in the Defendant's name has been signed on 23rd of July 1985 and both have been registered on 24th of September 1985. It is clear that there has been a gap of about 7 months between the date of transfer and his new MB and the Plaintiff has had enough time to protest or take any action if he wanted to. He cannot now plead ignorance or that the Defendant acted fraudulently, deceptively or used undue influence.
51. No sensible person in the shoes of the Defendant would have volunteered to become a lender or financier of such an amount of money for the sole purpose of collecting rental income, from the premises, main portion of which was continued to be occupied by the plaintiff and the members of the extended family including his Mother and when the remaining part of it (flat-2) was not on sufficient and steady rental income. The Plaintiff has not proved that the transfer of the Land in suit to the Defendant was **not** an outright one.
52. *"Ei incumbit probatio qui dicit non qui negat"* which means – "He who asserts and not he who denies, must prove". There is overwhelming evidence from the Defendant that the Plaintiff's Mother PANKUMARI, after discussing the impending Mortgage Sale at the family meeting with the participation of the Plaintiff and offering him the opportunity to take over the Mortgage, for him to become the owner of the premises in suit, which he failed to undertake, proceeded to Mr. Suresh Maharaj's office with the Plaintiff, his Brother Soorya Prakash and his former wife and signed the impugned transfer deed in favor of the Defendant on her own will. The burden of proving that the Deed of transfer (P-25) is a forgery or the signature of the Plaintiff's Mother was obtained by fraudulent means or by the use of undue influence or furtively and discreetly, is therefore shifted to the plaintiff. The evidence adduced by the plaintiff at the trial is not sufficient for the court to arrive at such conclusion. Making a mere allegation is not sufficient for the court to rule that the signature of the Plaintiff's Mother was obtained as alleged by the Plaintiff.
53. There is no evidence before the court to arrive at the conclusion that the Deed of Transfer (P-25), which gave the title to the Defendant, was **not** an absolute transfer. As I stated earlier, the evidence led by the Defendant and the circumstances under which the execution of the said Deed of Transfer took place, shows that it has been duly executed leaving no room for any subsequent allegation. There is no evidence of undue influence or that PAN KUMARI was made to place her signature (thumb impression) fraudulently or furtively and discreetly. The learned counsel for the plaintiff, although cross-examined the

defendant at length, did not succeed in debilitating Defendant's position. The court sees no reason to disregard the evidence of the Defendant.

54. The Defendant in keeping with his promise and undertaking given at the family meeting and at the time of the execution of the Deed of transfer, allowed the Plaintiff's Mother, Plaintiff and other Family members to continue to reside in the premises in suit, maintaining the Plaintiff's Mother until her death in 2004 and allowed further 1 year time till the annual Pooja of Plaintiff's Mother is over. It was only thereafter, he duly served the Plaintiff with the Notice to quit dated 07.01.2006 (PE-21) upon which the Plaintiff instituted this action on 26th January 2006 and obtained an injunction against the Defendant. The Plaintiff had admitted the title and ownership of the Defendant by paying the Rental for one month and thereafter continued to occupy the premises disputing the Defendant's rightful ownership.

Indefeasibility of title.

55. Sections 39 – 42 of the Land Transfer Act and the Torrens system of land registration, which operates in Fiji, make it clear that the title of the registered proprietor is indefeasible and unimpeachable, unless actual fraud is proved. (See **Subramani v Sheela [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); Assets Company Ltd v Mere Roihi [1905] AC 176 at p.210; Fels v. Knowles 26 N.Z.L.R. 608, at page 620**)

Where fraud is alleged, a bare allegation is not enough. There must be some evidence in support of such an allegation pointing to the need for a fuller investigation. (**Singh v Singh [1987] FJ-Law Rp 12; [1987] 33 FLR 63 (25 September 1987)**)

Here, the Plaintiff does not substantiate the allegations of fraud. Evidence of the Defendant clearly demonstrate that the Plaintiff was very well aware of the nature of the instrument executed on 28th December 1984 before Mr. Suresh Maharaj, who acted for the BANK OF NEW SOUTH WALES and the plaintiff played a leading role at the Family meeting, discussions took place at Lawyers Office and at the time of execution of the Transfer.

56. From the pleadings and the evidence adduced at the trial, it appears that the main issue to be determined is whether the defendant obtained the signature of the plaintiff's Mother PAN KUMARI to the transfer document on 28th December 1984 fraudulently, furtively and discreetly and/or deceptively or exerting undue influence. If the court answers the said issue in the affirmative, the plaintiff succeeds and if the said issue is answered in the negative the plaintiff's action is liable to be dismissed.
57. It is the plaintiff who came to court alleging that the Defendant obtained his Mother's signature fraudulently and/or discreetly and deceptively or exerting undue influence. Since the plaintiff says that his Mother's signature was obtained in the aforesaid manner, the court will have to infer that the plaintiff admits the signing of the documents in question by his Mother. The alleged fact that his Mother's signature was obtained fraudulently or discreetly and deceptively is within the exclusive knowledge of the plaintiff and therefore the burden is on him to prove such allegation. Instead, the Plaintiff was in the futile exercise of pleading and giving evidence on a non-existing last will and about his expenditure on alleged Mortgage installment payment, extension, improvement and development of the premises in suit. His claim that the transfer was signed in favor of the Defendant only for him (defendant) to collect rental from the premises for 10 years, in order to compensate the Defendant for redemption the Mortgage stand not proved.

58. If the monthly rentals were to be collected by the Defendant for 10 years, in lieu of and for the recovery the \$9,000.00 paid to the Bank by re-Mortgaging the property as claimed by the Plaintiff, it should have been embodied in the transfer deed for it to be a conditional transfer. The Plaintiff, being a matured person at the age of 25, who had actively participated at the family discussions and at meeting for the preparation of documents, cannot now be heard to say that no independent legal advice was obtained. He could have sought independent legal advice, if he wished to, prior to signing the deed by his Mother.
59. As far as the ancillary issues on the claim of under-valuation and implied trust are concerned, I am reminded of the '**drowning man who clutches at a straw**'. It is in plaintiff's evidence that the land in question was purchased only for \$800.00 in the year 1970. The amount the Defendant paid in the year 1984 to discharge the Mortgage Bond of the Plaintiff's Mother was \$9,000.00. In addition to the above the Defendant claims that he had to clear the water rate arrears of \$6,000.00 and town rate arrears of around \$ 3,000.00, which was not disputed by the plaintiff. Further, Plaintiff's Mother, Plaintiff and others were allowed to remain in the House with no rent and the Plaintiff continues in possession with no rent, except for one month, for nearly for 34 years. The document from City Council marked by the Plaintiff to show the annual value of the premises as \$ 30,500.00, was in its relation to the year 2000. There was no evidence supported by a formal valuation report as to the value of the property during the time material (in 1984). The claim of under valuation is unfounded and has to fail.
60. The plaintiff has failed to prove the existence of a will. His claim of purported encouragement on the part of his Mother and/or the Defendant has not been proved. The allegation that the impugned transfer was executed fraudulently, deceptively and/or by undue influence has also totally failed. The Defendant has proved that it was an absolute transfer. With this background any form of trust could not have formed in favor of the Plaintiff.
61. An important factor, that seems to have been deliberately suppressed by the parties for the reason best known to them and which has escaped the attention of the learned counsel for both the parties, is found in the Birth Certificates of **Rohith Vickson Kumar** and **Salesh Kumar**, who are said to be the Children of Defendant's wife, Chandra Kumari, by her former Marriage to one Bech Nath.
62. Defendant's position was that he came into this family in the year 1979, during the time the plaintiff's Father was alive and he got married to Chandra Kumari in the year 1983, after she obtained the Divorce from his former Husband Bech Nath and adopted the said two Children of Chandra Kumari as his own children. Though, the Plaintiff admits the said Marriage, he says the Defendant came there only after Plaintiff's Father's death in May 1981.
63. When I perused the Birth Certificates of both **Rohith Vickson Kumar** and **Salesh Kumar**, which is in the Defendant's bundle of documents admitted by consent, I find that it was the Defendant, who has informed and furnished the details of the birth of both the children for registration in the years 1969 and 1974. He has given his name as the Father of both the Children. This can be an admission on his part that the aforesaid children were born to him and Plaintiff's Sister Chandra Kumari. He has also given Sugar Avenue as the Place of Residence, which is the subject matter of this action.
64. The above elicited facts, by the admitted documentary evidence on record, that the Defendant is the father of the two Children of late Chandra Kumari, prompts me to form a safe inference that the Plaintiff's Mother PAN KUMARI would have had this as an

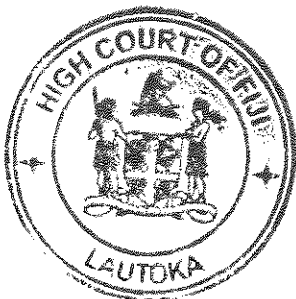
additional reason to justify her decision to transfer the property unto the Defendant as an absolute one, with no conditions or encumbrances attached thereto. Thus, I hold a view that the scale can be further tilted in favor of the Defendant in the resolution of this dispute.

H. CONCLUSION

65. On the oral and documentary evidence adduced before me by both the parties, I arrive at the following conclusion that;
- a. The Plaintiff has not proved on preponderance of evidence, that he spent Money on repayment of the Bank loan obtained by his Mother PAN KUMARI and/ or spent Money on the development, extension or improvement of the premises in suit, relying on the, purported encouragement of his Mother and/ or the Defendant, promising or assuring him that he would receive half share of the property.
 - b. The Plaintiff has failed in his onerous duty of proving that the Deed of Transfer dated 28th December 1984, executed by his Mother PAN KUMARI before Mr. Suresh Maharaj, was fraudulent or deceptive or signature of his Mother therein was obtained furtively and discreetly or without his knowledge exerting undue influence at gross undervalue as alleged by him. There are absolutely no suspicious circumstances surrounding the execution of the deed of transfer by the Plaintiff's Mother PAN KUMARI in favor of the Defendant on 28th December 1984.
 - c. The said Deed of Transfer dated 28th December 1984 in favor of the Defendant was an absolute one with no condition or encumbrance attached thereto and it has not created any trust in favor of the Plaintiff.
 - d. No relief can be granted in favor of the Plaintiff as prayed for.
 - e. Though, the circumstances demand the imposition of indemnity costs, this court decides to order a reasonable sum as summarily assessed costs, considering the relationship the parties share.

I. FINAL OUTCOME

1. The Plaintiff's claims and the action hereby dismissed.
2. No order made on Defendant's counter claim, as no counter claim existed during the trial.
3. The Defendant shall be entitled for a summarily assessed cost of \$5,000.00.



At Lautoka
13th August, 2018

A.M.Mohammed Mackie
Judge