

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CIVIL JURISDICTION

CIVIL CASE NO. HBC 104 OF 2011

**BETWEEN** : **SHYAM KAUR** aka SHAM KUAR of 10 Anderson Road, Martintar, Nadi, Domestic Duties, represented by her Son **RAM CHAND** of Korovuto , Nadi- Appointed as the Manager, Next Friend & Guardian ad litem for the purpose of conducting the cause herein.

Plaintiff

**AND** : **VISHWA NAND** of 10 Anderson Road, Martintar, Nadi-Driver.

Defendant

**Before** : A.M. Mohamed Mackie – J.

**Counsel** : Ms. Swami A. for the Plaintiff.  
: Ms. Lal for the Defendant.

**Dates of Trial:** 1<sup>st</sup> & 2<sup>nd</sup> of October 2018.

**Written**

**Submissions:** By the Plaintiff on 25<sup>th</sup> January 2019  
By the Defendant on 22<sup>nd</sup> February 2019

**Date of Jdgmt:** 25<sup>th</sup> February 2019.

J U D G M E N T

**A. INTRODUCTION:**

1. This is an action commenced by the plaintiff by way of her writ of summons and the Statement of Claim (SoC) dated 6<sup>th</sup> July 2011 and issued on 8<sup>th</sup> July 2011, against the defendant, praying for the following reliefs.
  - a. *An order requiring the Defendant to sign, execute and perfect all papers required to transfer the land comprised in Certificate of Title Number 14469 to the plaintiff free*

*of charges and all encumbrances and in the Alternative the Deputy Registrar of High Court execute all papers in place of the Defendant.*

- b. Alternatively a Declaration that the Defendant holds and have held the Land comprised in Certificate of Title Number 14469 as Trustee for and on behalf of the Plaintiff.*
- c. An order for cost on solicitor client indemnity basis.*
- d. Any other order as this Honorable Court may deem fit.*

**B. BACKGROUND:**

- 2. The defendant is a Grandson of the plaintiff, by whom he was brought up from his childhood since he had lost his Mother as she was murdered by her Husband, who happened to be the plaintiff's Son and defendant's father ended up in jail on account of the said murder.
- 3. As per paragraphs 1, 2 3 and 5 of the SoC, among other things, it is stated that the plaintiff was the registered proprietor of the Land comprised in the Certificate of Title Number 14469 on Lot 43 DP 2067, the plaintiff, during all the times material was resident, in occupation and possession of the land in question and the defendant had the knowledge that the plaintiff was the owner of the said land. ( Paragraph of SoC 4 missing)
- 4. As per the paragraphs 6 it is stated that on or about 3<sup>rd</sup> March 2008 the defendant wrongfully procured and induced the plaintiff by **fraud and undue influence** to execute an instrument, purporting to be an instrument of transfer, by which the plaintiff conveyed and transferred the said land to the defendant free of consideration. (emphasis mine)
- 5. In paragraph 7 of the SoC it is alleged that the plaintiff was induced to the acts and things mentioned in paragraph 6, which were by the fraudulent representation and undue influence of the defendant and under his direction and pursuant to the faiths, trust, confidence the plaintiff reposed in him and without due consideration of the reasons for or the effect of what she was doing.
- 6. The particulars of alleged fraud and undue influence are given in paragraphs 7.1 and 7.2 of the SoC as follows ;

**THAT** the defendant stated falsely to the plaintiff that the plaintiff will be allowed to reside in the house on the said Land during her life time, if the said land is transferred to him without consideration,

**THAT** the defendant dishonestly and falsely stated to the plaintiff that the defendant would maintain, take care of and provide for the plaintiff during her lifetime, if the said land was transferred to him without consideration.

7. In paragraphs 8 to 11 of the SoC the plaintiff states;

**THAT** the defendant knowingly and deceitfully made the representation knowing that to be false to procure the transfer of the said land to the defendant free of consideration.

**THAT** the representation as aforesaid were made by the defendant to the plaintiff with the intention that it would be acted on by the plaintiff.

**THAT** the plaintiff at all material times acted on the representation.

**THAT** the plaintiff has now been evicted by the defendant on the 8<sup>th</sup> May of 2011 from the said land after transfer of the same to the defendant.

8. From paragraphs 11 to 13 it is averred that the plaintiff has been verbally abused and assaulted by the defendant, the plaintiff has not been allowed to use the amenities in the dwelling house on the said land , she has now been evicted from and out of it , she has lost the use and ownership of it and in the premises the said conveyance and transfer of the said land **has become null and void** and the plaintiff is now entitled to the ownership of the said land or alternatively for a declaration that the defendant has held and holds the said land as the Trustee for and on behalf of the plaintiff. (emphasis mine)
9. Accordingly, the plaintiff prays for the reliefs as stated in paragraph 1 above.
10. The defendant by his statement of defence (SoD) filed on 3<sup>rd</sup> August 2008, having admitted the contents in paragraphs 1, 2, 3 and 5 of the SoC, except for the age of the plaintiff, has denied the rest of the averments in the SoC and moved for the dismissal of the plaintiff's claim with other ancillary orders.

**C. AGREED ISSUES:**

11. Parties had agreed to dispense with the Pre-trial Conference (PTC) in order to avoid the delay, considering the old age of the plaintiff and her alleged mental condition, on which the court was called upon to appoint her Son RAM CHAND as the Next Friend and *Guardian ad litem* on the application made to that effect, for which the learned former counsel for the defendant had objected. However, the learned defence counsel, who appeared for the trial, agreed for such appointment prior the trial date and the same was made accordingly.
12. However, on the first date of trial, the learned Counsel for the plaintiff submitted the following 7, instantly formulated hand written, issues to be tried at the trial, with which the learned counsel for the defendant agreed.
  1. *Whether the Defendant dishonestly and falsely stated to the Plaintiff that the Defendant would maintain, take care and provide for the Plaintiff during her lifetime if the said land was transferred to him without consideration and that she can stay on the property till her lifetime.*
  2. *Whether Defendant knowingly and deceitfully made the representation on knowing that to be false to procure the transfer of the said land to the Defendant free of consideration.*
  3. *Whether the representations were made by the Defendant to the Plaintiff with the intention that it would be acted on by the Plaintiff.*
  4. *Whether Plaintiff acted on said representation.*
  5. *Whether Plaintiff was harassed and abused while in care of the Defendant.*
  6. *Whether the Plaintiff was evicted from the property by the Defendant.*
  7. *Whether there was a resulting trust between Plaintiff and Defendant.*

**D. TRIAL:**

13. At the trial held on 1<sup>st</sup> and 2<sup>nd</sup> of October 2018, following witnesses gave evidence for and on behalf of both the parties.

**Witnesses for the Plaintiff:**

- i. Mr. Ram Chand – the Son of the plaintiff appointed as the Next Friend cum Guardian ad litem of the plaintiff- **PW-1.**
- ii. Ms. Reena Lata – a former tenant of the plaintiff -**PW-2.**
- iii. Ms. Savitri Devi – a Daughter of the plaintiff – **PW-3.**
- iv. Ms. Son Mati – a Daughter of the plaintiff – **PW-4.**

**Witnesses for the Defendant:**

- i. Ms. Vasantika Patel – before whom the transfer was signed – **DW-1.**
  - ii. Mr. Vishwa Nand – the defendant – **DW-2.**
  - iii. Ms. Hem Raju- a former tenant of the plaintiff – **DW-3.**
14. I shall not reproduce the lengthy evidence adduced at the trial. Instead only the relevant parts will be referred to or highlighted during the analysis bellow, if need arises to do so.

**Documents:**

15. Followings were the documents marked at the trial;
- i. PE-1- An undated letter from Nadi Police station-( document number 4 in PBoD)
  - ii. PE-2- Certificate of Title- (document No.5 in PBoD)
  - iii. PE-3- Letter from ZENS Medical Centre (document number 2 in PBoD-2)
  - iv. PE-4- Affidavit of the Plaintiff sworn on 10<sup>th</sup> December 2010.
  - v. DE-1- Last Will of the plaintiff.
  - vi. DE-2- Instruction sheet to Ms. Vasantika Patel to prepare the transfer.
  - vii. DE-3- Deed of Transfer by the plaintiff unto the Defendant.
  - viii. DE-4- Declaration under Land Sale Act.
  - ix. DE-5- Statutory declaration

**E. ANALYSIS:**

16. The action before me is being a civil action, the burden of proof squarely lies on the plaintiff to prove her case on the balance of probability by convincing the court to arrive at affirmative answers to all or at least to the pivotal issue/s raised.

**Allegation of Fraud, Undue Influence and Misrepresentation:**

17. The issues numbers 1 to 4 above mainly pertain to the alleged fraud, undue influence and misrepresentation committed by the defendant procuring and inducing the plaintiff to execute the Instrument of Transfer in favour of the defendant on 8<sup>th</sup> March 2008.
18. The plaintiff alleges that as a result of the said fraudulent representation, undue influence committed on the part of the defendant and under his directions and pursuant to the faiths, trust confidence the plaintiff reposed in him and without due consideration she signed the deed of transfer in favour of the defendant on 8<sup>th</sup> March 2008.
19. On careful scrutiny of the evidence and the surrounding circumstances, I find that the above stance of the plaintiff cannot be accepted and acted upon, particularly, in the light of the fact that around two years prior to signing of the impugned Instrument of Transfer on 3<sup>rd</sup> March 2008, the plaintiff had already executed her Last Will on 27<sup>th</sup> February 2006, by which she had given, devised and bequeathed all of her property both real and personal of whatsoever nature or kind whosoever unto her grandson, who is the defendant in this case.
20. No allegation of this nature was levelled by the plaintiff against the defendant that he had wrongfully procured or induced the plaintiff by any mean when the DE-1 Last will was executed in the year 2006, bequeathing everything she possessed unto the defendant, which was just two years prior to the signing of the Instrument of Transfer in the year 2008.
21. The execution of the DE-3 Instrument of Transfer did not take place instantly. As per the un-contradicted and convincing evidence of the DW-1, Ms. Vasantika Patel, the plaintiff despite being duly advised that there was no any necessity to execute an Instrument of Transfer on top of the Last Will, the plaintiff has insisted that an Instrument of Transfer should be executed in order to ensure that the property in question goes to the defendant without any hassle.
22. The instruction sheet (DE-2) prepared by DW-1 Ms. Vasantika Patel, with unambiguous instructions from the plaintiff, is a clear indication that the plaintiff had voluntarily gone to her office on 8<sup>th</sup> March 2008 and had got the Instrument of Transfer executed as per her own wish.

23. If the plaintiff had any valid reason to stop the property being inherited by the defendant or if the defendant had ill-treated the plaintiff as alleged by her, she could very well have revoked or cancelled the Last Will and need not have proceeded to execute the Instrument of Transfer by giving clear instructions to DW-1 Ms. Vasantika Patel as per the DE-2 instruction sheet marked on behalf of the defendant. The plaintiff had a period of over two years to revoke the Last Will, if she so wished or had a valid reason to do so.
24. There was no even an iota of evidence to the effect that the defendant or anyone on behalf of him was present in the office at the time of the execution of the Instrument of Transfer before DW-1 to exert influence or commit any act to induce or compel the plaintiff to execute the same in defendant's favour.
25. According to DW-1, the plaintiff was not a new face to her. DW-1 had been a signatory as a witness to the plaintiff's Husband's Last Will executed in year 1984 when she was practicing as an Associate at D. Patel & Company and in early 1990 the plaintiff had visited the said office to obtain the probate. Thereafter, when DW-1 commenced her own practice, the plaintiff has continued to go unto her to obtain various services, including her visit in the year 2006 for the execution of her own DE-1 Last Will.
26. When the Court specifically questioned DW-1 Ms. Vasantika Patel as to whether any others had accompanied the plaintiff to her office, her prompt answer was negative and there was not even a suggestion from the plaintiff's learned counsel to the effect that the defendant or any others were present at the time of the execution of the DE-3 Instrument of Transfer. Thus, it can be safely assumed that the plaintiff had gone unto DW-1 on 3<sup>rd</sup> March 2008 on her own volition and executed the Instrument of Transfer in favour of the defendant on her free will without any undue influence or compulsion being exerted on her or by way of misrepresentation or fraud being committed.
27. The unchallenged evidence of DW-1 Ms. Vasantika Patel is convincing to accept that a conducive environment prevailed at the time of the execution of the Instrument of Transfer marked DE-3 in favour of the defendant. Though, this witness was subjected to lengthy cross examination by the learned counsel for the plaintiff, nothing could be made out of it in favour of the plaintiff. , I found the position of the defendant was further consolidated through the cross examination, leaving no room for the

learned counsel for the defendant to clarify anything by way of re-examination. Vide page 71 of the copy record.

28. A notable aspect that drew my attention was the contradictory position held by the plaintiff in paragraph 13 of the SoC and in the prayers thereto. The plaintiff in paragraph 13, having taken up a position that the conveyance and transfer of the said land has become **null and void**, in prayers to the SoC is moving for an order for the defendant or registrar of this court to re-transfer the land unto the plaintiff's name from the defendant or alternatively for a declaration that the defendant is holding the land in question in trust for and on behalf of the plaintiff. This mean, the plaintiff tacitly admits that the defendant has a good title duly obtained from the plaintiff. The plaintiff cannot be allowed to hold two contradictory positions.
29. None of the witnesses called by and on behalf of the plaintiff were present at DW-1's office on 8<sup>th</sup> March 2008 for them to speak about the circumstances that prevailed at the time of the execution of the Instrument of Transfer. None of them uttered a word about the Last Will of the plaintiff.
30. Even the plaintiff's Son RAM CHAND (the Next friend cum Guardian ad litem), apart from giving evidence about the situations prevailed at home in relation to his family life and his alleged altercation with the defendant, could not speak out of his knowledge any material facts in support of plaintiff's allegation in relation to the execution of the Instrument of Transfer or about the alleged assaults and abuse. He mainly acted as a mere "Mouthpiece" of the plaintiff to read out certain averments from the purported affidavit of the plaintiff, which was marked as PE-4.
31. It is to be observed that the plaintiff, having born in the year 1929, should have been at the age of 83 when she is said to have sworn the said PE-4 affidavit on 10<sup>th</sup> December 2012. Subsequently, after around 4 months, in April 2013 an application was made seeking a declaration that the Plaintiff was a patient (mentally ill) and to appoint a next friend / guardian ad litem to represent her in the action.
32. The plaintiff has not taken up a position that she was mentally ill at the time of executing the Last will on 27<sup>th</sup> February 2006 or when signing the Instrument of Transfer on 8<sup>th</sup> March 2008. This affidavit has been signed in December 2012 after a period of 4 years and 7 months from the date of



signing of the Instrument of Transfer in March 2008. The order declaring the plaintiff as a mental patient has been sought for in April 2013 just 4 months after the signing of the impugned affidavit PE-4.

33. Then a reasonable doubt arises as to whether the plaintiff could have been at a proper mental condition to give such a comprehensive instructions on her own for the preparation of the purported affidavit on 10th December 2012. It is not safer to accept such an affidavit evidence and act on it. Hence, I disregard the affidavit evidence of the plaintiff adduced through her son PW-1.

**The Allegation of Assault, Abuse, Harassment & Eviction of the Plaintiff:**

34. The issues number 5 and 6 above pertain to the alleged assault, abuse, harassment and the eviction of the plaintiff by the defendant. The date of alleged eviction is said to be on 8th May 2011 being the Mother's day. The SoC does not specifically state a particular date on which or the time period during which the plaintiff was assaulted, abused or harassed. None of the witnesses for the plaintiff came out with specific incidents of abuse, assault or harassment or the date of it. No evidence adduced to prove that any alleged incident took place after the execution of Transfer document.
35. PW-2, who is a former tenant, answering the question number two in page 47 of the copy record, had this to say.

*Q. Is there any time she had complained to you about or she has said something that you must have felt was weird?*

*A. No my Lord; not at the time I was renting there.*

*Q. Can you tell the Court why exactly you had come to court today?*

*A. My Lord I'm here as a witness today in court, because I saw it with my eyes; Vishwa Nand's two daughters used to kick Shyam Kaur's foot.*

36. In my view, the above was an incident involving two school going children of the defendant and a common occurrence in house with extended family members. This need not be treated as a grave matter warranting the revocation of a deed of gift. No evidence to say that the defendant assaulted or he was present there at that time.

37. PW-3, who is a Daughter of the plaintiff also did not speak about a specific incident or time period. What she says is about the plaintiff complaining to her about an alleged assault by the defendant's wife Rohini and not by the defendant or on his instigation. Even the PW-4, who is also a daughter of the plaintiff could not substantiate the allegation of the plaintiff, except for saying that she learnt from the plaintiff that Rohini had assaulted her and saw some scars on her body. If this was such a serious matter, the plaintiff need not have waited till the Mother's day for her to leave the home. None of the daughters or Son had visited her on the Mother's day and she had to go all the way to visit them assisted by the defendant, his wife and DW-3.
38. All the above witnesses were seen to be mainly answering some leading question by the plaintiff's learned counsel and added nothing to the plaintiff's case. None of the plaintiff's witnesses gave evidence about the alleged harassment, assault or abuse by the defendant. They have not been an eye witness to any such assault or abuse. The only incident spoken about was in relation to the kicking of the plaintiff by two daughters of the plaintiff in the year 2010. This cannot be treated as a major incident for the plaintiff to leave the house in May 2011 or to ask for the cancellation of duly attested Instrument of Transfer.
39. It has been clearly established by the evidence of DW-3, who says that when she went to plaintiff's place on 8<sup>th</sup> day of May 2011, she saw for her own eyes that the plaintiff had packed few clothes in a blue color bag for her 3-4 days stay away and left the home by the defendant's Car, assisted by her and the defendant's wife to go to defendant's cousin Manoj's place first and therefrom for her to visit her daughters in Korovuto. She has given acceptable evidence, which corroborates the defendant's evidence, as how the plaintiff was making preparation to go, how she was dropped at Manoj's place and received by Manoj's wife. This, in my view, cannot be considered as eviction of the plaintiff.
40. On careful perusal of the events that have taken place as per the evidence, it is obvious that the plaintiff's Son Ram Chand, by making use of the above instance and the plaintiff's physical and mental debility, has initiated these proceedings in order to achieve his own goal, in collusion with his two sisters, who failed to contribute as witnesses to substantiate the claim of the plaintiff.
41. According to the overall evidence adduced, I find that there had been sufficient and justifiable reasons for the plaintiff to have the property in

question initially bequeathed to the defendant by way of her DE-1 Last Will in the year 2006 and subsequently to transfer the same by the Instrument of Transfer DE-3 in the year 2008. The fact that the defendant was brought up by the plaintiff from his childhood, after his Mother's death as aforesaid, seems to have been the principal reason for the plaintiff's decision to do the transfer and not the alleged fraud, undue influence or misrepresentation as averred by the plaintiff.

42. The learned counsel for the plaintiff in her written submission states that due to the fraudulent conduct of the defendant, the plaintiff now has no place stay and that the defendant has broken the Trust placed by the plaintiff in the defendant. The defendant from the inception has clearly indicated that the plaintiff can come home at any time and stay there and she will be looked after.

**Undue Influence:**

43. The plaintiff, who alleges about undue influence, must establish that the defendant had the capacity to exert influence. I don't think this could have been a possible task for the defendant to carry out, when the plaintiff had number of elderly and matured children of her own around her in the family.
44. It is also the duty of the plaintiff to prove that the influence was in fact exerted and its exercise was undue, its exercise only brought about the transaction and the transaction was to the manifest disadvantage of the plaintiff. The above elements of undue influence were set out by Richardson -J in *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157. Also vide *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923-967.

The presumption of undue influence can be rebutted by the following;

- i. That the opposing party had been given independent advice;
- ii. Independent advice would have been disregarded; and
- iii. The donor's ability to form an independent judgment.

The convincing evidence given by defence witness DW-1 Ms. Vasantika Patel has well and truly rebutted the above presumption. According to her evidence, she has taken sufficient time to take down the clear instructions as per DE-2 and given independent advice to the plaintiff, who in turn has

insisted that the Instrument of Transfer has to be executed in favor of the defendant. Her evidence has remained unchallenged.

45. The allegation of misrepresentation too will not favor the plaintiff in view of the above revelations. The execution of the Instrument of Transfer in favor of the defendant was not a sudden or forced occurrence. It was only a follow-up action duly executed by the plaintiff on 8<sup>th</sup> March 2008 fulfilling her desire initially expressed by her Last Will dated 27<sup>th</sup> February 2006. The misrepresentation, if any, could not have long-lived from 27<sup>th</sup> February 2006.

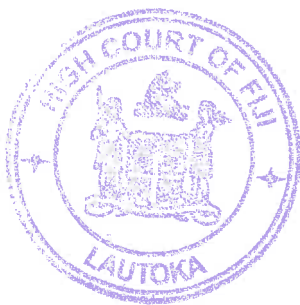
**F. CONCLUSION:**

46. The allegation of harassment, assault, ill-treatment and abuse of the plaintiff by the defendant is totally unfounded and only a made up story in order to obtain the property back from the defendant not for the benefit of the plaintiff, but for that of the plaintiff's Son and his sisters, who came to court as witnesses to buttress the case initiated by the Plaintiff's Son PW-1.
47. The plaintiff has not proved her case before this court on preponderance of evidence that the defendant got the property transferred in his name from her by exerting undue influence or by inducement or by way of fraud.
48. The plaintiff had bequeathed the land in question unto the defendant on her own will firstly by way of her Last will and subsequently gifted by way of an Instrument of Transfer and this court accept the evidence adduced for and on behalf of the defendant with no reservations .
49. The Plaintiff has also failed to prove that the defendant or anyone in his family abused, assaulted or ill-treated and evicted her from the premises in dispute. The defendant has clearly stated that the doors are always open for the plaintiff to come in, if she wishes so.
50. The evidence adduced by the plaintiff did not justify a finding of fraud, undue influence or harassment on the part of the defendant. Instead, the overall evidence establishes that the plaintiff, who willed the property in question should go to the defendant, subsequently transferred same to the defendant by the DE-3 document on account of natural love and affection and due to other good reason transpired through evidence.

51. Having heard and seen the witnesses in the witness box and observed their demeanor in court and having reviewed the totality of the evidence, I find and I so hold that the Plaintiff has not satisfied me, on a balance of probabilities that a fraud was committed and/or undue influence was exerted by the defendant on the plaintiff.
52. On the contrary, I am satisfied that the plaintiff freely and voluntarily transferred the property to the defendant. I therefore find and so hold that there is no basis for me to order the defendant to re-transfer the property to the plaintiff or to declare that the defendant holds or has held the property in Certificate of Title Number 14469 as a Trustee for and on behalf of the plaintiff. The plaintiff, who in paragraph 13 of the SoC averred that the instrument of transfer is null and void ab initio, cannot ask for good title back from the defendant.

### **G. FINAL ORDERS**

53. For the reasons stated above , I make the following orders;
- a. The writ of summons is struck out together with the Statement of Claim.
  - b. Plaintiff's action stands dismissed.
  - c. Taking all the circumstances into consideration, I make no order of costs of this action.



A. M. Mohammed Mackie  
**Judge**

**At Lautoka**  
**25<sup>th</sup> February, 2019**