

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO.: HBC 144 of 2015**

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

**AND** : **RAIDU BHIM KRISHNA** of 21006 Tenker Avenue Torrance CA 90501, United States of America and **RAMESH NAIDU** of 67 Whitford Road, Hinchinbrook, 2168 NSW Sydney, Australia as executors and trustees of the **ESTATE OF KRISHNA RAIDU** late of Wailailai, Ba.

**DEFENDANTS**

**Appearances** : **Mr. Ram Padarath for the plaintiff.**  
**Mr. Eroni Maopa for the defendants.**

**Hearing** : **Friday, 28<sup>th</sup> February, 2020.**

**Decision** : **Friday, 01<sup>st</sup> May, 2020.**

**DECISION**

- (01) The parties in this case invited the court to determine two preliminary issues under Order 33, rule 3 of the High Court Rules, 1988 raised at the pre-trial conference minutes.
- (02) The two preliminary issues are;
  - (A) whether the plaintiff is prevented from instituting this action pursuant to Section 59 (d) of the Indemnity Guarantee and Bailment Act, Cap 232?
  - (B) whether the action herein is statute barred pursuant to Section 4 of the Limitation Act?
- (03) The statement of claim which is as follows sets out sufficiently the facts surrounding this case from the plaintiff's point of view as well as the prayers sought by the plaintiff.

### The Parties

1. *The Plaintiff is the registered proprietor of all the land comprised under Certificate of Title number CT 30453 and a purchaser for value of part of land compromised in his neighboring property and covered under CT 20584.*
2. *At all material times, the Defendants were and remain the registered proprietor of freehold land comprised in Certificate of Title number CT 20584 (referred to as "CT 20584").*

### The Agreements

3. *On or about 14<sup>th</sup> August 1981, a subdivision plan was prepared on the instructions of the Plaintiff whereby part of CT 20584 was divided into 10 lots.*
4. *The said subdivision plan was duly approved and deposited with the relevant authority and allocated deposited plan number DP 5563.*
5. *The Defendants entered into an agreement on or about 30<sup>th</sup> January 1981 to sell one lot of approximately 1000m<sup>2</sup> in area to one Deo Narayan of Wailailai, Ba, Fiji. This lot was identified in the Plan as Lot 1 (referred to as "Lot 1 on DP 5563").*
6. *The said Mr. Deo Narayan, paid the full purchase price for the purchase of Lot 1 on DP 5563.*
7. *Some time thereafter, the said Deo Narayan entered into an agreement with one Mr. Bal Ram Raidu and sold Lot 1 on DP 5563 to him.*
8. *On or about 5<sup>th</sup> March 1986, the said Mr. Bal Ram Raidu sold Lot 1 on DP 5563 to one Mr. Shees Ram (deceased).*
9. *Subsequently, on or about 10<sup>th</sup> December 2006, the Plaintiff entered into a Sale and Purchase Agreement with the Estate of Shees Ram aka Shish Ram Shankar and purchased Lot 1 on DP 5563 for the sum of \$6,000.00 (Six Thousand Dollars).*
10. *The area of land covered under Lot 1 on DP 5563 is properly marked and the Plaintiff had at his own expense erected a fence and had occupied the area until on or about 1<sup>st</sup> May 2014.*
11. *The Defendant at all material times have been aware of the rights of the Plaintiff and of his occupation of Lot 1 on DP 5563.*

Conduct of Defendants

12. *Since about 1981, the Defendants have allowed each of the purchasers named above to be in occupation of all the area under Lot 1 on DP 5563.*
13. *The Defendants have carried out further subdivisions on CT 20584, but have not interfered, subdivided or purported to sell the area of land under Lot 1 on DP 5563.*
14. *Until on or about 1<sup>st</sup> May 2014, the Defendants raised no objections to the occupation and use of all the land described under Lot 1 on DP 5563 by the Plaintiff.*
15. *The Defendants had promised the Plaintiff and all other purchasers and occupiers of the said lot before him that they would effect a proper transfer of the lot into the name of the purchaser and subsequently into the name of the Plaintiff.*
16. *By their above conduct the Defendants have accepted that they have dealt with and alienated Lot 1 on DP 5563.*

Breach by Defendant

17. *The Plaintiff upon reliance of the conduct of the Defendants and all the written agreements and representations referred to in the Statement of Claim, proceeded to develop and occupy Lot 1 on DP5563.*
18. *In breach of their various representations and the written agreements, the Defendants:-*
  - 18.1 *On several occasions before 1<sup>st</sup> May 2014 attempted to forcefully enter Lot 1 on DP 5563 and to remove and destroy the structures erected by the Plaintiff and goods belonging to the Plaintiff;*
  - 18.2 *On or about 1<sup>st</sup> May 2014, the Defendants obtained an order ex-parte from the Magistrate Court at Ba in Civil Action number 22 of 2014 and removed the fences. The said injunction orders were obtained without giving full disclosure to the Magistrates Court; and*
  - 18.3 *Has refused to recognize the Plaintiffs lawful occupation and ownership of Lot 1 on DP 5563 and have neglected and/or refused to effect a proper registered transfer in the name of the Plaintiff.*

Damages

19. *As a result of the breaches, the Plaintiff has suffered loss and damages and is unable to use the property for which he has given due consideration.*

Other Remedies

20. *As a result of the breaches, the Plaintiff further seeks following:-*
- 20.1 *The Defendants take all steps necessary, at their own cost, to issue a separate title in the name of the Plaintiff for all the land covered under Lot 1 on DP 5563;*
- 20.2 *The Defendants and/or their servants and/or their agents be restrained from selling, alienating or in any way dealing with the land under Lot 1 on DP 5563.*
21. *The Plaintiff further claims interest on any damages awarded.*

**WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS JOINTLY AND SEVERALLY:-**

- (a) *A declaration that the Plaintiff is the owner of and has exclusive right of possession of approximately 1000m<sup>2</sup> in area of land compromised in CT 20584 and more clearly defined and demarcated as Lot 1 on DP 5563.*
- (b) *An order requiring the Defendants to take all steps necessary to transfer approximately 1000m<sup>2</sup> in area of land compromised in CT 20584 and more clearly defined and demarcated as Lot 1 on DP 5563.*
- (c) *An order requiring the Defendants to take all steps to regularize the subdivision as per Deposited Plan No. 5563 and have issued a separate title over the land defined and demarcated as Lot 1 on DP 5563 into the name of the Plaintiff.*
- (d) *The Defendants and/or their servants and/or their agents be restrained from selling, alienating or in any way dealing with the land under Lot 1 on DP 5563.*
- (e) *Interest on 10% per annum from the date of the breach to the date of judgment under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 29, Laws of Fiji on all sums awarded.*
- (f) *Costs.*

(04) The defendants' defence and counter-claim are stated in their statement of defence and counterclaim which is as follows;

1. *As to the paragraph 1 of the Statement of Claim, the Defendants admit the first part and denies the rest of the paragraphs as there is no sales and purchase agreement between the plaintiff and the defendant and or the late Krishna Raidu.*
2. *That the Defendants admit paragraph 2 of the Statement of Claim.*
3. *As to paragraph 3 of the Statement of Claim, the Defendant state that it was a proposed subdivision plan. The subdivision was not completed due to no payment on some of the intended purchasers including the plaintiff.*
4. *As to paragraph 4 of the Statement of Claim, the Defendants deny the content and state that the subdivision was not completed due to no payment. That a new subdivision was carried out in 2010 with DP No. 11149*
5. *As to paragraph 5 of the Statement of Claim, the Defendants admit the content and state the purchase did not go through as there was a default in payment by Deo Narayan and hence breach the agreement.*
6. *As to paragraph 6 of the Statement of Claim, the Defendants deny the contents as there was default in payment.*
7. *As to paragraph 7 of the Statement of Claim, the Defendants state the agreement did not succeed due to default in payment and put the plaintiff to strict proof.*
8. *As to paragraphs 8 and 9 of the Statement of Claim, the Defendants deny and unaware of the contents.*
9. *As to paragraph 10 of the Statement of Claim, the Defendants are unaware of the content. Further the Defendant state the fence erected was in not accordance to the survey plan. The fence was erected illegally.*
10. *As to paragraph 11 of the Statement of Claim, the Defendants deny the contents as it was in dispute for quite sometimes and the Plaintiff was reported and charged by Police for trespass by Ba Police.*
11. *As to paragraph 12 of the Statement of Claim, the Defendants deny the content and state that due to breach of Sales and Purchase agreement, no one has occupied the said Lot, as the sale was never completed.*

### *Conduct of the Defendants*

12. *As to paragraph 13 of the Statement of Claim, the Defendants deny the content as the subdivision is yet to be completed and a new development plan number (DP No.) will be issued.*
13. *As to paragraph 14 of the Statement of Claim, the Defendants deny the contents and state the trespass and obstruction matters were reported to the police. Another survey was carried by Dinesh Chandra & Associates to mark the proper boundary.*
14. *As to paragraph 15 of the Statement of Claim, the Defendants deny the content and state that there is absence of sale and purchase agreement or deed whatsoever between the plaintiff and the defendant to give rise to any interest on the estate land. Hence section 59 of the Bailment, Indemnity and Guarantee Act prevents the plaintiff to institute this action. Also the claim by the plaintiff is statute bar pursuant to section 4 of the Limitation Act Cap 35.*
15. *As to paragraph 16 of the Statement of Claim, the Defendants deny the content.*

### *Breach by the Defendants*

16. *As to paragraph 17 of the Statement of Claim, the Defendants deny the content and state that there is no representation or either formal or oral agreement to sell with the plaintiff and or to enter Lot 1.*
17. *As to paragraph 18 –*
  - *18.1 the Defendant state that the Plaintiff is a trespasser and the matter was reported to the Ba police.*
  - *18.2 of the Statement of Claim, the Defendants admit the contents but denied giving full disclosure.*
  - *18.3of the Statement of Claim, the Defendants admit the first sentence of the paragraph and denies the rest of the paragraph. The Defendants further state that he has no right/interest to be on the land.*

### *Damages*

18. *As to paragraph 19 of the Statement of Claim, the Defendant deny the content and put the plaintiff to strict proof.*
19. *As to paragraph;*

- 20 of the Statement of Claim, the Defendants deny any breaches. All dealings in land must be in writing and the action by the plaintiff is null and void pursuant to section 59 of the Bailment, Indemnity and Guarantee Act (Fiji)
- 20.1 of the Statement of Claim, the Plaintiff cannot bring this action as it is time barred hence the Limitation Act applies.
- 20.2 of the Statement of Claim, the Defendants deny that the Plaintiff is entitled to any remedy and further state the claim be dismissed with costs.

20. *The Defendant denies the Plaintiff is entitled to any interest.*

#### *Counter Claim*

*By way of Counter Claim the Defendants state:*

21. *The Defendants repeat paragraphs 1 to 20 above.*
22. *The estate of Krishna Raidu described in the Certificate of title No. 20584 containing 3 acres 3 rods, 29 & one tenth perches being Lot 2 DP No. 4826 in the district of Ba (the estate land)*
23. *That the late Krishna Raidu sold a portion of his property to Shees Ram being Lot 1 DP No 7652 Certificate of Title No. 30456 (previous title CT 20349)*
24. *The trustee of the estate of Shees Ram, Kamla Pati then sold this property to the Plaintiff on 1<sup>st</sup> August 2003.*
25. *That the Plaintiff on numerous occasions, when the Defendants were away overseas, encroached into and entered the estate land by erecting illegal fence and dumping old wreckages of vehicles, scrap metals and rubbish.*
26. *That sometimes in July 2013 the first named Defendant visited the estate land and discovered it was fenced with chain links by the Plaintiff and or his servants/agents. It was removed with the police assistance.*
27. *Before returning overseas the Defendants erected 3 layers of barbed wire and 3 FEA like concrete posts to replace the fence erected by the Plaintiff on the corners/edge of the estate land next to the Plaintiff's property.*
28. *By letter dated 25<sup>th</sup> July 2013 the first named Defendant wrote to the Plaintiff to stop dumping old wreckages of vehicles, crap metals and rubbish into the estate land.*

29. *The first named Defendant returned to Fiji and went to Wailailai Ba on March 2014. He discovered the barbed wire and the 3 FEA concrete like post he erected has been removed allegedly by the Plaintiff and or his servants/agents.*
30. *That the Plaintiff re-fenced the area with chain links and double gate the entrance to the driveway hence encroaching on the estate land.*
31. *That on 13<sup>th</sup> April 2014 Dinesh Prasad & Associates surveyed the land and confirmed the original position of the pegs on lots 1 & 2 DP4826. The survey report confirms the total encroachment by the Plaintiff is 1001 sq. meters (Approx. 0.25 acres)*
32. *That the Plaintiff denied/refused the first named Defendant and the surveyor entry to the site to conduct survey. The Ba Police were called to assist to maintain order and stop any violence. The Plaintiff and his servants/agents were arrested and charged for obstruction.*
33. *That the Defendant is processing and distributing the estate land to the respective beneficiaries by applying for new subdivisions with new Development Plan Number (DP No.) to be allocated.*
34. *As consequence of the encroachment and trespass into the estate land by the Plaintiff, the Defendants suffer and continue to suffer financial loss, damages and the delay in the distribution of the estate to the beneficiaries.*

*Particulars of loss*

(i)	General expense (transportation to and from Ba police station, hiring security officers	- \$ 250.00
(ii)	Fencing materials & Labour	- \$1,350.00
(iii)	Planting along the fence boarder Coconut trees, bananas etc	- \$ 300.00
(iv)	First survey fee for re defining boundary	- \$ 600.00
(v)	Second survey fee re defining boundary	- \$1,000.00
(vi)	Hiring Bailiff	- \$ 120.00
(vii)	Removal of illegal fence & erecting new ones	- \$ 630.00

<u>TOTAL</u>	<u>\$4,250.00</u>
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35. *As consequence of the matters aforesaid the Defendants suffer and continue to suffer frustration and mental distress.*



**WHEREFORE the Defendants pray:**

- (a) *Special damages in the sum of \$4,250.00*
- (b) *General damages for:*
  - (i) *Trespass and or Encroachment;*
  - (ii) *Frustration and mental distress;*
- (c) *A Declaration that the portion of the estate land in dispute is part of the estate of Krishna Raidu and the Plaintiff has no interest therefrom.*
- (d) *Injunction against the Plaintiff not to interfere whatsoever with the estate land in dispute and or the peaceful enjoyment of the whole estate land.*
- (e) *Interest at the rate of 6% under the Law Reform (Miscellaneous Provisions) (Death & Interest) Cap 29.*
- (f) *Further or any other orders the Court deems just and necessary.*

(05) As I understand the plaintiff's pleadings, the alleged contracts for the sale of part of CT 20584, Lot 1 (1000 square meters) on DP 5563 are;

- ❖ The sale and purchase agreement dated 30/01/1981, between Krishna Raidu (the vendor) and Raj Deo and Deo Narayan (the purchasers) (Annexure SGS-13 referred to in the affidavit of Sunil Gupta Sen sworn on 06/11/2017).
- ❖ The contract for the sale between Deo Narayan (vendor) and Bal Ram Raidu (purchaser). **No contract document was produced to court.**
- ❖ The sale and purchase agreement between Bal Ram Raidu (the vendor) and Shiu Ram Shankar (the purchaser) dated 05.03.1996. (Annexure SGS-14 referred to in the affidavit of Sunil Gupta Sen sworn on 06/11/2017).
- ❖ The sale and purchase agreement between Kamla Wati and Ajay Kumar Shankar (the vendors) as executor/executrix and trustees of the estate of Shiu Ram and the plaintiff (the purchaser) dated 10<sup>th</sup> December 2006. (Annexure marked SGS-2 referred to in the affidavit of Sunil Gupta Sen sworn on 06/11/2017).

(06) The plaintiff is relying on the legal principle of **assignment**. The plaintiff says that a contract is assignable in equity, and may be enforced by the assignee. The plaintiff relies on the House of Lords decision in "**Tolhurst v Associated Portland Cement Manufactures Ltd (1904) UKHL 456, (date of decision 06.08.1904)** and **claims interest in the subject property through various sale and purchase agreements mentioned**

in paragraph (5) above. The argument advanced on behalf of the plaintiff is that every subsequent purchaser took an assignment of the initial sale and purchase agreement dated 30/01/1981, (annexure SGS-13).

The plaintiff had taken possession of the land in the year 2006 and had erected a fence and a structure on the land.

- (07) By the writ of summons dated 02/09/2015 the plaintiff sued for;
- (a) *A declaration that the Plaintiff is the owner of and has exclusive right of possession of approximately 1000m<sup>2</sup> in area of land compromised in CT 20584 and more clearly defined and demarcated as Lot 1 on DP 5563.*
  - (b) *An order requiring the Defendants to take all steps necessary to transfer approximately 1000m<sup>2</sup> in area of land compromised in CT 20584 and more clearly defined and demarcated as Lot 1 on DP 5563.*
  - (c) *An order requiring the Defendants to take all steps to regularize the subdivision as per Deposited Plan No. 5563 and have issued a separate title over the land defined and demarcated as Lot 1 on DP 5563 into the name of the Plaintiff.*
- (08) On the other hand, the defendants argue that there is nothing in writing within the terms of Section 59 (d) of the Indemnity, Guarantee and Bailment Act, Cap 232 to establish that the late Krishna Raidu or his estate (the defendants) sold a portion of land compromised in CT 20584 to the plaintiff. **Put simply, the defendants say that there was no contractual relationship between the plaintiff and the late Krishna Raidu or his estate (the defendants) to grant a decree of specific performance.** The defendants counterclaimed for a declaration that “*the portion of the estate land in dispute is part of the estate of Krishna Raidu and the plaintiff has no interest therefrom*” . The defendants argue that the plaintiff has no right or interest to be on the land and seek damages for encroachment and trespassing.
- (09) Referring to the sale and purchase agreement dated 30/01/1981 (see paragraph 5 above), the defendants plead that; (reference is made to paragraph 5, 7, 11 and 14 of the statement of defence and counterclaim)
- (5). *As to paragraph 5 of the Statement of Claim, the Defendants admit the content and state **the purchase did not go through as there was a default in payment by Deo Narayan and hence breach the agreement.***

- (7). *As to paragraph 7 of the Statement of Claim, the Defendants state the agreement did not succeed due to default in payment and put the plaintiff to strict proof*
- (11). *As to paragraph 12 of the Statement of Claim, the Defendants deny the content and state that due to breach of Sales and Purchase agreement, no one has occupied the said Lot, as the sale was never completed.*
- (14). *As to paragraph 15 of the Statement of Claim, the Defendants deny the content and state that there is absence of sale and purchase agreement or deed whatsoever between the plaintiff and the defendant to give rise to any interest on the estate land. Hence section 59 of the Bailment, Indemnity and Guarantee Act prevents the plaintiff to institute this action. Also the claim by the plaintiff is statute barred pursuant to section 4 of the Limitation Act Cap 35.*

(Emphasis added)

- (10) However, the plaintiff pleads as follows in paragraph (17) and (19) of the reply to statement of defence and defence to counter claim

- (17). *In relation to paragraph 22, the Plaintiff confirms that the Estate of Krishna Raidu is the registered proprietor of Certificate of Title Number 20584.*
- (19). *In relation to paragraph 25, the Plaintiff denies the contents and states that the Plaintiff acquired lawful assignment of a sale and purchase agreement dated 30<sup>th</sup> January, 1981, which entitled the Plaintiff to take possession sometime in the year 2006.*

(Emphasis added)

- (11) Let me turn to the first issue based on contract of sale.
- (12) **It is common ground on the pleadings that at the time the sale and purchase agreement was entered into between late Krishna Raidu (the vendor) and Raj Deo and Deo Narayan (the purchasers) on 30/01/1981, and at all times subsequently and until todate, the title to the whole land comprised in CT 20584 remained in the name of Krishna Raidu. What is crucial to note is that late Krishna Raidu has not executed a document of transfer in the name of Raj Deo and Deo Narayan. There was no disposition of land to Raj Deo and Deo Narayan.** The defendants allege that the purchasers Raj Deo and Deo Narayan did not settle the residue of the purchase price within the stipulated time and as a result the ownership of the land did not pass to them

and the contract for the sale dated 30.01.1981 was kept in suspense, or held in abeyance . The plaintiff says that the residue of the purchase price has been paid.

(13) Be that as it may, **it is common ground on the pleadings that the legal title to the property, Lot 01 on DP 5563 in CT 20584 was not transferred or transmitted into the names of Raj Deo and Deo Narayan.** To date, the estate of late Krishna Raidu (defendants) are the registered proprietors of the land comprised in CT 20584. Raj Deo and Deo Narayan need to have legal title to the property transferred or transmitted into their names to sell the property to Bal Ram Raidu. Raj Deo and Deo Narayan are not the registered proprietors of Lot 1 on DP 5563 in CT 20584. They do not have a registered document of title to Lot 1 on DP 5563 in CT 20584. Therefore, Deo Narayan cannot sell Lot 1 on DP 5563 in CT 20584 to Bal Ram Raidu. **How can Deo Narayan sell Lot 1 on DP 5563 in CT 20584 to Bal Ram Raidu without having legal title to the property? How could Deo Narayan enter into any disposition of Lot 1 on DP 5563 in CT 20584 by way of a contract for the sale of the land with Bal Ram Raidu without first having registered title to the land as prima facie evidence of his unfettered right to deal with the land as he pleases? How could Deo Narayan convey non-existent title to the property to Bal Ram Raidu? I hold that there was no legally binding/enforceable dealing between Deo Narayan and Bal Ram Raidu.** The doctrine of 'equitable conversion' rests on valid, legally binding and legally enforceable contracts. The doctrine of equitable conversion serves no useful purpose in this case and it breaks down wholly and becomes a perfectly useless fiction leading to no results by reason of Deo Narayan's non-existent title to the property. The vendor Deo Narayan holds no title to the property. That being the case, how could the vendor Deo Narayan convey land to the vendee Bal Ram Raidu? How could the vendor Deo Narayan give the title to vendee Bal Ram Raidu ? How could the vendee Bal Ram Raidu receive the conveyance because of vendor's non-existent title to the property? The vendor Deo Narayan is not in a position of a donee of the property because he does not have legal title to the property. That being the case, then how could the property held subject to an equitable obligation? The vendee Bal Ram Raidu has no equitable title to the property or to a conveyance of the land. Therefore, what is in equity to pass to the assignees of the contract for sale? Besides, the plaintiff cannot be in a better position than Bal Ram Raidu who does not have an equitable title to the land.

(14) **In the circumstances, I cannot help feeling quite convinced that all the agreements entered subsequently ( see paragraph (5) above) in the circumstances hereabove stated are not legally binding because there is no chain of legal title to the property. The result is that the plaintiff cannot assert a right to the title in the land under the contract of sale made between him and Kamla Wati and Ajay Kumar Shankar (the vendors) as executor/executrix and trustees of the estate of Shiu Ram dated 10<sup>th</sup> December 2006. The equity would never intervene once an illegal purpose had been carried out. The equity does not intervene to grant a decree of specific performance in this case because equitable conversion by contracts have not taken place due to the vendor's (Deo Narayan's ) non-existent legal title to the property.** It is true as pointed out by counsel for the defendants there is no contractual relationship between the

plaintiff and the late Krishna Raidu or his estate (the defendants) to give rise to any interest on the estate land to the plaintiff. The plaintiff has no contractual right against late Krishna Raidu or his estate (the defendants).

- (15) **Therefore, it is a complete misstatement of law to say that every subsequent purchaser took an assignment of the initial sale and purchase agreement dated 30/01/1981, (Annexure SGS-13).** The legal principle of assignment does not arise upon the facts of this case because the property does not have a chain of title. I find great difficulty in finding anything of benefit to the plaintiff in the House of Lords decision in **“Tolhurst v Associated Portland Cement Manufactures Ltd. (supra).**

So in the end, I am driven to conclude that counsel for the defendants is right.

- (16) In view of the approach I have adopted, I do not think it necessary to deal with the defendants’ second legal argument based on the Limitation Act.

### **ORDERS**

1. The plaintiff’s claim is dismissed.
2. The defendants’ are entitled to costs and the costs are reserved for a later decision.
3. Mention on 15<sup>th</sup> May, 2020 to fix a hearing date for the defendants’ counterclaim.



**At Lautoka  
Friday, 01<sup>st</sup> May, 2020**

  
.....01/05/2020.....  
**Jude Nanayakkara**  
[Judge]