

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 330 of 2010

Phul Mati, as Attorney of Durga Prasad

Plaintiff

v

Jai Shree Lal

Arvin Lal

Suruj Lal, executors and trustees of Moti Lal

Suresh Chandra

Defendants

Counsel: Mr Sunil Kumar for the plaintiff
Mr A.K. Singh for the first and second defendants
Mr P. Katia for the third defendant
Mr V. Maharaj for the fourth defendant

Dates of hearing: 14th and 15th March, 2022

Date of Judgment: 9th January, 2023

Judgment

1. The late Ram Singh bequeathed CT 9854 consisting of 34 acres, 3 rods and 26 perches to his 4 sons, Goverdhan, Rattan, Moti Lal and Shiu Prasad to be divided equally. Rattan surveyed and obtained a separate title for his share with approval of the other beneficiaries. Shiu Prasad's share was transferred on his death to Lila Wati. Her share was taken over by the first, second and third defendants, the executors and trustees of Moti Lal. In the result, the estate of Goverdhan has $\frac{1}{3}$ rd share and the first, second and third defendants have $\frac{2}{3}$ rds share of the land. The parties had discussions on the subdivision of CT 9854.

2. The plaintiff, in her amended statement of claim states that she brings this action as Attorney of Durga Prasad,(Durga) the only surviving executor and trustee of the late Goverdhan. The first, second and third defendants refused to sign the subdivision she got done and together with the fourth defendant,(a Barrister and Solicitor) asked Edmond Chang, a Surveyor to carry out a subdivision. She alleges that the defendants colluded with each other and fraudulently subdivided and allocated all the prime larger blocks of dry and high land abutting the road with proper drainage to themselves without her consent or concurrence, leaving the boggy land for her. The particulars of fraud and/or collusion pleaded read as follows:

- i. *the three Defendants were aware of the Plaintiff's subdivisions of higher dry and river side land which is prone to flood however the three Defendants refused to sign the subdivision plan and her plan had remained unsigned.*
- ii. *1st, 2nd and 3rd Defendants colluded amongst themselves to defraud the Plaintiff by getting all drier land subdivided and allocated to them so that they could sell it for better value.*
- iii. *the first three Defendant s then approached the 4th Defendant to act for them as he was their lawyer from beforehand.*
- iv. *the 4th Defendant then agreed to act for them and assist them.*
- v. *4th Defendant failed to advise the Defendants properly that without the Plaintiff's signature the subdivision will be invalid.*
- vi. *the 1st, 2nd, 3rd and 4th Defendants inclusive acts was fraudulent when they had the full knowledge that the subdivision plan required the signature of the Plaintiff as one of the registered proprietor however they deliberately signed the subdivision plan regardless.*
- vii. *the 1st, 2nd and 3rd Defendant inclusive colluded with the 4th Defendant in their personal or in executive capacity to sign the subdivision plan knowing very well that the 4th Defendant was not the registered proprietor.*
- viii. *the 1st, 2nd and 3rd Defendants got the 4th Defendant to fraudulently sign the subdivision plan instead of the Plaintiff when they knew and ought to have known that he was not the registered proprietor.*
- ix. *the subdivision plan was signed to defeat the fair and equal distribution entitlement of the Plaintiff and her beneficiaries' shares.*
- x. *the 1st, 2nd and 3rd Defendants inclusive in personal or in executive capacity allocated the blocks to themselves, their sister, sons-in-law and their nuclear family.*
- xi. *the 4th Defendant fraudulently proceeded to prepare necessary documents to transfer lots and to obtain separate Certificate of Titles for the 1st, 2nd and 3rd Defendants, their relatives and persons nominated by the 1st, 2nd and 3rd Defendants.. (He) was a legal practitioner and he owed a duty to provide proper legal advice at the time of signing the subdivision plan as he had represented the 1st, 2nd and 3rd Defendants in other cases. ...the 4th Defendant colluded with them and assisted them in committing fraud against the Plaintiff and her attorney. As a result of the actions of the 4th Defendant fell below the standard of that of a Legal Practitioner as his conduct amounted to professional misconduct and/or unsatisfactory professional conduct.*

3. The plaintiff claims that that the subdivision carried out by Edmond Chang on 7th December, 2007, as approved by the Dept of Town and Country Planning, (DTCP) and Surveyor General on 18th December,2007, is a fraud, unfair, unlawful, null and void. She seeks that the Subdivision Plan and CTs issued be cancelled; a declaration that a subdivision in equal shares be carried out by a registered Surveyor with the cost to be shared by the beneficiaries proportionate to their shares; and, damages, for wrongful use of the land belonging to the estate.
4. The first, second and third defendants in their statement of defence state that the plaintiff was not granted leave to amend her claim to sue the first to third defendants as executors and trustees. Goverdhan appointed his wife and son Durga as executors and trustees. The plaintiff had no legal right to be appointed as executor and trustee of the estate of Goverdhan. She has no locus standi to institute these proceedings as Power of Attorney, (POA) holder of Durga's personal properties. She did not properly disclose to the High Court that she was only acting on a POA given by Durga in his personal capacity.
5. All parties including the plaintiff agreed to the subdivision and went to the fourth defendant's office on separate occasions to execute the Subdivision Plan on the instructions of the plaintiff. DP No. 9741 was approved by the DTCP on 18th December, 2008, and was successfully registered with the Register of Titles,(ROT) on 19th December,2008, within the knowledge and consent of the plaintiff. The Plan was approved mutually by all parties on the basis of occupation of CT No. 9854.
6. The defendants state further that it was agreed that each beneficiary will be allocated the land where their houses were built. After the DP was registered with the ROT, a total of 19 individual CTs were prepared in the individual names of all the beneficiaries. CT No. 39719 has been extracted in the name of a third party, namely Brij Lal. The Orders sought will affect all the parties who have individual indefeasible titles extracted in their names. The ROT, DTCP, the Attorney General and the rest of the beneficiaries of both estates who have indefeasible titles have not been made parties to this action. The estates of Moti Lal and Shiu Prasad have been wound up.

7. The fourth defendant in his statement of defence states that the plaintiff has no locus standi to institute these proceedings as Attorney, as a deceased trustee cannot assign her powers to a third party. The fourth defendant states that he has no knowledge of the allegations made by the plaintiff. He was a witness to the Subdivision Plan approved by the DTCP and did not purport to act for the plaintiff. There is no cause of action nor relief claimed against him.
8. The plaintiff, in her reply to the first, second and third defendants states that she has locus standi to bring this action as Durga, the executor and trustee of the estate of Goverdhan gave her POA. The subdivision was lodged and approved without her knowledge and with the knowledge, concurrence and collusion of all the defendants.
9. The plaintiff, in her reply to the fourth defendant states that the fourth defendant was not a witness to the subdivision plan. His signature clearly appeared where she was to sign. He colluded with the other defendants and committed fraud. As Barrister and a Solicitor, he was aware where, what and who was supposed to sign the subdivision plan.

10. ***The hearing***

a. *PWI, (the plaintiff)*

The plaintiff, in examination in chief said that Chandra Mati and Durga were the executors and trustees of the estate of Goverdhan. Durga became the sole executor and trustee after the death of Chandra Mati. Durga gave her POA. She was appointed executor and trustee of the estate of Goverdhan.

The defendants did not sign the subdivision her mother got done. CT 9854 was illegally subdivided by the first, second and third defendants and their lawyer, the fourth defendant. She was not consulted nor informed of their subdivision. Neither she nor her Attorney, (her brother) signed the Subdivision Plan DP 9741. Only the executors and trustees of Moti Lal signed. The 4th signature is that of the fourth defendant, Mr Suresh Chandra. He fraudulently signed in place of her, a registered proprietor. She did not authorize him to sign.

19 titles were extracted from the Subdivision Plan. The plaintiff said that all the titles issued must be cancelled.

In cross examination by Mr Singh, counsel for the first and second defendants, the plaintiff denied that the subdivision was done according to the Deed of 1969. The Deed provided that the parties would be given the particular portions where their houses are situated, but the subdivision done by the defendants took the land on the side of the road. The low line area near the Waimanu river was wrongfully given to the estate of Goverdhan. She denied that she was asked to go to Mr Suresh Chandra's office and sign. She said Mr Chandra did not witness the second defendant's signature. Certain subdivided properties have been sold to third parties. It was put to the plaintiff that she did not produce a written authority from Kampta and Sumeshwar Prasad, the other beneficiaries of the estate of Goverdhan, that they had authorized her to proceed with this action, as she contended.

Mr Maharaj, counsel for the fourth defendant put it the plaintiff that Mr Suresh Chandra witnessed the signatures of the registered proprietors and for that reason he placed his rubber stamp indicating that he is a Barrister and Solicitor and he did not sign as registered proprietor. She agreed that Mr Suresh Chandra's rubber stamp was on the disputed Plan. The plaintiff was referred to titles no 39700 to 39718 issued from CT 9854 in respect of which she had placed caveats.

In re-examination, the plaintiff said that there is no provision in a Plan for a signature to be witnessed. Only registered proprietors sign. CTs were issued to siblings of Moti Lal.

b. *PW2, (Ravin Prasad, Dept of Town and Country Planning, DTCP)*

PW2 said that Survey Plan DP 9741 originated from the Plan Examiner's Office. The Plan Examiner made a requisition to remove Mr Suresh Chandra's name. The Surveyor should have done so and re-submit the Plan for approval. A Plan is returned to the Surveyor, if a registered proprietor has not signed. Signatures are not required to be witnessed.

In cross examination by Mr Singh, the witness agreed that there was a column in the Plan above the words "*registered proprietor*", which provides that the signature needs to be witnessed. He set out the process for the approval of a Plan commencing with the DTCP followed by the Director of Lands and ROT.

In cross-examination by Mr Maharaj, PW2 said that his office does not consider whether a Plan was witnessed. The Plan Examiner would have rejected the Plan if he was of the view that the signature of the witness ought not to be on the Plan. In this case, the Plan has been witnessed by Mr Suresh Chandra with his rubber stamp stating that he is Barrister and Solicitor.

In re-examination, he said that the signature of the witness was in the registered proprietor's column. There was no witness column in the Plan.

c. *PW3, (Ronita Rovina Ram, Administrative Officer, ROT)*

In answer to Mr Kumar, counsel for the plaintiff, PW3 said that Mr Suresh Chandra signed the Plan on behalf of the registered proprietors. Neither the plaintiff nor the defendants signed as registered proprietors. The office of the ROT checks if the subdivision is for the correct title and if the registered proprietors are mentioned. The plaintiff's name is not on the Subdivision Plan.

In cross examination by Mr Singh, PW3 said that a title issued can only be set aside on account of fraud. He agreed that anyone who witnesses a signature places their stamp as Mr Suresh Chandra did in the present case. He witnessed the signature of three registered proprietors.

This witness, in answer to Mr Maharaj, agreed that Mr Suresh Chandra does not state that he is the registered proprietor in the Plan. He put his stamp as Barrister and Solicitor and Commissioner of Oaths. Once a DP is registered by the ROT, an application can be made for issue of titles. The titles issued are indefeasible.

In re-examination, the witness said that the signatures of the registered proprietors have to be witnessed by a solicitor.

d. *PW4, (Michael Lee Whippy, Land Surveyor)*

Mr Singh objected to the plaintiff calling this witness, as the plaintiff had indicated that he was an expert witness and adequate notice was not given to the defendants. Mr Kumar's riposte was that he was not an expert witness.

PW4, in evidence in chief said he gave his opinion to the plaintiff that she should not have signed the Plan, as she was not the registered proprietor. Only a registered proprietor signs a Survey Plan or a person holding his POA. If a registered proprietors has not signed, the plan is not in order

In answer to Mr Singh, he said that the signatures of registered proprietors are usually witnessed by a Commissioner of Oaths .

In answer to Mr Maharaj, the witness said that the Surveyor is the only person who witnesses the signatures of registered proprietors on a Survey Plan. DP 9471 was registered and approved by the ROT and titles were issued.

In re-examination, PW 4 said that Edmund Chang witnessed the Plan and Mr Chandra's signature appears in the registered proprietor's column. Chang signed twice, as registered Surveyor and as witness to the signatures of the registered proprietors.

e. *PW5, (Asakaia Tabua Bisataki, Surveyor General)*

This witness said that Mr Suresh Chandra had signed on the registered proprietor's column of the approved Subdivision Plan DP 9741. The anomaly was noted and sent as a requisition to the Surveyor. The registered proprietor should have signed on the Plan. Subdivision Plan DP 9741 was approved by the DTCP, Surveyor General and ROT. He produced the Glisspac Report, the calculation field notes of the Dept of Lands and Surveys and approvals given by the DTCP. A Plan can be amended if a registered proprietor advises the Surveyor General's office. If titles are issued, the ROT can advise the Surveyor General and the Plan can be amended

Mr Singh referred to the comment on the calculation sheets to delete Mr Suresh Chandra's name. After all the rectification was done, the Plan was approved.

In response to Mr Maharaj's question, the witness explained the hand written notes on the calculation sheets, which stated that there was insufficient space in the registered proprietors column and a comment to delete Mr Suresh Chandra's name. Once the Director of Lands gives approval, the Plan is submitted to the ROT. It is assumed that the errors would have been rectified before the Plan was passed. All the processes had been fulfilled.

In re examination, PW5 said that the errors are yet to be rectified. He did not find the clearance from DTCP.

f. *DW1, (Arvin Lal, the second defendant)*

DW1 produced the 1969 Deed. He said that Chang, their Surveyor asked him to go to Mr Suresh Chandra's office and sign the Subdivision Plan. Mr Suresh Chandra witnessed his signature on the Plan. There are 3 signatures on the Plan, the first defendant, the third defendant and himself. One land has been sold to his brother in law.

In cross examination, he denied that Chandra Wati and the plaintiff asked him to sign a subdivision. The defendants signed at the top where the words approvals is written, as there was inadequate space in the registered proprietors' column. They were unaware that the entire share of Goverdhan was for the plaintiff. He approached Kampta

Prasad and the plaintiff for their consent to the subdivision. Mr Kumar put it to the witness that the land where the houses were situated was not to be touched, but the remaining land was to be subdivided and the defendants took the better land leaving the boggy land at the rear for the plaintiff. His answer was none of the lands are boggy. Mr Kumar put it to the witness that only one half of the CT was surveyed and subdivided.

In re-examination, DW1 said that his sister transferred her property to Robert Jai Prakash. Robert Jai Prakash took a loan to pay the purchase price.

g. DW2, (Robert Jai Prakash)

DW2 produced his affidavit. He said that he purchased CT 39072 from his wife Reshmi Lata. She received the land as a gift from her father's estate.

The determination

11. I have summarised the agreed facts in paragraph I above.

12. The *Agreed Issues* read:

- a. *Whether the Plaintiff has "locus standi" to institute this action as a Power of Attorney holder?*
- b. *Whether there was any agreement binding all parties to own or allocate the land where their current houses were?*
- c. *Whether the Plaintiff had arranged a Surveyor named Ronad Chang and got the Sub Division done?*
- d. *Whether the court could make orders as prayed ..and if so, whether the Defendants without consent, approval and/or concurrence of the Plaintiff got all dry and higher land subdivided by the registered Surveyor Edmond Chang and allocated themselves and their brother and sisters larger block of dry land abutting Navuso Road with proper drainage?*
- e. *Whether the subdivision without the signature of one of the Registered Proprietor is invalid, void or anybody else can sign in place of the Registered Proprietor without any authority?*
- f. *Whether there was fraud by means of preparing documents or otherwise committed against the Plaintiff by any of the Defendants?*
- g. *Who prepared the necessary documentation for Subdivision, Transfer and Extraction of Separate Certificate of Title for the 1st to 3rd Defendants, their relatives and persons nominated by the 1st to 3rd Defendants?*
- h. *Which party is entitled to damages for wrongful use of the estate land?*

13. At the hearing, Mr Singh submitted that the plaintiff has no locus standi to bring this action as POA holder of Durga. Durga gave the plaintiff POA in a personal capacity and not on behalf of the estate.

14. Mr Kumar replied that the High Court accepted the POA and appointed the plaintiff as the executor and trustee of the estate of Goverdhan in place of Durga.
15. It is an agreed fact that Govardhan appointed Chandra Mati and Durga as executors and trustees. Chandra Mati passed on.
16. In my judgment, the appointment of the plaintiff as the executor and trustee of the estate of Goverdhan by the High Court cannot be challenged in these proceedings, as quite correctly submitted by Mr Kumar.
17. I am not satisfied from the evidence that the consent of the plaintiff was obtained for the subdivision .
18. The plaintiff has not established that she arranged a surveyor named Ronald Chang to get the subdivision done.
19. The plaintiff contends that DP 9741 is invalid, as she did not sign it and the fourth defendant fraudulently signed in place of her in the registered proprietor's column.
20. PW2 said that a Plan is returned to the Surveyor for compliance, if a registered proprietor has not signed it. The process for approval commences with the lodging of the Plan with the DTCP. The DTCP approves the proposed Plan with conditions and lodges it with the Director of Lands. He checks the ownership and approves the survey after which the Plan is registered with the ROT. Finally, the owner applies for a new title.
21. PW2 further said that the Plan Examiner would have rejected the Plan if he was of the view that the signature of the witness ought not to be on the Plan. He agreed that there was a column in the Plan above the words "*registered proprietor*", which provides that the signature needs to be witnessed.
22. PW3 said that the office of the ROT verifies if the subdivision is for the correct title and if the registered proprietors are mentioned.

23. I refer to the calculation sheet of 17 July, 2008, of the Dept of Lands and Surveys, which provide as follows:

<i>Requisition</i>	<i>Surveyor's Reply & Signature</i>
<i>All registered proprietors name are to be shown on the appropriate column</i>	<i>INSUFFICIENT SPACE IN PROPRIETORS column</i>

The following comments were hand written below:

*show registered proprietors name and their Fathers name on both plans.
Delete Suresh Chandra's name.*

... ..

11/01/08

Errors still on the plan

1....

2 Show the correct Registered proprietor's names on appropriate column...

..The above errors are yet to be rectified..

24. In my view, the evidence reveals that the two matters raised by the plaintiff were picked up by the relevant Depts. As PW5 agreed in cross-examination, it is assumed that the errors would have been rectified before the Plan was passed and all processes fulfilled. The Plan was passed by the DTCP and ROT. Neither have been made parties in this action, as pointed out by the defence.
25. I will now deal with the contention that the fourth defendant fraudulently signed the Plan as registered proprietor.
26. I find that none of the defendants signed in the column titled "*Registered Proprietor*". The first to third defendants signed on the top of the Plan above that column .
27. DW1 said that the defendants signed at the top, as there was inadequate space in the registered proprietors' column, which is also noted in the calculation sheet of the Dept of Lands and Surveys. He said that Mr Suresh Chandra witnessed his signature.
28. In my judgment, Mr Suresh Chandra, the fourth defendant clearly signed as a witness and not as a registered proprietor, as he placed his rubber stamp "*BARRISTER AND SOLICITOR AND COMMISSIONER OF OATHS*" under his name.

29. In my judgment, the several allegation of fraud made against the fourth defendant,(which in any event are not a matter for this Court) have not been established. Nor that his signature caused the plaintiff loss, as submitted by Mr Maharaj in his closing submissions. There is no cause of action nor relief sought against him as averred in his defence.
30. The plaintiff accepts that by a Deed of 1969, the parties were to be allocated the land where their current houses are situated, as contended by the defendant. She contends however, that the defendants without her consent subdivided and allocated to themselves all dry and higher land abutting Navuso Road with proper drainage that land and left the boggy land to her.
31. DW1 disputed that any of the lands are boggy. The plaintiff has not established that the land was boggy nor that there was a loss to the estate of Goverdhan.
32. The plaintiff said that nineteen titles have been issued after the subdivision.
33. Section 39 of the Land Transfer Act confers paramount title on a registered proprietor, except in case of fraud.
34. In *Prasad v Mohammed* (2005) FJHC 124; HBC 0272J.1999L (3rd June, 2005) Gates J (as he was then) stated:

In Fiji under the Torrens system of land registration, the register is everything: Subaramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] NZGazLawRp 66; (1906) 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] UKLawRpAC 11; [1905] AC 176, PC.

In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:

"It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent: Assets Co Ltd v Mere Roihi."

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title." The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.

Actual fraud or moral turpitude must therefore be shown on the part of the plaintiff as registered proprietor or of his agents Wicks v. Bennett [1921]30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97.

35. The Supreme Court in *Star Amusement Ltd v Prasad*, [2013] FJSC 8; CBV0005.2012 (28th August 2013)

..the Land Transfer Act, Cap. 131, is based on the "Torrens System" which is a system of land title where a Register of land holdings maintained by the State guarantees an indefeasible title to those included in the Register. Section 38 ..provides that-

"No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title."

..the cardinal principle of the Land Transfer Act that the Register is absolute and conclusive except in case of actual fraud, which has to be brought home to the registered proprietor.

The judgment of the Court cited the decision of the Court of Appeal in New Zealand in *Fels v. Knowles*,(1906) 26 NZLR 604 at pg 620 as follows:

..Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the case which registration of a right is authorized, as in the case of easements or incorporated rights, to the right registered.

36. In *Kumar v Wati* [2017] FJCA 126; ABU0011.2014 (14 September 2017) Prematilaka JA stated:

There is no statutory definition of fraud in the Real Property Act in NSW or Land Transfer Act in Fiji. Fraud, wrote Sir Rupert Cross, is "one of those irritating words that seems more technical than it really is",^[5-] ... Fraud has been judicially defined as actual dishonesty, which can be attached to the registered proprietor's title. ...

Equitable fraud is constructive fraud when the registered proprietor should have realised that the transaction was fraudulent. Bahr v Nicolay (No 2) [1988] HCA 16; [1988] 164 CLR 604, Mason CJ and Dawson J suggested that not all species of equitable fraud were outside the concept of fraud under the Real Property Act. This approach was endorsed .. by the Court of Appeal in NSW in Grgic v ANZ Banking Group Ltd (1994) 33 NSWLR 202 where, at 221, Powell JA said:

'Those species of 'equitable fraud' which are regarded as falling within the concept of 'fraud' for the purposes of s. 42 of the Act are those ... in which there has been an element of dishonesty or moral turpitude on the part of the registered proprietor of the subject interest or on the part of his or its agent.'

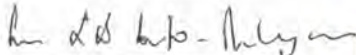
Generally fraud must occur in the lead up to registration and must be shown to have been practiced against the person who seeks relief. Mason CJ and Dawson J in Bahr v Nicolay (No 2) (supra) have suggested that post-registration conduct by the registered proprietor may be considered on the issue of whether there is fraud by the registered proprietor. This approach has been endorsed by Wood J in Snowlong Pty Ltd v Choe [1991] 23 NSWLR 198 at 212.(footnotes omitted)

37. The plaintiff has not made the registered proprietors of the new titles nor the other beneficiaries of the estate of Moti Lal as parties to this action nor alleged that they acquired their titles by fraud.

38. The plaintiff's claim fails.

39. **Orders**

- a. The plaintiff's action is declined.
- b. The plaintiff shall pay the first, second, third and fourth defendants costs summarily assessed in a sum of \$ 1500 each.


A.L.B. Brito-Mutunayagam
JUDGE
9th January, 2023

