

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 144 of 2015

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

AND : **RAIDU BHIM KRISHNA** of 21106 Tenker Avenue Torrance CA 90501, United States of America and **RAMESH RAIDU** of 67 Whitford Road, Hinchinbrook, 2168 NSW Sydney, Australia as Executors & Trustees of the **ESTATE OF KRISHNA RAIDU** late of Wailailai, Ba.
DEFENDANTS

Appearances : Mr. Niven Padarath for the Plaintiff
Mr. Eroni Maopa for the Defendant
Date of Trial : 18 July 2023
Date of Judgment : 01 October 2025

JUDGMENT

INTRODUCTION

1. This case has had a rather chequered history. It has gone up to the Fiji Court of Appeal twice on appeal of two separate interlocutory rulings of Mr. Justice Sapuvuda and Mr. Justice Nanyakarra.
2. Sunil Gupta Sen (“**Sen**”), the plaintiff, is a businessman. He resides in Wailailai in Ba on his freehold property which is comprised in Certificate of Title No. 30453 and which is one thousand three hundred and fifty-one (1,351) square meters in size.
3. Sen moved into occupation of CT 30453 on 01 August 2003. That was the same day when the property was transferred to him after he purchased it from the estate of one Shees Ram¹ (“**Shees Ram**”).
4. The property at the heart of the dispute in this case is a certain plot of land which adjoins Sen’s CT 30453. This plot is approximately 1,000 square meters in size (“**Lot 1**”).

¹ as admitted by Sen in cross-examination.

5. Sen moved into occupation of Lot 1 on 01 August 2003. This was the same day he started occupying CT 30453. He claims to have also bought the property from Shees Ram.
6. However, Lot 1 is actually part of a bigger piece of freehold land. This freehold land is all comprised in Certificate of Title 20584.
7. CT 20584 vests in the estate of the late Krishna Sami Raidu (“**Raidu**”). Raidu died testate on 17 October 1984. He executed his Last Will and Testament just five months earlier on 16 May 1984. Probate No. 2138 was granted on 07 February 1986 to three of his six children, namely Ramesh Raidu (“**Ramesh**”), Tataiya David (deceased) and Raidu Bhim Krishna (“**Krishna**”).
8. Ramesh and Krishna are named as defendants in this case.

BACKGROUND

9. Once upon a time, Raidu was the owner of a large piece of freehold property in Ba. This was all comprised in Certificate of Title No. 11925. Between 1980 to 1981, Raidu subdivided CT 11925². Out of that subdivision, two plots were created, namely Certificate of Title 20349³ and Certificate of Title 20584⁴. CT 20349 comprised 1 acre and 18.10 perches. CT 20584 comprised 2acres, 3 roods and 29.10 perches.
10. CT 20349 was issued to Shees Ram on 04 June 1981. I gather this was carried out pursuant to a pre-subdivision sale and purchase arrangement between Shees Ram and Raidu.
11. Shees Ram would later subdivide CT 20349⁵. One of the four plots created out of this subdivision was **CT 30453**. This was the one which Shees Ram sold to Sen and on which Sen currently resides.
12. As for CT 20584, this plot has remained with Raidu⁶ (his estate). Raidu had plans to subdivide this land into eleven plots when he was alive. He had a subdivision plan (DP 55563) prepared in 1981. When he died three years later in 1984, the subdivision had yet to begin.
13. However, Raidu left specific instructions in his Will about how CT 20584 was to be subdivided into ten lots in terms of DP 5563 and how six of these are to be distributed between his wife and children. In fact, Probate No. 21328 over his estate was issued with his last Will and DP 55563 annexed.
14. With regard to the four remaining plots, Raidu had entered into various arrangements to sell these to the following persons:

² the subdivision plan for CT 11925 was lodged as DP 4826 on 16 December 1980 and was approved.

³ i.e. Lot 1 on DP 4826 comprised in Certificate of Title 20349.

⁴ i.e. Lot 2 on DP 4826 comprised in Certificate of Title 20584.

⁵ the approved sub-division plan was lodged as DP 7652.

⁶ the Certificate of Title was issued to Raidu on 14 August 1981.

- (i) Lot 1 to one Deo Narayan (**PW2**) and Raj Deo.
- (ii) Lots 2 and 4 to one Ishwar Chandra.
- (iii) Lot 3 to one Ram Deo.

15. It is Lot 1 above which is at the heart of the dispute in this case.

HOW SEN ASSERTS HIS CLAIM OVER THE PROPERTY (Lot 1)?

Table 1

<i>Raidu</i> (defendant)	→	<i>Deo</i> <i>Narayan</i> & <i>Ram Deo</i>	→	<i>Bal Ram</i> <i>Raidu</i>	→	<i>Shees Ram</i>	→	<i>Sen</i> (plaintiff)
		<i>1981</i> <i>(\$12,250)</i>		<i>1986</i> <i>(\$6,000)</i>		<i>1996</i> <i>(\$6,000)</i>		<i>2003</i> <i>(\$9,000)</i>

16. Mr. Padarath submits that Sen is pursuing a right to purchase Lot 1 as an expectancy interest and a future chose in action. Sen’s interest was acquired by equitable assignment in 2003. It is founded in a succession of equitable transactions beginning in 1981.

17. Mr. Padarath theorises his argument as follows:

- (i) on 30 January 1981, Raidu and **PW2**/Raj Deo entered into a sale and purchase agreement (“**1981 Agreement**”) over Lot 1.
- (ii) at the time of the 1981 Agreement, Lot 1 was yet to be formally created as a legal parcel.
- (iii) however, the creation of Lot 1 was anticipated under a proposed subdivision of CT 20584. The proposed subdivision was to be carried out under DP 55563. DP 55563 was attached as part of the 1981 Agreement.
- (iv) pursuant to the 1981 Agreement, **PW2**/Raj Deo paid the full purchase price⁷. They then waited for Raidu to complete the subdivision and issue/transfer the legal title over Lot 1 to them.
- (v) however, while the subdivision was pending, **PW2**/Raj Deo sold the “interest” to Bal Ram Raidu in 1986. In 1996, some ten years or so later, Bal Ram sold the interest to Shees Ram.
- (vi) Shees Ram purportedly sold the interest to Sen on 01 August 2003.
- (vii) to this day, the subdivision of CT 20584 pursuant to DP 55563 is, for one reason or another, still pending. Lot 1 is still yet to be created, let alone registered.
- (viii) the 1981 Agreement anticipates that the subdivision as per DP 55563 will be carried out. So, while the subdivision is pending, there is a persisting expectation by **PW2**/Raj Deo (or their assigns) that Raidu/his estate will complete the subdivision of CT 20584 as per DP 55563 and facilitate the issuance/transfer of the title over Lot 1 to them.

⁷ The evidence of **PW2** in chief was that he did settle the full purchase price. This, I reject.

- (ix) hence, while that expectation persists, **PW2/Raj Deo** (or their assigns) reserve the right to purchase Lot 1. The 1981 Agreement establishes that contractual right. This is reinforced by equitable principles which support a claim for an equitable future chose in action
- (x) Sen claims the right to purchase Lot 1, not because of any direct dealing with Raidu or **PW2/Raj Deo**, but as the latest assignee in a chain of equitable assignments dating from 1981 to 2003 – as set out in *Table 1* above.
- (xi) the right to purchase was purportedly sold to Bal Ram Raidu in 1986, who then sold it to Shees Ram in 1996, and who ultimately then sold it to Sen on 01 August 2003.
- (xii) while Lot 1 has not yet been formally created as a legal parcel, its existence is anticipated under subdivision plan DP 55563. The plan was duly approved on **10 May 1989 (PEX 15)**, and remains valid and operative.
- (xiii) accordingly, there is a right which vests in Sen, as assignee, to compel Raidu’s estate to subdivide CT 20584 as per DP 55563.
- (xiv) while Lot 1 is yet to come into existence, the right to compel subdivision exists now because the approved subdivision plan DP 55563 exists, and because the full purchase price was settled by **PW2/Raj Deo**.
- (xiv) hence, the defendants should proceed with subdividing CT 20584 pursuant to DP 55563 as they are obligated to do so under the Agreement, and then transfer Lot 1 to Sen.

THE DEFENDANTS’ POSITION

18. The defendants acknowledge that Raidu did enter into an agreement to sell Lot 1 to **PW2**. He also had an agreement to sell lots 2, 3 and 4 to other purchasers.
19. The arrangement was that CT 20584 would be subdivided (as outlined in DP 55563). Thereafter, individual titles for Lots 1 to 4 would be issued or transferred to the respective purchasers.
20. The purchasers were to cover the cost of subdivision from their full purchase payments. As such, DP 55563 was a proposed plan only. Its formalisation rested on **PW2’s** and other purchasers’ payment of the full purchase price by the stipulated date of **31 January 1987** (see Table 2 below).
21. The subdivision was not completed because the purchasers, including **PW2**, all defaulted in settling their respective sale price by the due date.
22. Raidu’s obligation to subdivide CT 20584 and to have a legal title issued over each Lot to each purchaser, was contingent upon approval and registration of DP 55563 which, in turn, was conditional upon the payment of the full purchase price by each purchaser by the due date.
23. Thus, the purchasers bore the financial responsibility of enabling the subdivision.

Counter-Claim

24. The defendants counter-claim for their costs and expenses in having to remove the plaintiff's fences and dumped scrap material from Lot 1.
25. As for the alleged transactions which purportedly happened thereafter, the defendants' position is that they were not aware of those. In any event, since the balance of the purchase price had not been settled, each purported assignment down the chain would lack validity.

ISSUES

26. The parties did execute a set of Pre-Trial Conference Minutes on 23 April 2019. These minutes record four (4) only agreed facts and 16 agreed issues to be resolved. In my view, the main legal issues raised could be summarised as follows:
- (i) whether or not Deo Narayan and Ram Deo did in fact acquire an equitable proprietary interest in Lot 1 from their dealing with Raidu, and
 - (ii) if the answer to the above question is "yes", was that interest assignable at all relevant times in this case?
 - (iii) if the answer to the above question is "yes", was the interest validly assigned at each different transaction points along the chain as illustrated in Table 1 above?

THE TRIAL

27. The trial of this case happened on 18 July 2023. The plaintiff called the following witnesses:
- (i) Mr. Sunil Gupta Sen **PW1**
 - (ii) Mr. Deo Narayan **PW2**
28. For the defendant's case, only Mr. Raidu Bhim Krishna (**DW1**) was called to give evidence.

COMMENTS

Key Features of the Agreement of 30 January 1981

29. The key features of the Agreement between Raidu and Deo Narayan (**PW2**)/Raj Deo) are as follows:

Table 2

Purchase Price	<u>\$12,250 – 00</u> (twelve thousand two hundred and fifty dollars only)
Amount already paid by purchasers	<u>\$1,000</u>

(Clause 1 (a) and (b))	(by Raj Deo on 05/03/79) \$5,000 (on execution (i.e. \$2,000 by Raj Deo and \$3,000 by Deo Narayan).
Balance outstanding as @ execution (Clause 1 (c) subclauses (a) to (e))	\$6,250 (to be paid in yearly instalments of \$1,000 i.e. \$500 each per annum between Deo Narayan & Raj Deo)
Due date of Last Instalment (Completion Date) (Clause 1 (c) and subclause(f))	31 January 1987

30. Clause 5 of the Agreement provide:

The possession of the land shall be given by the vendor to the purchasers upon the execution hereof and the purchasers shall have full right to use and occupy the said land.

31. Clause 3 places the obligation on **PW2/Raj Deo** to pay for stamp duty (no longer applicable now) and also the costs of transfer and survey relating to the dealing. Clause 6 requires **PW2/Raj Deo** to pay for the survey of Lot 1.

Purchaser's Equitable Interest

32. A purchaser who enters into an agreement to purchase land acquires an equitable interest. This is a *right in personam*. It does not confer a right against the land. Rather, it only entitles him to sue on the contract.

33. However, if the purchaser has performed (or has part-performed and is ready to complete) all contractual obligations, equity may then treat him as the equitable owner.

34. Whether equity will treat a purchaser as the equitable owner depends on whether the purchaser is entitled to the equitable remedy of specific performance.

35. Whether the purchaser is entitled to specific performance is a question of fact and a matter of discretion.

36. Hence, it is said that a purchaser's equitable interest is commensurate with his ability to obtain specific performance (see **Brown v Heffer** [1967] HCA 40; (1967) 116 CLR 344 (19 October 1967; **Chang v. Registrar of Titles** [1976] HCA 1; (1976) 137 CLR 177).

37. This means that the availability of specific performance is the defining point at which a purchaser's equitable *right in personam* may mature into an equitable proprietary interest.

38. In **Connolly v Ryan** [1922] HCA 25; (1922) 30 CLR 498 (2 June 1922), Higgins J of the Australian High Court said:

....equity, in considering the rights of the parties to an agreement, treats the agreement (if capable of specific performance) as having the same force as between the parties as if the agreement had been carried out

39. In **Reg. v. Australian Broadcasting Tribunal; Ex parte Hardiman** [1980] HCA 13; (1980) 144 CLR 13 the Australian High Court as per Gibbs, Stephen, Mason, Aickin and Wilson JJ at 31 said that:

"a purchaser who can by way of specific performance compel a transfer of shares under a contract is a beneficial owner of the shares."

Vendor – Constructive Trustee

40. Similarly, a vendor who can, by an Order for specific performance, be compelled to transfer an interest in property, holds title on constructive trust for the beneficial owner⁸. This common law position is codified in section 80(a) of Fiji's Trustees Act 1966⁹. Section 80 (a) allows the High Court to declare a vendor as a trustee where a judgment has been given for specific performance in favour of a purchaser in a contract for the sale of any interest in land:

Where a judgment is given for specific performance of a contract concerning any interest in land, or for partition, or sale in lieu of partition, or exchange of any land, or generally where any judgment is given for the conveyance of any interest in land....the court may declare –

(a) that any of the parties to the action are trustees of any interest in the land or any part thereof, within the meaning of this Act;

41. Once a vendor is declared a trustee under section 80 (a), the Court may then make a vesting order in favour of the purchaser. Section 74 (2) (o) gives the Court power to make a vesting order:

"...where property is vested in a trustee and it appears to the Court to be expedient to make a vesting order".

42. Hence, the availability of the remedy of specific performance is itself relevant to a purchaser's entitlement to a vesting order.

⁸ cf. in **Lysaght v Edwards** (1876) 2 Ch D 499 at 506, Jessel M.R said:

The moment you have a valid contract for sale the Vendor becomes in equity a trustee for the purchaser of the estate sold , and the beneficial ownership passes to the purchaser , the vendor having a right to the purchase money, and a right to retain possession of the estate for the security of that purchase money , and a right to retain possession of the estate until the purchase money is paid in the absence of express contract as to the time of delivering possession

⁹ see **Chang v Registrar of Titles** (Vic) [1976] HCA 1; (1976) 137 CLR 177 (11 February 1976) for a discussion on certain provisions of the Trustee Act 1958 (Vict.) for which there are corresponding provisions in Fiji's Trustee Act (1966).

WHETHER OR NOT DEO NARAYAN/RAJ DEO EVER ACQUIRED AN EQUITABLE INTEREST IN LOT 1?

43. Clearly, **PW2/Raj Deo** did acquire an equitable interest. I say this on account of the fact that they did execute the 1981 Agreement with Raidu and pursuant to which **PW2/Raj Deo** had paid a deposit of \$6,000.
44. As stated, their equitable interest is commensurate with their ability to obtain specific performance on the 1981 Agreement.
45. While **PW2/Raj Deo** may have acquired an equitable interest, the 1981 Agreement was executory in nature. This means that the availability of the remedy of specific performance depends now on (i) the extent to which **PW2/Raj Deo** will have performed the obligations which remain unfulfilled, and (ii) before that is even considered, whether or not the Agreement is in fact still in force.
46. I am of the view that the 1981 Agreement is not specifically enforceable at this time for the following reasons:
- (i) **PW2/Raj Deo** did not settle the balance of the purchase price by the stipulated date of completion which was 31 January 1987.
 - (ii) **PW2/Raj Deo** did not pay the stamp duty which was leviable on all instruments pertaining to their deal as per clause 3 of the 1981 Agreement.
 - (iii) **PW2/Raj Deo** did not settle the costs of transfer and survey relating to the deal as per clause 3.
 - (iv) **PW2/Raj Deo** did not settle the costs of the survey for Lot 1 as per clause 6.
 - (v) DP 55503 was not approved by the DTCP within the time stipulated under the 1981 Agreement.

Settlement of the Balance of the Purchase Price

47. **PW2** did not give any clear evidence that he actually settled the balance of the purchase price which was \$6,250. I say this for the following reasons:
- (i) **PW2** showed no receipts that he ever paid any money to Raidu between the date of execution of the Agreement (30 January 1981) and the date of completion (31 January 1987)¹⁰.

¹⁰ **PW2** said in chief that he and Raidu were neighbours. Asked if he has paid the full purchase price of \$12,500, **PW2** said he has paid this. He said he and Raidu went to a Solicitor (G. P Shankar & Associates). He does not recall the year he paid up the balance. When asked if G. P Shankar ever made any receipt, **PW2** said “yes”, but G.P Shankar did not hand them over to him. Rather, G.P Shankar kept these in his files. **PW2** said:

“I did not ever ask for receipt because I fully paid the amount”.

- (ii) in fact, the Last Will of Raidu which was executed on 16 May 1984, records that all the accounts for Lots 1,2,3 and 4 were in default¹¹.
- (iii) although **PW2** did say in chief that he had paid the full purchase price, in cross-examination, he said he only sold the Agreement to Bal Ram for the sum of \$6,500 as he was only interested in recovering what he had paid.
- (iv) when the above testimony is placed side by side with the fact that the purchase price stipulated in the Agreement is \$12,250, would strongly suggest that **PW2** did not settle the full purchase price with Raidu.
- (v) flowing from the above, it is hard to understand how anyone who has paid the full purchase price of \$12,250 would then short-sell by approximately 50% a potential proprietary claim to a piece of freehold property in Fiji, especially just months before the date of completion of the sale and purchase agreement – when the remedy of specific performance was clearly at his disposal.
- (vi) in a chain of successive dealings such as the one which the plaintiff claims, each subsequent purchaser would rely on the validity of the prior purchaser’s interest.
- (vii) if the original or the previous purchaser had not paid, the entire chain is compromised.
- (viii) without demanding evidence of payment, each purchaser down the chain risks engaging with someone who has no enforceable right. The conduct of each purported purchaser in not demanding strict evidence of payment does not align with what one would reasonably expect of a genuine sale.
- (ix) this opens the door to numerous other complications (e.g. every purchaser being exposed to fraud).

48. In his cross-examination of **DW2**, Mr. Padarath asserted that clause 4 (II) (see footnotes) does not identify that **PW2/Raj Deo’s** account was in default and that it is not safe to construe that ambiguity to include **PW2**. I reject that submission for the following reasons:

- (i) the Will makes *default bequests* (for want of a better term) or fall-back provisions in relation to all four lots. These provisions specify what should happen if the primary arrangement in relation to one, two, three, or ALL four

¹¹ Raidu’s Will which was made on 16 May 1984, notes as follows at clause 4 (II):

- (I) I have made agreements to sell Lots 1 to 4 details of which are as follows:-
 - (i) Lot 1 to **DEO NARAYAN** son of Sat Narayan, shopkeeper.
 - (ii) Lots 2 and 4 to **ISHWAR CHANDRA** Accountant
 - (iii) Lot 3 to one **RAJ DEO**

Clause 4 (II) then goes on to state as follows:

There have been defaults in payment and other complications in respect of the abovementioned agreements to sell lots 1 to 4 and I may take action to terminate the above agreements. Should any of the above agreements for sale be terminated and any of lots 1 to 4 form part of my estate, then **I GIVE DEVISE AND BEQUEATH** the abovementioned lots as follows.....

of the lots – should fail. This suggests that all four accounts were in default at the time the Will was made.

- (ii) Raidu passed away exactly five (5) months after he made the Will. However, **PW2** gave no evidence that he made any payment to Raidu during the five months between the making of the Will and the time of Raidu's passing – let alone – that he settled the balance of \$6,250 that was owing.
- (iii) furthermore, even if Clause (II) was ambiguous, that ambiguity cannot be relied on by the plaintiff to establish that the balance of the purchase price was in fact fully settled. The onus is primarily on the plaintiff to establish payment.

49. All the factors which I outline above lead me to reject **PW2's** evidence that he and Raj Deo did settle the full purchase price of \$12,250 with Raidu.

Stamp Duty/ Transfer & Survey Costs

- 50. Clauses 3 and 6 of the 1981 Agreement oblige **PW2/Raj Deo** to bear the above costs. No evidence was adduced at trial to show that they did fulfill these obligations.
- 51. In fact, none of the documents tendered are duly stamped. While stamp duty is no longer leviable from 01 August 2020 on account of the repeal of the Stamp Duties Act, documents dated before 1 August 2020 may still require stamping to be enforceable.
- 52. I repeat paragraphs 17 to 22 above which I accept. Clearly, **PW2/Raj Deo** bore the financial responsibility of enabling the subdivision. Their failure to settle the balance of the purchase price stymied the entire subdivision process.

DP 55503! Was it Duly Approved?

- 53. Clause 8 states that the 1981 Agreement is subject to the consent of the Director of Town & Country Planning.
- 54. According to **PW1**, DP 55503 was duly approved on **10 May 1989 (PEX 15)**. I do note that **DW1** was visibly surprised in Court when this was put to him.
- 55. If **PW1's** assertion was to accepted as true, then the approval was given some five years or so after Raidu passed on 17 October 1984 and some three years or so after Probate No. 2138 was granted over his estate on 07 February 1986.
- 56. Moreover, it would tend to establish that the approval was sought without any knowledge or involvement of the administrators of the Raidu estate. This means that there was a total lack of communication between the parties during **PW2/Raj Deo's** time.

57. In any event, although I am presently unable to confirm whether DP 55503 was duly approved, given the uncertified and poor-quality photocopy tendered, it is evident that the defendants were unaware of any such approval.
58. Flowing from that, it would appear then that the costs associated with securing that approval were not deducted from the balance of the sale and purchase price, which, as I have already found, was never paid by PW2/Raj Deo.
59. This further reinforces the conclusion that the balance of the purchase price was never settled by PW2/Raj Deo.

Limitation Period & Indemnity, Guarantee & Bailment Act

60. These issues were raised initially before Mr. Justice Jude Nanyakarra¹².
61. Mr. Maopa submits that the claim is statute barred and ought to be struck out for abuse of process. If one were to look at this scenario from the view point of specific performance, then the cause of action would accrue from the point when an alleged breach occurs.
62. Mr. Padarath appears to hinge his whole case theory on the alleged fact that DP 55563 was approved on 10 May 1989. Accordingly, Raidu's obligation to complete subdivision and issue Lot 1, and PW2's/Raj Deo's expectation to have Lot 1 issued to them, are both tied to the approval. Hence, the cause of action accrues from the point when the 1981 Agreement becomes enforceable which was in 1989 when DP 55563 was approved.
63. I have also considered that Sen did occupy the property briefly from 2003¹³ to 2014 and that he moved out only when his occupation was challenged. In my view, Sen's cause of action as a purported assignee accrues from that point. Accordingly, there is no issue of the action being statute barred.

Is the Agreement still in force?

64. A purchaser may lose his chose in action and the right to enforce a land sale contract if he fails to pay on time where timeliness in payment is an essential term (**Tanwar Enterprises Pty Ltd v Cauchi** [2003] HCA 57; 217 CLR 315; 77 ALJR 1853; 201 ALR 359).
65. A purchaser's failure as such would then entitle the vendor to terminate their agreement.
66. I am of the view that the provision in the 1981 Agreement which required PW2/Raj Deo to settle the balance of the purchase price by the stipulated date was essential to the deal. Clearly, the subdivision effort was anchored in the expectation of full payment.
67. The question is whether or not the Agreement was validly terminated by Raidu.

¹² see **Sen v Krishna** [2022] FJCA 195; ABU042.2020 (25 November 2022) on Court of Appeal's discussion on how Nanyakara J dealt with the issues.

¹³ although he pleads that he occupied Lot 1 from 2006, in cross-examination, Sen admitted that he started occupation of Lot 1 in 2003 on the same day when he moved onto his adjoining property CT 30453.

68. Notably, the Agreement does not make any notice provision for termination. Having said that, termination may still be effected by conduct or implication. However, for this to apply, the breach must be sufficiently serious to justify repudiation¹⁴.
69. **DW1**, in his evidence, said that while it was always open to **PW2/Raj Deo** to move into occupation, they never occupied the property.
70. Clearly, clause 5 of the Agreement entitled **PW2/Raj Deo** to possess and enjoy full right to use and occupy Lot 1. However, **PW2** did say in cross-examination that he never ever actually went into occupation or possession of Lot 1. He said he chose to remain in his other property which is situated nearby and on which he runs the neighbourhood store.
71. **DW1** said Raj Deo did try to build a house on Lot 1 but later ran out of cash and could not complete it. He later emigrated to the US in 1987 following the coup. Notably, that would have been about a year or so after **PW2** purportedly sold the benefit of the 1981 Agreement to Bal Ram. Incidentally, this does raise the question as to whether **PW2** possessed any authority to sell the purported beneficial interest under the 1981 Agreement to Bal Ram without the consent of Raj Deo who, arguably, held 50% of the beneficial interest in Lot 1.
72. I take the above into account together with the fact, as I have found, that following the execution of the 1981 Agreement, no further payment was received from **PW2/Raj Deo**, nor was there any demonstrated effort by them to demand performance on the part of Raidu.
73. I also take into account the fact that the defendants have since embarked on a new subdivision plan, albeit, pursuant to a different subdivision plan.
74. In my view, for all practical purposes, and taking all of the above into account, the 1981 Agreement was in fact repudiated by conduct.

WAS THAT INTEREST ASSIGNABLE AT ALL RELEVANT TIMES

75. Given my findings in paragraphs 46 above, it follows that what **PW2/Raj Deo** possessed in 1986 which was the year of their purported sale to Bal Ram, was the benefit of the 1981 Agreement coupled with a serious burden to settle the balance of the purchase price by the stipulated completion date of 31 January 1987.
76. In light of the findings set out in paragraph 46 above, it follows that in 1986, being the year of the purported sale to Bal Ram, **PW2/Raj Deo** held two things:
- (i) the benefit of the 1981 Agreement.
 - (ii) the burden to settle the balance of the purchase price by the stipulated completion date of 31 January 1987 and all other obligations under clauses 3 and 6 thereof.

¹⁴ **Vitol SA v Norelf Ltd (The Santa Clara)** [1996] AC 800; **Heyman v Darwins Ltd** [1942] AC 356; **Champtaloup v Thomas** [1976] 2 NSWLR 264

77. What **PW2/Raj Deo** actually assigned to Bal Ram, assuming it really happened, as an equitable interest, the enforceability of which was conditional and subject to performance, and all the other factors which I have outlined above in paragraphs 42 to 66.

Did the Assignment(s) Really Happen?

78. At this juncture, it is hard for me to believe that the assignments really happened as a matter of fact. I say this for the following reasons:
- (i) until Sen entered the picture, none of the other assignees throughout the chain (see *Table 1*) ever attempted to move into occupation or to demand that Raidu perform the subdivision. In fact, only Sen has ever attempted to place a caveat on the property in 2009. This was six years after he moved into occupation.
 - (ii) for his part, Sen only “quietly” moved into occupation of Lot 1 in 2003 at the time when he also moved in to occupy his property (CT 30453) which adjoins Lot 1.
 - (iii) in all assignments down the chain, the benefit of the Agreement was exchanged for a consideration which was considerably less than the original price. Considering that a piece of freehold plot was at stake, which are hard to come by in Fiji, and the value of which is known to escalate exponentially over time, one wonders about the *bona fides* of these alleged deals.
 - (iv) there is no evidence of the Agreement between **PW2/Deo Raj** and Bal Ram. The Deed of 1996 by Bal Ram to Raidu (**PEX 13**) was not duly stamped.

Assuming Assignments Happened – Were they Valid?

79. Mr. Padarath argues that what **PW2/Raj Deo** actually passed onto Bal Ram was an expectancy interest or a right to purchase Lot 1. He describes this as a future chose in action.
80. The contractual right and benefit would be the right to sue for specific performance under the 1981 Agreement, and, thereafter, the obtaining of a mandatory injunction to compel the estate of Raidu to subdivide CT 20584 pursuant to DP 55563, accompanied by a vesting order under sections 80 and 74 of the Trustee Act to register Lot 1 thereof to the plaintiff.
81. I am of the view that, given that **PW2/Raj Deo** had not settled the balance of the purchase price by 1986, the only interest capable of assignment at that time was the burden to discharge the outstanding payment by the stipulated completion date of 31 January 1987, together with all other pending obligations under clauses 3 and 6 of the 1981 Agreement. In addition, **PW2/Raj Deo** could only have transferred such purchaser’s equity as had accrued to them up to that point. This interest, as I have said, is conditional upon full performance.

82. Having said that, I must observe that Mr. Padarath's submissions presuppose that **PW2/Raj Deo** had fully performed all contractual obligations under the 1981 Agreement at the time of the purported assignment in 1986.
83. As I have said, that assumption is not borne out by the evidence.
84. Accordingly, any purported assignment made at that point could not have conveyed a fully perfected interest. Rather, all that **PW2/Raj Deo** would have conveyed would be a conditional and an incomplete purchaser's equity, burdened by continuing obligations.
85. Generally, a contractual right and benefit may be assigned freely. This is subject only to some limited exceptions.
86. As such, there is no need to obtain the consent of the non-assigning party (see discussion by Windeyer J in **Norman v FCT** (1963) 109 CLR 9 at 26); [1963] HCA 21; (1963) 109 CLR 9 (25 July 1963)¹⁵ unless the parties have agreed by contract to limit or restrict the right to assign¹⁶ OR where the right concerned is so personal to the intended assignor that it cannot be transferred.
87. I note that the 1981 Agreement contains no provision to limit or restrict the latter's right to assign.
88. Having said that, a contractual obligation or burden (as opposed to a contractual right or benefit), cannot be transferred so freely except by novation¹⁷.
89. In other words, the existing contract must first be rescinded (see **Vickery v Woods** (1952) 85 CLR 336, 345, 351) and a new contract must be entered into to substitute the "old" contract.
90. The rescission and the substitution are, of course, interdependent of each other and must occur together.
91. In practical terms, given that **PW2/Raj Deo** had not settled the full purchase price with Raidu, this means that **PW2/Raj Deo** cannot simply assign or transfer whatever burden it is they were purporting to transfer to Bal Ram, without the prior consent Raidu (the original vendor).
92. The end result of their failure, as such, is that all purported assignments in the chain (see *Table I*) would not be legally binding on the estate of Raidu. Accordingly, if one were to

¹⁵ <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1963/21.html>

¹⁶ (e.g. by a pre-emption or a prior consent clause)

¹⁷ In **Scruples Imports Pty Ltd v Crabtree & Evelyn Pty Ltd** (1983) 1 IPR 315, 320, Powell J observed:

'Novation, since it involves the discharge of one contracting party and the acceptance of another in lieu, is a matter relating to the existence or otherwise of an allegedly legally enforceable obligation; ... Reduced to its simplest form, a novation is merely a contract between three parties, the obligee, the original obligor, and the substituted obligor; the effect of which contract is that in consideration of the obligee releasing the original obligor from his obligation, the substituted obligor promises the obligee that he will assume responsibility for the performance of the obligation.'

assume that the 1981 Agreement is still operative (which is unlikely as I have said in paragraphs 60 to 70), Sen would lack an enforceable claim against the Raidu estate on two principal grounds:

1. lack of privity of contract. Sen was not a party to the original Agreement and therefore cannot assert contractual rights against the Raidu estate.
2. defective assignment of equitable interest. The equitable interest held by **PW2/Raj Deo** was never properly assigned to Bal Ram. This defect undermines any purported transmission of rights down the chain to Sen.

COMMENTS

93. For the reasons stated above, I am of the view that the plaintiff's claim must fail and the defendants' counter-claim must succeed.
94. As stated, the defendants counter-claim is for \$3,444.10 in special damages being costs associated with their efforts in removing all the scrap material which Sen had dumped onto Lot 1 over the years and the costs of survey and erecting a fence around the property. The relevant receipts were duly tendered.
95. They also claim for solicitors costs and travel costs between Fiji and the US related to this case.
96. Having said that, I do note that Clause 8 provides that the Agreement is subject to the consent of the Director of Town & Country Planning and in the event this consent is not obtained, then "the whole of the monies paid hereunder shall be refunded to the purchaser by the vendor".
97. I read the above clause together with clauses 3 and 6.
98. In other words, if **PW2/Raj Deo** were to attempt to secure approval for DP 55563 without fulfilling their financial obligations under the Agreement, the 1981 Agreement would remain incomplete and unenforceable.
99. Raidu would thus have retained the right to withhold further action until all conditions are met, or act in repudiation of the Agreement if the balance remains outstanding for a prolonged period.
100. As the 1981-Agreement evinces, "the whole of the monies paid" is \$6,000 – 00 (six thousand dollars only) made up as follows:
 - (i) FJD\$3,000 – 00 by Raj Deo
 - (ii) FJD\$3,000 – 00 by Deo Narayan
101. Given the failure of consideration by **PW2/Raj Deo**, the monies paid must be returned to the purchasers with full interest.

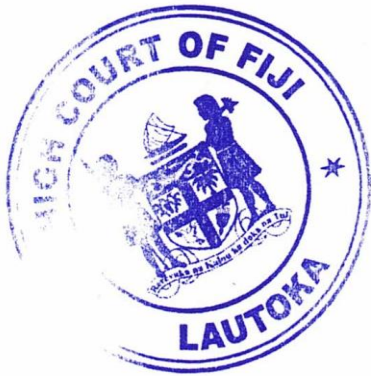
102. The question is to whom? The parties concerned are at liberty to apply further.

ORDERS

103. The plaintiff's claim is dismissed.

104. The defendants' counter-claim succeeds. Special Damages in the sum of \$3,444.10 is awarded. As for costs and travel expenses, I grant a global award of \$10,000 - 00 only.

105. The defendants are to refund the sum of \$6,000 -00 plus a modest interest which I fix at 2% per annum from 31 January 1981 (the date of the 1981 Agreement) to the date of this judgment. This sum is to be paid into Court and held for the benefit of those appropriate persons (as per paragraph 100 above) who are at liberty to apply.



.....
Anare Tuilevuka
JUDGE

01 October 2025