

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NOS. ABU 10 of 2020
(Civil Action NO. HBC 43 of 2011 with HBC 170 of 2011)

BETWEEN : **SATENDRA PRASAD**
Defendant/Appellant

AND : **SHIVA NAND**
Plaintiff/Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Mr. R. Gordon for the Appellant**
Mr. D. Naidu for the Respondent

Date of Hearing : **10 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Basnayake, JA

[1] This appeal is filed to set aside the judgment of the High Court delivered on 6 June 2018. By this judgment the court has allowed the Plaintiff/Respondent's (hereinafter referred to as the Plaintiff) action in HBC 170 of 2011. The Defendant/Appellant (hereinafter referred to as the Defendant) in this case was the Plaintiff in Action No. HBC 43 of 2011. The Defendant in No. HBC 43 of 2011 was the Plaintiff in HBC 170 of 2011. These two cases were amalgamated and heard as one. The Plaintiff too has filed a cross appeal (pgs. 9-11 of the Record of the High Court (RHC)). However no submissions were made by either party orally or in writing on the cross appeal and it is thus treated as abandoned and the cross appeal is dismissed without costs.

[2] GROUND

1. *The Learned Trial Judge and/or Justice A. Tuilevuka erred in law and/or in fact when he decided and/or ruled and/or ordered to amalgamate and/or consolidate both actions;*
2. *The Learned Trial Judge and/or Justice A.Tuilevuka erred in law and/or in when he decided and/or ruled not to strike out the action number HBC 170 of 2011.*
3. *The Learned Trial Judge erred in law and/or in fact when he decided and/or ruled that the facts and/or brief facts of both actions were as according to the pleadings when pleadings are and/or were not evidence;*
4. *The Learned Trial Judge erred in law and/or in fact by relying on irrelevant facts and/or evidence and/or by not relying on relevant facts and/or evidence;*
5. *The Learned Trial Judge erred in law and/or in fact by not assessing and /or weighing all the relevant and admissible evidence in totality individually and cumulatively;*
6. *The Learned Trial Judge erred in law and/or in fact by making findings of fact that were not supported by and/or any credible evidence;*
7. *The Learned Trial Judge erred in law and/or in fact when he reversed the onus of proof onto the Appellant;*
8. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the main question that begs answer is whether the Appellant, being the administrator committed fraud on the Plaintiff pertaining to the intestate estate of the deceased, Parma Nand, for which the Plaintiff is the only beneficiary according to the law as recited by the Learned Trial Judge earlier in his reasons for judgment;*
9. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Respondent was a minor when his father died and as such was influenced and/or taken advantage of by the Appellant when there was no evidence and/or no credible evidence to support the same;*
10. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant took advantage of the vulnerable position of the Respondent who had become a destitute after the death of his parents when there was no evidence and/or no credible evidence to support the same.*
11. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant exploited the Respondent when there was no evidence and/or no credible evidence to support the same.*

12. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that a question that demanded answer as to why the Respondent showed such an interest, hurry and took trouble, while the deceased had other brothers, sisters and mother who were alive to come forward either to make claim or to obtain letters of administration in order to assist the Respondent when there was no evidence to support the same;*
13. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant was required to bring his siblings as witnesses to assist him in his purported claim;*
14. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Letters of Administration were obtained through fraudulent means when there was no evidence and/or no credible evidence to support the same;*
15. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant required the consent of the Respondent to obtain the Letters of Administration as the Respondent was a minor then when in fact the Respondent was when in fact the Respondent was not a minor then and in any event the consent of the Respondent was not required to obtain the Letters of Administration;*
16. *The Learned Trial Judge erred in law and/or in fact when he failed to find and/or hold that the Letters of Administration were duly and/or properly issued by the High Court of Fiji and no proceedings were on foot or had been taken out or ought to have been taken out the by the Respondent to recall the Letters of Administration and/or have the same revoked by the issuing court and as such the Letters of Administration were extant and valid and the Court had not authority, jurisdiction or power in these proceedings to declare the Letters of Administration as fraudulently obtained;*
17. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant engaged in subsequent surreptitious activities which were inimical and detrimental to the Respondent's interest in the estate as the sole beneficiary of it when there was no evidence and/or no credible evidence to support the same;*
18. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant's actions and/or subsequent actions were a direct violation of his fiduciary duty as an administrator towards the estate and the Respondent when there was no evidence and/or no credible evidence to support the same;*
19. *The Learned Trial Judge erred in law and/or in fact when he prejudged and/or pre-decided and/or exhibited a bias in favour of the Respondent when he referred to the Deed of Renunciation as a impugned Deed of Renunciation prior to evaluating the facts and evidence and law in the matter;*
20. *The Learned Trial Judge erred in law and/or in fact when he referred to the Deed of Renunciation as the purported Deed of Renunciation and / or thereby prejudging the issues before him and/or behaving in a biased and/or prejudicial manner against the Appellant and/or when there was no evidence and /or no credible evidence to support the same;*

21. *The Learned Trial Judge erred in law and/or in fact when he referred to the Deed of Renunciation as “... without any reservation, is not even worth the paper it’s written on” and/or thereby prejudging the issues before him and/or behaving in a biased and/or prejudicial manner against the Appellant and/or when there was no evidence and /or no credible evidence to support the same;*
22. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Deed of Renunciation was fraudulent and/or null and/or void when there was no evidence and/or credible evidence to support the same.*
23. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the onus was on the Appellant to prove that the Deed of Renunciation was the Respondent’s and/or lawfully and/or properly executed by the Appellant as his deed;*
24. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the onus was on the Appellant to prove that the instrument signed was nothing but a Deed of Renunciation and was in fact signed before Mr Vijay Naidu by calling him as a witness;*
25. *The Learned Trial Judge erred in law and/or in fact when he made adverse inferences against the Appellant for the Appellant not calling Vijay Naidu.*
26. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the explanation of the Deed of Renunciation to the Respondent in both English and Hindi and being explained by both a lawyer and a paralegal was an unusual practice when there was no evidence and/or no credible evidence to support the same;*
27. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant, ‘having made all the pre-arrangements to have the land in question transferred in his name, brought the Respondent to the solicitors’ office in Lautoka ... and surreptitiously got the ill-fated Deed of Renunciation signed under the guise of signing a document to obtain a bank loan to put up another flat in the land in question’ when there was no evidence and/or no credible evidence to support the same;*
28. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant was required to elicit and explain through reliable evidence as to how he became a beneficiary and what made the Respondent to renounce his rights as shown in the ‘purported Deed of Renunciation’;*
29. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Deed of Renunciation was forged when there was no evidence and/or no credible evidence to support the same.*
30. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant created the Deed of Renunciation by a fraudulent act when there was no evidence and/or no credible evidence to support the same;*

31. *The Learned Trial Judge erred in law and/or in fact when he asked and/or posed rhetorical questions about the actions of the Appellant and/or the actions and/or inactions and/or state of mind of the Respondent and/or then required the Appellant to answer these questions and/or prejudicial findings and/or observations and/or conclusions and/or inferences against the Appellant.*
32. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Respondent's purported pleading of non-est factum was a valid and/or proper pleading and/or a proper claim and/or properly made out and/or satisfied on the evidence before the court;*
33. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant became the registered proprietor by use of a forged deed of renunciation when there was no evidence and/or no credible evidence to support the same;*
34. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the registration of title, recorded on 20th May 2009 making the Appellant as the proprietor of the property, which is Lot 46 in DP 5850, is void as it was procured by means of fraud when there was no evidence and/or no credible evidence to support the same;*
35. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant became the registered proprietor by use of a forged deed of renunciation when there was no evidence and/or credible evidence to support the same;*
36. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the filing of the '169 application was nothing but another most despicable and unfaithful move adopted by the Appellant to achieve his ultimate goal of owning the entire estate of the deceased by distancing and depriving the Respondent from enjoying it as the sole beneficiary' when there was no evidence and/or no credible evidence to support the same;*
37. *The Learned Trial Judge erred in law and/or in fact when he incorrectly applied the time immemorial principles and/or statutory law of indefeasibility of title;*
38. *The Learned Trial Judge erred in law and/or in fact when he set aside the transfer dated 20th May 2009 by instrument number 719216 when he was not so empowered to do so;*
39. *The Learned Trial Judge erred in law and/or in fact when he repeatedly found and/or held and/or referred to the actions of the Appellant as surreptitious when there was no evidence and/or no credible evidence to support the same;*
40. *The Learned Trial Judge erred in law and/or in fact when he found and/or made conclusions and/or inferences when he was not entitled to base on the pleadings and/or evidence before him.*

41. *The Learned Trial Judge erred in law and/or in fact when he failed to find and/or hold that the Respondent's case and/or claim(s) and/or pleading(s) and/or action(s) disclosed no and/or no reasonable cause of action and/or were misconceived and/or defective and/or bad in law and/or in fact and/or in substance and/or in form;*
42. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant could not make any claim and/or any monetary claim against the Respondent by reason of the Appellant's fraud and utter failure in his fiduciary duty;*
43. *The Learned Trial Judge erred in law and/or in fact when he found and/or held that the Appellant in being prepared to abandon his claim, if the expenses incurred by him are paid back showed an admission of his folly in acting in on wrong advice and fraudulently dealing with the intestate estate of his brother, without any right on it in his favour when there was no evidence and/or no credible evidence to support the same;*
44. *The Learned Trial Judge erred in law and/or in fact when he misapplied and/or incorrectly applied and/or misinterpreted and/or incorrectly interpreted the principles and/or reasoning and/or method in assessing and/or calculating quantum of damages and/or the award of exemplary and/or punitive damages of \$15,000.00;*
45. *The Learned Trial Judge erred in law and/or in fact when he awarded interest at the rate of 3% on punitive damages and at the rate of 2% on the value of the van;*
46. *The Learned Trial Judge erred in law and/or in fact when he awarded \$5,000.00 for costs;*
47. *Such further or other grounds as may be advisable upon a perusal of the record.*

[3] By an amended statement of claim (pgs. 43-46 RHC) the Plaintiff sought the following reliefs, namely;

- (a) *Order staying the Civil Action No. 43 of 2011 until determination of this action.*
- (b) *Detailed accounts from the Defendant as to the Administration of the Estate of Parma Nand (deceased).*
- (c) *Order that the Defendant not transfer or deal with the Housing Authority sub-lease No. 260960 until determination of this action.*
- (d) *All bank accounts in the name of the Estate of Parma Nand (deceased) be frozen until determination of this action.*

(e) Setting aside all transactions in relation to the Estate of Parma Nand (deceased) as per paragraphs (9) (11) (12) (13) (14) (15) (16) of the Amended Statement of Claim.

(f) Transfer of the assets or properties of the Estate of Parma Nand (deceased) to the Plaintiff.

(g) Punitive Exemplary / Punitive damages

(h) Interest from 12th day of May 2006 till date of payment.

(i) Costs on a Solicitor/Client indemnity basis.

[4] This case is concerning the administration of the Estate of the deceased who died on 12 October 2005. The deceased having left no will had a Housing Authority sub lease bearing No. 260960 which housed three flats, vehicle No. BW 585, several insurance policies and a savings bank account. Admittedly the Plaintiff was the sole beneficiary of the Estate of the deceased being the only child. The wife of the deceased predeceased him. At the time of his death the plaintiff was living with his father and was 19 years old. The deceased had several brothers. The Defendant, being one brother, has obtained letters of administration on 12 May 2006. The Plaintiff states that the Defendant did not obtain his consent prior to obtaining letters. The Plaintiff claims that the Defendant having obtained letters has transferred to himself, namely, to the Defendant, the Housing Authority sub-lease No. 260960 on 20 May 2009 and collected rental from the flats, and converted it for his own use. The Defendant has also converted the money deposited in the bank account of the deceased and got the vehicle No. BW 585 transferred into his name.

[5] The Plaintiff alleges that the Defendant having obtained letters of administration has failed to provide accounts. The Plaintiff seeks the return of all the assets belonging to the Estate. The Plaintiff also claims that he has no knowledge of the execution of a Deed of Renunciation in favour of the Defendant. The Plaintiff specifically pleads under the heading; “Particulars of fraud/dishonesty/deceit/misrepresentation/undue influence/breach of fiduciary relationship”, the Plaintiff particularly avers how the Defendant has converted the properties to the Defendant’s own benefit and use. The Plaintiff avers that the Defendant has

instituted Civil Action No. 43 of 2011 under section 169 of the Land Transfer Act (Cap 131) to evict the Plaintiff from the property that he is residing in and which property he inherited.

- [6] The Defendant in his amended statement of defence (pgs. 48-50 RHC) claims that the letters of administration was obtained with the consent and knowledge of the Plaintiff when the Defendant gave instructions to Mr. Chandra Singh to obtain it. At that time the Plaintiff was staying with the Defendant (para. 5 of the statement of defence at pg. 48). The Defendant states that on 15 April 2009 the Plaintiff renounced all his shares of the deceased Estate in favour of the Defendant by executing a deed of renunciation the contents of which was well explained to him by Mr. Vijay Naidu (Solicitor).
- [7] The Plaintiff in reply to the amended statement of defence (pgs. 52-53) whilst admitting the signing of a document in the office of Mr. Vijay Naidu on 15 April 2009 denied that the document was explained as a deed of renunciation by Mr. Vijay Naidu or any other person. The Plaintiff said that he was told that the document was to obtain funds to construct another flat. The Plaintiff claims that the properties were obtained by the Defendant through misrepresentation, deceit, undue influence, fraud and dishonesty when the Defendant was in a fiduciary position.
- [8] It was admitted at the pre-trial conference that (pgs. 115-117) the Estate comprised the Housing Authority sub lease No. 260690, vehicle No. BW 585, Insurance policy and the savings bank account. It was also admitted that the Plaintiff was the only surviving issue of the deceased and that the Defendant had applied for and was granted Letters of Administration of the Estate on 12 May 2006. It was also admitted that the Defendant had transferred the Housing Authority sub lease No. 260960 (comprising 3 flats) and the vehicle No. BW 585 to his name on 20 May 2009 and a date earlier as Administrator of the Estate.
- [9] I reproduce the issues in dispute that are material to the determination of this appeal as follows;
10. Whether the transfer of the Housing Authority Sub Lease No. 260960 by the Defendant to his name was fraudulent?

11. Whether the transfer of the vehicle No. BW 585 by the Defendant to his name was fraudulent or whether it was done with the consent and knowledge of the Plaintiff?
13. Whether the Plaintiff executed the Deed of Renunciation in the Defendant's favour on 15 April 2009?

[10] In evidence the Plaintiff (pg. 389) said that the property (testamentary property) that he is living in is in the name of the Defendant. There are tenants in other parts. The vehicle is also in the name of the Defendant. He said the rent from the flats are going to the Defendant. He did not know the whereabouts of the vehicle. He said in April 2009 the Plaintiff came to Lautoka with the Defendant. He was told that they are going to apply for a loan and need to go to a lawyer's office. The Plaintiff said that he did not meet the lawyer. It was Mr. Vijay Naidu's office. The Plaintiff said that he had not gone to this office before and thereafter. He said he did not meet a lawyer in this office on the day that he went. Only an office girl and the Defendant were present. After signing the document the Plaintiff went outside the office. The Defendant was inside the office with the girls. He said the document was not read over to him. He said that he did not pay a fee and did not instruct to prepare the document. The Plaintiff said he knew about the plan for an extension of the building. This was his father's work. The Plaintiff said that he got to know about the transfer of the house when Bailiff came and locked the house in 2010. He said that he decided to take legal action thereafter.

[11] Referring to the lawyer's signature in the document he said that it was not made in his presence. He said the document was not explained to him by a lawyer. The Plaintiff was not questioned that he stayed in Mr. Vijay Naidu's office from morning till evening. He also said that he never received accounts with regard to his father's Estate. He said that first he received a letter from the Defendant requiring him to vacate the house. Thereafter a Bailiff evicted him from the house. Under cross examination he admitted that he can read English. He said, "but not to that extent" (pg. 450). He also said that he went to Lautoka with the Defendant's son Amit and not with Nilesh as suggested. He also denied that Mr. Naidu explained to him the Deed of Renunciation. Referring to the Deed of renunciation

he said if he knew what it was, he would not have signed. He denied that Mr. Vijay Naidu was present when he went to the lawyer's office.

[12] The Defendant said it was Shiva's idea that the Defendant should obtain Probate and it was Shiva who instructed them. He said then they went to Chandra Singh and Associates in 2006 March or April. The Plaintiff too accompanied and it was the Plaintiff who instructed the lawyer. The Defendant said that the defendant paid for the documents. The defendant said that the Plaintiff viewed the documents and approved them. He also said that he paid for insurance (premium) and rates. After taking out Probate the Plaintiff had told the Defendant to transfer the land in the Defendant's name. He said after a discussion he went to Vijay Naidu Associates. He said it was the Plaintiff who instructed the lawyer (pg. 513). He said it was the Plaintiff, and Nilesh who went with him. Q. Who instructed Mr. Vijay Naidu to do the transfer? A. It was instructed by Shiva My Lord. Q. Who paid for the lawyer? A. It was me My Lord. Q. And who told the lawyer to transfer? A. Shiva Nand My Lord...giving (give him) my share to (too).

[13] The Defendant said that his son did not accompany him. He said the Plaintiff forced the Defendant to take this vehicle or otherwise he said that he will give it to somebody else. The Plaintiff's evidence was that the vehicle was with the Defendant and that he does not even know of its whereabouts. The Defendant denied that. In answering to a question from court (pg. 516) the Defendant said, "*My Lord I have already given the house for him to stay in and also another flat. Proceeds to get from the rent and also I was paying the insurance and also repaired the house My Lord*". The Defendant said that after going to the lawyer's office, "We told her that we have come for this...and upon agreement by Shiva Nand that he is transferring his share under my name". Then the girl accompanied us to Vijay Naidu. When they went to the lawyer's office, the Plaintiff told the lawyer that he is giving his share to the defendant. A. "*He told the lawyer that I'm giving my share to you? Then the lawyer had explained to the Plaintiff about it in English language and the Plaintiff said it's alright* (pg. 518)". He said the document was drafted in the office of the lawyer and the lawyer read each and every paragraph. Thereafter the Plaintiff put his signature. The Defendant denied that the Plaintiff was told that the document was for a loan to submit

to the bank. The Defendant denied that the document was given by the girls at the reception. The Defendant said the lawyer was present. The Defendant said that the Plaintiff said that he understood the terms of the Deed of Renunciation. The Defendant said that all the monies that were in the bank were withdrawn by the Plaintiff. He said he never withdrew from the account for himself. He also denied that he got the Plaintiff's signature to blank withdrawal slips.

[14] He said one flat was given to the Plaintiff to live. It was due to the Plaintiff's bad behavior that he sent the Bailiff. The defendant said that the Plaintiff was damaging the property. The Defendant said that he was one of the beneficiaries. Under cross examination the Defendant said that the Plaintiff knew what probate was.

[15] The learned Judge considered the Deed of Renunciation as the pivotal issue. The question was in fact whether the Plaintiff has executed the Deed of Renunciation relinquishing his rights and interests in the property in favour of the Defendant. The learned Judge said that, *"The person who alleges the existence of a fact must prove that fact. The Plaintiff denies the alleged Deed....He states that he signed a document on being told by the Defendant that it is for obtaining a loan to expand the building in the land. The Defendant says the plaintiff has signed it and it is valid. The burden is then on the Defendant to prove that the Plaintiff did in fact, sign the document renouncing his rights and it was clearly read out to him and signed it having understood the entire contents of it. In order to prove this, the Defendant ought to have called Mr. Vijay Naidu, who is said to have witnessed the Plaintiff sign the Deed of Renunciation. The Defendant did not make any attempt to call Mr. Vijay Naidu. The Defendant deliberately avoided calling Mr. Vijay Naidu who would have been a material witness for the Defendant's case if called, but he failed to do so"*.

[16] The Deed of Renunciation is at page 198 of the RHC. The Plaintiff admitted the signature. However he denied that he signed a deed of renunciation. The Plaintiff said that if he knew that he was renouncing his rights, he would not have signed this document. What he was told by the Defendant was that the document was needed to obtain a loan from the bank for the extension of the building. A Plan has been drawn prior to the death of the deceased. The Defendant admitted that he was aware of it. The Plaintiff said that that was the only

occasion that he ever went to Mr. Vijay Naidu's office in Lautoka. He has never been there before or after 15 April 2009. The Plaintiff was cross-examined on the basis that it was the Plaintiff who instructed Vijay Naidu to write the Deed of Renunciation. The Plaintiff said although he went to the office of Vijay Naidu he never met him. At the time of signing it was only a girl from the office and the Defendant that were present. Mr. Vijay Naidu was not in office. An examination of the Deed of Renunciation shows that, on the left hand corner after the *jurat* Mr. Vijay Naidu appeared to have placed his signature. The Plaintiff denied that this signature was placed in his presence.

[17] The jurat reads, "Signed by the Shiva Nand this 15 day of April 2009 before me and I certify the contents were read over and explained to him in the English language and that he appeared to understand the meaning and effect thereof in the presence of me". In the third paragraph of the deed it states that the Defendant and the Plaintiff are the beneficiaries and are entitled to share in the above estate. However the Defendant has admitted that the Plaintiff was the only surviving issue of the deceased (paragraph 5 of the amended statement of claim at page 43 was admitted in the amended statement of defence in paragraph 3 at page 48 RHC). The Plaintiff in paragraph 13 of the amended statement of claim states that he was the sole beneficiary of the Estate of the deceased. The Defendant in paragraph 10 of the amended statement of defence neither admits/nor denies it. The contents of this paragraph indicates the improbability of the Plaintiff willingly signing this document. The Defendant while giving evidence admitted in court (pg. 532) that he stated in an affidavit that the Plaintiff was the only beneficiary. This affidavit was submitted while obtaining letters of administration to the estate of the deceased.

[18] When the Defendant was asked in cross examination as to how the Defendant became a beneficiary he said he has no idea (pg. 532). Thereafter the Defendant said that he was told this by the deceased brother before dying. He admitted that this fact was never disclosed in the affidavits filed. The Defendant's position was that it was the Plaintiff who instructed Mr. Vijay Naidu to write the Deed of Renunciation (pg. 518) and it was drafted in the office of Vijay Naidu Associates. The Defendant said that Mr. Vijay Naidu read each and every paragraph and then the Plaintiff placed his signature. The Defendant admitted that he had

paid several visits earlier, to Mr. Vijay Naidu's office to get the Deed of Renunciation prepared. Once on 26th January 2009. Again on 9th April 2009. On the 15th April 2009 he went to Mr. Vijay Naidu's office as he was told to come on that date. On those occasions he made payments of \$400.00 and \$601.50 to Vijay Naidu's office. It was suggested to the Defendant that on 15th April 2009 that he did not meet Mr. Vijay Naidu, which suggestion he denied.

[19] In the teeth of the overwhelming evidence the Defendant did not take any steps to call Mr. Vijay Naidu as a witness to prove that the Plaintiff had signed the Deed of Renunciation after it was explained to him by Mr. Naidu. The Plaintiff admitted the signature in the document. However he denied that he signed a Deed of Renunciation. According to the Plaintiff what he signed was a document to be given to the bank to obtain a loan for the extension of the building belonging to the Estate of the deceased. While making submissions in court at the hearing, the learned counsel for the Defendant was reluctant to admit that the Deed of Renunciation was the work of Mr. Vijay Naidu. If admitted the learned counsel would have been answerable. Why was he not called as a witness? The learned counsel attempted to escape the embarrassment by saying that Mr. Vijay Naidu only signed as a witness. On the face of the document it was Mr. Vijay Naidu who has attested the Deed of Renunciation. According to the Defendant it was prepared by Mr. Vijay Naidu's office after several visits and payments as fees. Despite this the learned counsel for the Defendant submitted that it was the Plaintiff who should have called Mr. Vijay Naidu as a witness. Could the Plaintiff call a witness to prove the negative?

[20] The Defendant also admitted having received insurance payments. The Defendant on 20 May 2009 got the land and the premises of the Estate of the deceased transferred into his name. The Defendant has also effected a transfer into his name the van No. BW 585 belonging to the Estate. Although 46 grounds of appeal have been lodged in this appeal, the learned counsel for the Defendant submitted in the written submissions filed in court on 20 July 2020 that the central issue was whether the Deed of Renunciation was valid or a forgery. The learned counsel stated that, "*All the grounds of appeal attack the finding of the learned Judge who concluded that the Deed was invalid and a forgery and therefore*

will be addressed together". At the hearing too, the learned counsel made submissions with regard to the validity of the Deed. By this deed the Plaintiff has renounced his share in favour of the Defendant. Although the Deed states, "renounce all my shares", the Plaintiff was the sole beneficiary and the Defendant was able to get the entirety of the land and premises belonging to the Estate after the execution of this deed of renunciation.

[21] The learned counsel submitted that it was the Plaintiff who should have called Mr. Naidu as a witness. The learned counsel submitted that the learned Judge failed to draw an adverse inference against the Plaintiff for not calling the lawyer as a witness. The learned counsel submitted that the learned Judge has imposed an incorrect burden and onus on the Defendant to call Mr. Vijay Naidu to prove that the deed was not a forgery. The learned counsel was very critical of the learned Judge for imposing a burden of proof on the Defendant. The learned counsel also submitted that the Plaintiff did not plead forgery of the deed, and that the deed is not attacked in the pleadings of the Plaintiff.

[22] In paragraph 11 of the amended statement of claim (pg.44) the Plaintiff states that the Plaintiff has no knowledge of the execution of any renunciation in favour of the Defendant in regard to the Estate of the deceased Parma Nand. In paragraph 16 the Plaintiff states, "That as a consequence of the Defendant's fraud/dishonesty/deceit/misinterpretation undue influence/breach of fiduciary relationship and conduct the Plaintiff has suffered loss and damage. It was only after the execution of this Deed of Renunciation that the defendant transferred the residential property of the Estate in the name of the Defendant. That was on 20 May 2009. The learned counsel for the Defendant argued that the Plaintiff had failed to plead the particulars of fraud, and that the learned Judge could therefore not have acted on the allegation of fraud. However, the cumulative effect of paragraph 10 (a) to (d) and paragraph 11, place beyond doubt that the Plaintiff has pleaded with sufficient clarity, the particulars of fraud.

[23] One of the issues of this case (pg. 116) was whether the Plaintiff executed the deed of renunciation on 15 April 2009 and whether it was explained to the Plaintiff the nature and effect of the renunciation. It is only after the Deed of Renunciation was executed that the

premises of the Estate was transferred in the name of the Defendant. An issue of fraud was raised with regard to the transfer of the house.

[24] It appears from the evidence led in this case that the Plaintiff had to seek the refuge of court there not being another option. At the time the Plaintiff's father died the Plaintiff was only 19 years of age. The Plaintiff was born on 29 September 1986. The Plaintiff's father died on 12 October 2005. The Plaintiff's mother had died in the year 2000. After the father died the Plaintiff lived with the Defendant, the father's brother. The Plaintiff appears to have lived according to the dictates of the Defendant. The Plaintiff had a joint account with his father At ANZ Bank. The Defendant got the Plaintiff to open a joint account with the Defendant in Bank of Baroda and got the Plaintiff to transfer the money from ANZ to Bank of Baroda. This was in the year 2006. Both the Plaintiff and the Defendant were signatories to the bank account. This was done to prevent the Plaintiff from withdrawing money. The Plaintiff said that he never withdrew money from the account and the Defendant got the Plaintiff to sign blank withdrawal slips. By 2009 all the money in the account had been withdrawn. Where is the accountability? The Defendant was duty bound as the Administrator of the Estate to explain as to the income and the expenses.

[25] The Estate had two flats which were given on rent. The Plaintiff said that the rent were taken by the Defendant. As Administrator it was the duty of the Defendant to account for the rentals received. The Defendant mentioned that he spent money for maintenance of the buildings, payment of rates and Insurance premium etc. However no accounts were ever submitted by the Defendant. What the Defendant wanted was to keep the Plaintiff away from the property so that the Defendant could "plunder" the property as he wished without any interference.

[26] The Defendant admitted to having taken payments from three insurance policies. However he has not given an account for it. The Defendant knew that he could do nothing without obtaining Letters of Administration. The Defendant said in evidence that somewhere in March 2006, he went to Mr. Chandra Singh with the Plaintiff, as the Plaintiff wanted the Defendant to obtain the Letters of Administration. However it transpired that a paper advertisement was published in January 2006. This shows how the Defendant

surreptitiously made a move to get Letters of Administration as early as possible. In order to get a newspaper advertisement published the Defendant would have met Mr. Chandra even prior to that date. Was it the Plaintiff who instructed the Defendant in December 2005 or early part of January 2006 to go to Mr. Singh? The Defendant got Letters of Administration on 12 May 2006. This is the reason why the Defendant wanted to keep the Plaintiff the beneficiary of the Estate in Rakiraki, which is several miles away from Nadi where the property is.

[27] The defendant got the vehicle BW 585 transferred in his name as the administrator of the Estate. The Defendant says it was the Plaintiff who wanted the Defendant to own the vehicle, and that is the reason why the Defendant got the vehicle transferred into his name. Thereafter it was the Deed of Renunciation. Having got the Deed of Renunciation, the Defendant on 20 May 2009 got the house and property transferred into his name. The execution was done by Mr. Vijay Naidu, Solicitor. Mr. Vijay Naidu has been the Defendant's lawyer in all these dubious transactions. So far the Defendant had no problem. He was plundering the wealth of the deceased knowing fully well that there was a beneficiary. The beneficiary happened to be his young nephew who can be controlled by him. The defendant first bust up the money in the Bank. Thereafter he made use of the money received from the insurance policies. He used the rents received from the two flats. He transferred the vehicle into his name. He got the Plaintiff's signature on a document to facilitate him to enjoy the entire wealth of the deceased's Estate. Thereafter the Defendant got the house and property transferred into his name and became the owner. Being the owner the Defendant wanted to get rid of the sole beneficiary of the Estate. The Defendant also surreptitiously got his name entered into the Deed of Renunciation as a beneficiary along with the Plaintiff. Having done all that the Defendant sent a quit notice to evict the Plaintiff from the house that he inherited from his father. Are not these fraudulent activities?

[28] Having sent a notice to quit the Defendant was instrumental in sending the Bailiff to lock the Plaintiff out of his own house. The Plaintiff was able to take possession with the intervention of the Police. The Defendant was not satisfied. His greed was so much that one way or another the Defendant wanted to get rid of the Plaintiff who he regarded as a

nuisance, and who was the only obstacle preventing the Defendant from enjoying this testamentary property. As administrator it was his duty to distribute the property to the lawful beneficiary, and give an account. With a sole beneficiary how easy it would have been to discharge this duty. The Defendant never wanted to distribute the property or give an account. What the Defendant wanted was to own the Estate. The Defendant finally filed Civil Action No. 43 of 2011 under Section 169 of the Land Transfer Act Cap 131 against the Plaintiff. It is only thereafter that the Plaintiff was compelled to file the present action No. 170 of 2011. These two actions were amalgamated and heard as one case. The learned Judge was compelled to dismiss Action No. 43 of 2011 and decide No. 170 of 2011 in favour of the Plaintiff.

[29] The learned Judge has awarded \$15000.00 as punitive damages. The learned counsel stated that the Plaintiff did not plead for punitive damages. The Plaintiff has in fact prayed that he be granted punitive damages in his prayer to the amended statement of claim. The entire case of the Plaintiff is based on the fraudulent acts of the Defendant due to which the Plaintiff had to suffer loss.

[30] The learned Judge states at page 29 RHC that, “*The Plaintiff prays for punitive and exemplary damages. The defendant has committed fraud on the plaintiff taking advantage of his vulnerable position and failed his duty as an Administrator of the estate. The defendant acted deliberately to plunder the estate of the Deceased, Parma Nand, which should have duly devolved on the Plaintiff Shiva Nand. Having considered all the above, I decide to grant \$ 15,000.00 as punitive damages*”.

[31] I am of the view that punitive damages has been rightly awarded. I am also of the view that the costs awarded is not excessive. For the reasons given I answer all grounds of appeal cumulatively and in favour of the Plaintiff Respondent. I am of the view that this appeal is without merit and hence is dismissed with costs of \$5000.00 to be payable within 21 days from the date of this judgment.

Lecamwasam, JA

[32] I agree with the reasons given and the conclusion arrived at by Basnayake JA.

Jameel, JA

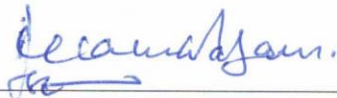
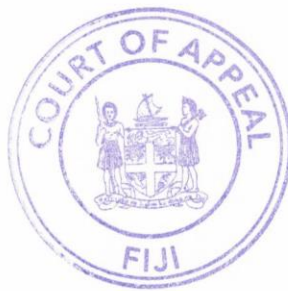
[33] I agree with the reasons and proposed orders of Basnayake JA.

Orders of Court are:

1. *The appeal is dismissed with costs.*
2. *The cross appeal is dismissed without costs.*
3. *The Defendant/Appellant to pay costs \$5000.00 to the Plaintiff/Respondent within 21 days from the date of this judgment.*



Hon. Justice Eric Basnayake
JUSTICE OF APPEAL



Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Justice F. Jameel
JUSTICE OF APPEAL