

IN THE COURT OF APPEAL

APPELLATE JURISDICTION

**COURT OF APPEAL NO. ABU 0016/2011
(INDEPENDENT
LEGAL SERVICES COMMISSION)**

BETWEEN:

Dr. Muhammed Shamsud-Dean Sahu Khan *3rd Respondent/Appellant*

AND:

Chief Registrar *1st Respondent/Respondent*

Coram: Basnayake JA
 Lechamwasam JA
 Balapatabendi JA

Counsel: Mr. C.R. Pidgeon QC with Ms. K. Vulimainadave for the Appellant
 Ms. L. Vatetei with Mr. V. Sharma and Mr. K Prasad for the Respondent

Date of Hearing: 9 & 10 May 2013

Date of Judgment: 30 May 2013

JUDGMENT

Basnayake JA

[1] The 3rd respondent appellant (hereinafter referred to as the 3rd respondent) was charged before the Independent Legal Services Commission (ILSC) for professional misconduct contrary to sections 82 (1) (a) and (b) of the Legal Practitioners Decree 2009.

Legal Practitioner's Decree 2009

82 (1) For the purposes of this Decree, '*professional misconduct*' includes-

- (a) *Unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; or*
- (b) *Conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, or that the law firm is not fit and proper to engage in legal practice, or that the law firm is not fit and proper to operate as a law firm.*

Sub section (2) is not reproduced.

[2] The proceedings commenced with a complaint made by Ms Shashi Kiran Pratap (hereinafter referred to as the purchaser) on 12 June 2009 against Vipul Mishra (1st respondent), Meheboob Raza (2nd respondent), Muhammad Shamsud-Dean Sahu Khan (3rd respondent) and Sahu Khan and Sahu Khan (4th respondent, a Firm of Lawyers for the 3rd respondent). Counts 1, 2 and 3 were against the 1st respondent. Count 4 was against the 2nd respondent. Counts 5, 7 and 8 were against the 3rd respondent. Count 6 was against the 4th respondent. After trial the 1st respondent was found guilty of counts 1 and 2. The 2nd respondent was found guilty of count 4. The 3rd respondent was found guilty of count 8.

The sentence (pg 216 of the Supplementary Record of the Independent Legal Services Commission)

[3] The 3rd respondent was sentenced as follows:-

- (i) *That Muhammad Shamsud-Deen Sahu Khan's name be struck from the roll of legal practitioners.*

- (ii) *The 3rd respondent is to indemnify the purchaser with respect to any moneys payable by her as a result of the actions commenced by him on behalf of Lala Kishore Singh and Ram Narayan in the Ba Magistrate Court whether such monies are payable to the plaintiffs therein or to the purchaser's solicitor.*
- (iii) *The 3rd respondent is to pay within 28 days all principal and interest owing on the loan in the sum of \$120000.00 referred to in the Deed of Guarantee and Indemnity.*
- (iv) *Witness expenses in the sum of \$478.00 are to be paid to the commission within 28 days.*
- (v) *The 3rd respondent is to lodge his passport (s) with the Commission within 24 hours for retention until orders ii, iii and iv are complied with.*

[4] All three respondents appealed against their convictions and sentences. The appeals against the 1st and the 2nd respondents were heard on 19 February 2013 and judgment delivered on 13 March 2013 (Civil Appeal Nos. ABU 0027 of 2011 and ABU 0018 of 2013). By this judgment the 1st respondent's appeal was dismissed with costs while the 2nd respondent's appeal was allowed without costs. The 3rd respondent's appeal was fixed to be heard separately. This judgment is with regard to the appeal of the 3rd respondent.

The facts

[5] Ambika Nand was the registered owner of crown lease No. 5375. A mortgage was registered against the lease 5375 in 1983 (Pg 266-Vol 1 of the Record of the Independent Legal services Commission (RILSC)). At present the mortgagee is the Reserve Bank of Fiji (RBF). A caveat too had been registered by the Lands Department against lease No. 5375. The lease No. 5375 expired on 31 December 2003. At the time of its expiry, the mortgage and the caveat had not been discharged. A new lease was registered on 5 April 2006 with effect from 1 January 2004, in place of the old lease No. 5375. The number of the new lease is CL 16375.

[6] On 28 July 2006 Ms. Sashi Kiran Pratab (purchaser) entered into an agreement to purchase crown lease No. 16375 from Ambika Nand (vendor) for a sum of \$130000 (Vol. 1 pg 205). In terms of the agreement the property had been described as one free of all encumbrances. Crown Lease 16375 was registered without mention of any

encumbrances. The encumbrances of the earlier lease had not been copied to the new lease; the new lease did not give any particulars of the old.

[7] The encumbrances were carried forward to the new lease after the purchaser (complainant) purchased the land. The land was purchased on 24 October 2006. On 25 October 2006 the 2nd respondent lodged with the Registrar of Titles the duly executed transfer of CL 16375 and awaited the registration. In March 2007, the purchaser found that the transfer had not been registered and the Registrar of Titles had rejected the registration of the transfer of the purchaser in March 2007. Thereafter the registration papers were withdrawn on 7 May 2007.

[8] On 18 May 2005 the 3rd respondent obtained judgment for \$171879.59 in a debt recovery case (HBC 123 of 1996 L) against Ambika Nand and another. The plaintiff in this case was one Farouk Ali. On 31 July 2007 a judgment caveat was registered by the 3rd respondent against the land CL 16375. Even at that date the registered owner of CL 16375 was Ambika Nand. Thereafter the 3rd respondent sought orders for the sale of this property in the action between Farouk Ali v Ambika Nand in HBC 265 of 2007. The court issued orders allowing the sale. Thereafter on applications made for intervention the Director of Lands and the Registrar of Title were added as defendants. The purchaser and the Reserve Bank were allowed to be joined as interested parties.

[9] On 26 February 2008 the purchaser through M.K. Sahu Khan filed an application in HBC 265 of 2007 seeking the following reliefs:-

- (i) to be joined as defendant
- (ii) to have the order of sale set a-side
- (iii) to have the judgment registered against CL 16375 not extended
- (iv) An order against the Registrar of Title to register the transfer lodged on 25 October 2006.

[10] The 3rd respondent states that the purchaser's lawyer M.K. Sahu Khan had a discussion with him to resolve this dispute and a settlement was reached. On 11 March

2008 the following two documents were sent to M.K. Sahu Khan & Co (lawyer for the purchaser) by the 4th respondent;

- (i) *The Terms of settlement- (to be adopted as an order of court. This settlement was adopted by the High Court of Fiji in May 2008 (pg. 541 of vol. 2 of the RILSC)).*
- (ii) *Deed of Guarantee and Indemnity by Muhammad Shamsud-Dean Sahu Khan (pg 100 of volume 1 of RILSC)*

[11] The 3rd respondent (for the plaintiff Farouk) and M.K. Sahu Khan (for the purchaser) signed the settlement on 12 March 2008. On 13 March 2008 the Deed of Guarantee and Indemnity was signed between the 3rd respondent and the purchaser.

[12] Terms of Settlement

- *The Crown Lease No. 16375 (the said lease) be registered in the name of Sashi Kiran Pratap in consideration of the **purchaser paying the sum of \$120000 to the plaintiff as purchase price** under the Orders of the Court made on the 24th day of October, 2007 and 17th day of January, 2008*
- *To avoid additional expenses it is agreed between the plaintiff and the purchaser that the current transfer of the said Lease lodged with the Registrar of Titles for registration from the first defendant to the purchaser shall be deemed to be transfer from the plaintiff to the purchaser in pursuance of the orders of sale made by the court on the 24th day of October, 2007 and 17th day of January, 2008.*
- ***The plaintiff shall indemnify the purchaser in respect of any amount that may be payable to the Mortgagee under Mortgage No. 201344 (the said Mortgage) if it is held that the said mortgage has been validly endorsed by the Registrar of Titles on the said lease and the debt under the said Mortgage is payable to the Mortgagee by the purchaser** and subject to the above and liability arising under the said mortgage by the purchaser in favour of the Mortgagee that the transfer herein to be registered in the name of the purchaser shall be subject to the said Mortgage and the Caveat Number 260056 of the Director of Lands.*

- *The purchaser shall be at liberty to take any action for damages against any other party that she deems fit except against the plaintiff herein.*

The Deed of Guarantee and Indemnity was executed to affect the terms of the settlement.

The Deed of Guarantee

[13] WHEREAS

- (a) a, b, c, d, e, f, g, h, i, and j not reproduced
- (b) The purchaser shall pay the Judgment Creditor the sum of \$120000.00 as purchase price as if the sale was under the Said Orders.
- (c) The Guarantor shall at his own costs in all things whatsoever arrange the loan of \$120000 to pay the Judgment Creditor the purchase price referred to in paragraph 1 herein.
- (i) *The purchaser shall take action of damages against the Registrar of Titles for not registering the said transfer when it was lodged for registration in 2006.*
- (ii) *Whatever damages are received or payable to the purchaser shall be payable to the Guarantor absolutely.*
- (iii) *The purchaser gives this irrevocable authority to Guarantor to take any action for damages against the Registrar of Titles and/or the Attorney General in the name of the purchaser.*
- (iv) *If the purchaser shall for any reason whatsoever terminate this irrevocable authority to the guarantor then this Guarantee and Indemnity herein shall be immediately cancelled and shall become null and void.*

[14] ***In consideration of the matters in paragraph 3 herein the Guarantor hereby given this Guarantee and Indemnity that if no damages are recovered from the Registrar of Titles and/or Attorney General under the said proposed claim for damages then the Guarantor shall take the full responsibility of paying the lender in respect of the sum of \$120000 to be borrowed by the purchaser to pay the purchase price of \$120000 referred to in paragraph 1 herein***”.

[15] On 6 October 2008 the purchaser had placed her signature on two promissory notes for \$120000. Two payment vouches and two cheques amounting to \$120000 too were written in favour of the purchaser. The two cheques were allegedly endorsed by the purchaser in favour of Farouk Ali. The payments made to Farouk Ali were supposed to be in terms of the settlement. This money was purportedly loaned by Natrajan Pillay and Mehrul Nisha in amounts of \$70000 and 50000 (pgs. 553 to 560 in Vol. 3 of RILSC) respectively.

[16] In October 2008 M.K. Sahu Khan on behalf of the purchaser filed a motion seeking declaratory orders that the mortgage No. 201344 was not validly registered on CL 16375 and that the mortgage is not binding on the purchaser. On 9 February 2009 the High Court delivered its judgment in respect of the notice of motion filed in October 2008. The notice of motion filed was dismissed. The court also declared that the mortgage No. 201344 had been validly endorsed on the lease CL 16375.

[17] The 3rd respondent was seeking instructions from the purchaser to file an appeal. The purchaser had met the 3rd respondent twice. However the purchaser had refused to give instructions to file an appeal. The purchaser complained that to file an appeal, the 3rd respondent demanded \$7000. The 3rd respondent claimed that this amount was for disbursements. However the 3rd respondent considered this refusal as terminating the Deed of Guarantee and Indemnity.

[18] In March 2009 Mehrul Nisha and Natrajan Pillay demanded, through the 3rd respondent's Law Firm, payment of the loan debts together with interest, stating that they would initiate recovery proceedings in the event of failure to pay. On 25 May 2009 proceedings were instituted in the Magistrate's Court of Ba by the 3rd respondent on behalf of Lala Kishore and Ram Narayan who claimed to be assignees of Mehrul Nisha and Natrajan Pillay. These actions are now pending.

Evidence of Sashi Kiran Pratap

[19] **The Deed of Guarantee and Indemnity:** She states that M.K. Sahu Khan was retained to remove the judgment, mortgage and the caveat. M.K. Sahu Khan was a brother of the 3rd respondent. M.K. Sahu Khan had told her that a deed is being prepared which is in her favour. According to this deed the 3rd respondent was to file

action against the Registrar of Title to claim damages and get whatever the amount awarded. She agreed to that proposal. At page 700 in vol. 3 of the RILSC the purchaser said as follows:-Witness: *Sir I agreed because I was told that the deed was in our favour and that with that money they will remove the judgment* (Farouk Ali's). She said that she was told that the Dr. (3rd respondent) was going to arrange the money to be paid to the creditor at his cost. She said that she was happy because it was not her money that was going to be used.

[20] Referring to the case that was filed to get the mortgage set aside she said that she became aware that it was unsuccessful. She admitted that the 3rd respondent called her to take steps to file an appeal. She said that she met the 3rd respondent twice regarding this appeal. At the first meeting, the 3rd respondent had wanted \$7000. She met the 3rd respondent again after two weeks and at that time the 3rd respondent had asked for \$2000. That was instead of the \$7000 claimed earlier. She said that she read Justice Datt's judgment and decided not to appeal.

[21] Referring to the promissory notes she has revealed startling information. She said (pg 705 of the RILSC) "*when Dr. (3rd respondent) told us to appeal and we did not appeal, there was a bailiff who came to us and showed us a promissory note which showed that she had taken money from somebody. He had told her to come to court and tell in court where she had taken this money from*". She denied to having received any money from the two persons, namely Mehrul Nisha and Natarajan Pillay. She said that she did not know them. She even denied to having seen the promissory notes before. Looking at the signatures she said that it seems like her signature but that she was not aware as to when she signed them and how they had made her sign them (pg 708 of the RILSC).

[22] She also denied to having received any cheques. She said that if she received any cheques she would have deposited them in her bank. She said that she saw the cheques for the first time only when the bailiff gave them to her. She said that she did not know the people who had issued the cheques and that none of them attended courts. Two cases namely No. 19 of 2009 and 20 of 2009 are pending in the Magistrate's Court of Ba (Fiji).

[24] The following evidence is found at page 734;

Dr. Sahu Khan: *"I put it to you madam that it was on the same date that you had signed the promissory notes that you had borrowed \$70000 from Natarajan Pillay and \$50000 from Mehrul"*.

Sashi Kiran Pratap: *"I am saying that I was made to sign this without me knowing. If I would have taken money from somebody then that person would have come upfront and said take this money"*.

(At page 735) Sashi Kiran Pratap: *"Sir I'm saying this looks like my signature if I had known I would not have done such thing"*.

Dr. Khan: *"Now I put it to you they were all signed on 6th of October 2008 the deed and the promissory notes were signed on 6th October 2008"*.

Sashi Kiran Pratap: *"I only signed one paper"*.
(At page 736) Commissioner: *"So you could have may be signed these documents"*.

Sashi Kiran Pratap: *"That's what I'm saying if he had given me (referring to M.K. Sahu Khan who was her lawyer) I trusted him so much I paid him and all the papers that were given to me I had not actually read it I trusted him and signed it"*.

Referring to payment orders she said that she trusted her lawyer and that she was given different types of papers all the time and that she signed them because she trusted him. She said that she did not know when and how they had got her signature.

[24] Evidence of Dr. Muhammad Shamsud-Dean Sahu Khan

Referring to the Deed of Guarantee and Indemnity Dr. Khan said that it was **purely conditional**. He said that she terminated instructions to take action against the Registrar of Titles (pg 980 of the RILSC). He admitted that he was dealing with money lending and making arrangements for loans all the time in his office.

Referring to the conditions mentioned in the Deed of Guarantee and Indemnity the following questions were put for the prosecution:

Ms Lidise: *"You are the maker of this document?"*

Dr. Khan: *"Yes it looks like my typing"*.

Ms. Lidise: *"I suggest to you Dr. Sahu Khan that the meaning of this paragraph is that you would arrange the loan and that you would be responsible for the loan?"*

Dr. Sahu Khan: *“Certainly that is not correct...I will not be naive to pay for the purchase price when we had nothing to do with that...we were only supposed to arrange the loan”.*

Ms Lidise: *“So ...Sashi Kiran Pratap was going to pay an additional \$120000”.*

Dr. Sahu Khan: *“That was part of the settlement otherwise Muhammad Farouk Ali would have never agreed to any settlement and we proceeded with the sale to Ram Narayan which was more beneficial to us”. (Pg 1001 of RILSC)*

Count 8 (of which Dr. Muhammad Shamsud-Dean Sahu Khan was found guilty)

[25] Professional Misconduct: Contrary to section 82 (1) (b) of the Legal Practitioners Decree;

Dr. Muhammed Shamsud-Dean Sahu Khan a legal practitioner, between the 13th day of March 2008 and the 25th day of May 2009, executed a Deed of Indemnity and Guarantee with one Sashi Kiran Pratap, which provided that the said Muhammad Shamsud-Dean Sahu Khan would arrange at his own costs a loan of \$120000 for Shashi Kiran Pratp to pay one Mohammed Farouk Ali, who was the said Dr. Muhammad Shamsud-Dean’s client, when the said Sashi Kiran Pratap had already paid the sum of \$130000 to Ambika Nand the registered owner of Crown Lease 16375, and in exchange the said Sashi Kiran Pratap would provide Dr. Muhmmad Shamsud-Deen Sahu Khan with her irrevocable authority to take action for damages against the Registrar of Titles and/or the Attorney General and in the event that no damages were recovered from the civil suit, that the said Dr. Muhammad Shaumsud-Dean Sahu Khan would take full responsibility for paying the lenders in respect of the sum of \$120000, and which deed the said Dr. Muhammad Shamsud-Dean Sahu Khan subsequently failed to honour when he purportedly on behalf of the lenders, initiated civil proceedings in the Ba Magistrate’s Courts against the said Sashi Kiran Pratap for failing to repay the loan amount and accrued interests to the respective lenders, after the civil suit against the Registrar of Titles and the Attorney General was dismissed, which conduct occurred in connection with the said Dr. Muhammad Shamsud-Dean Sahu Khan’s practice of law and would justify a finding that the said Dr. Muhammad Shamsud-Dean Sahu Khan is not a fit and proper person to engage in legal practice.

Judgment

[26] Having dealt with the facts in detail the learned Commissioner made the following findings:

146. Action 265 of 2007 (Lautoka) is not referred to in the Deed of Guarantee and Indemnity [Ex A-102]. However the 3rd respondent treats the purchaser’s

failure to instruct him to appeal the decision in that matter (including the payment of the requested costs) as termination of his authority to take action for damages against the Registrar of Titles and/or the Attorney General.

147. This behaviour is made even worse when the 3rd respondent commences actions in the Ba Magistrate's Court to recover the moneys he caused to be advanced to the purchaser to meet the judgment registered on the title in favour of his client the judgment creditor, which judgment has not been removed from the title despite the debt having been paid.

148. The 3rd respondent's client, the judgment creditor, has not met his obligation pursuant to the terms of settlement in the matter of 265 of 2007, in that he has not discharged the mortgage to the Reserve Bank as that mortgage is still on the purchaser's title. There is no evidence before the commission that the 3rd respondent made any attempt to cause this to happen.

149. The conduct of the 3rd respondent is disgraceful and dishonourable and is conduct that justifies a finding that the practitioner is not a fit and proper person to engage in legal practice.

The submissions of the learned counsel for the 3rd respondent

[27] The learned counsel submitted that the 3rd respondent was compelled to consider the guarantee and indemnity as cancelled and consider it null and void as the purchaser withdrew the authority that was given to the 3rd respondent. He specifically referred to the proceedings at page 729 (Vol. 3 of the RILSC) where the purchaser was under cross examination, part of which is as follows:-

Dr. Sahu Khan: And you decided not to appeal

Witness: We have always decided we will not appeal

Dr. Sahu Khan: And then you decided not to engage me to take legal proceedings against the Registrar of Titles

Witness: Yes Sir

Dr. Sahu Khan: So you decided whatever authority you gave me before to take any action to appear for you withdrew that

Witness: Yes Sir

Dr. Sahu Khan: And then after these actions no further proceedings were taken against the Registrar of Titles

Witness: No sir

[28] The learned counsel submitted that the 3rd respondent never appeared for the purchaser. He submitted that the guarantee of indemnity gave the 3rd respondent authority. However this authority was withdrawn. The learned counsel also drew the attention of court to page 561 wherein the 3rd respondent wrote to the purchaser on 27 February 2009. In that letter the 3rd respondent had stated that *“I must inform and advise you that if you do not give instructions to me to appeal against the above judgment that will seriously affect and jeopardise your proposed claims for damages and action against the Registrar of Titles and the Attorney General.....If you do not come to see me then I will regard that you have terminated my authority to take action for you for damages against the Registrar of Titles and/or the Attorney General”*.

[29] The learned counsel submitted that Justice Datt’s judgment was very critical and as the 3rd respondent was prevented from appealing, the 3rd respondent thought that a damages action will not be successful. He submitted that otherwise the 3rd respondent never refused to file action.

[30] He admitted that that he was the author of the Deed of Guarantee and Indemnity and that he was a signatory. The learned counsel admitted that a claim of \$7000 was made before filing the appeal to meet disbursements. He submitted that the 3rd respondent could not file action for damages without first filing an appeal to set aside Justice Datt’s judgment.

[31] The learned counsel relied on *W v Auckland Standards Committee* where the court found that there was no breach of undertaking. He submitted that an honest mistaken interpretation of a document does not amount to professional misconduct. The learned counsel further submitted that the obligation was to one’s client. However the facts are different therefore not relevant.

Submissions of the learned counsel for the respondent

[32] The learned counsel submitted that although the court held that the mortgage was validly endorsed in to the title of CL 16375, the plaintiff Farouk Ali failed to indemnify the purchaser as per the settlement. The purchase price of \$120,000 was apparently paid to Farouk Ali. The Settlement and the Deed of Guarantee and Indemnity were authored by the 3rd respondent.

[33] By this guarantee the purchaser was bound to pay the purchase price of \$120,000. It was agreed that the guarantor would arrange a loan of \$120,000 for the purchaser to pay the Judgment Creditor. In this deed it was agreed that the purchaser shall take action against the Registrar of Title and/or the Attorney General for not registering the transfer lodged on 24 October 2006 with the Registrar. It was also agreed that the full amount of the damages awarded would be paid to the 3rd respondent.

[34] The purchaser agreed to give irrevocable authority to the 3rd Respondent to file this action against the Registrar of Titles. In the event no damages were recovered from the Registrar of Titles the 3rd Respondent agreed to pay the lender \$120,000 which sum was allegedly borrowed by the Purchaser to pay the Judgment Creditor.

[35] In spite of the above terms the 3rd Respondent never took any steps to file action for damages against the Registrar of Title and/or the Attorney General.

[36] At the time of signing the Deed of Guarantee and Indemnity it was not contemplated that an order would be sought from court to declare that the endorsement of the mortgage (on the application of Crompton's for Reserve Bank of Fiji) into CL 16375 invalid and also to have the Registrar of Title to register the transfer lodged on 24 October 2006 in favour of the purchaser.

[37] As the court refused this application the 3rd respondent intended to file an appeal. For this purpose the 3rd respondent met the purchaser on a few occasions. On the first day of the meeting the 3rd respondent admittedly wanted \$7000 to file this

appeal. The purchaser not inclined to spend any more money and for other reasons as well refused to file an appeal.

[38] As the purchaser failed to file an appeal, the 3rd respondent by using a clause in the Deed of Guarantee and Indemnity treated the Deed as cancelled. With the cancellation the 3rd respondent brought actions against the purchaser on two promissory notes which the purchaser allegedly gave to two persons. The two promissory notes appeared to bear the signature of the purchaser. In addition to that two cheques were written in favour of the purchaser. The purchaser allegedly endorsed the two cheques and the total amounting to \$120,000 deposited same to the trust fund of the 3rd respondent.

[39] The purchaser says that she never received any money from anyone. She did not know the persons to whom promises were made for payment. She did not know the persons who had drawn the cheques.

[40] Two letters of demand were sent to the purchaser by the 3rd respondent demanding a sum of \$70,000 and \$50,000. Thereafter complaints were filed in court to claim the above money. Although names appeared as plaintiffs, their addresses were not sufficiently provided. None of these persons attended courts to prosecute these actions. Are they all fictitious persons? The 3rd respondent does not reveal the whereabouts of these persons. These actions were filed by the 3rd respondent. The terms of settlement and the Deed of Guarantee and Indemnity were authored by the 3rd respondent. It is the 3rd respondent who considered the Deed of Guarantee and Indemnity cancelled. The 3rd respondent did not take any steps to comply with the terms of the Deed of Guarantee and Indemnity.

[41] Cheques for \$120,000 said to have been received by the purchaser was endorsed to be paid to Farouk Ali. The amounts were credited to the trust fund of the 3rd respondent. There is no trace of Farouk Ali either. There is no evidence that Farouk Ali was paid \$120,000. If Farouk Ali was paid, Farouk Ali was bound to indemnify the purchaser in terms of the settlement. That was not done.

[42] The 3rd respondent admittedly had been a Money Lender. His Firm has expertise in making documents involving money lending. It appears that all these papers were created by the 3rd respondent through his Firm of Lawyers (4th Respondent). It appears that transactions were made with fictitious persons in order to cheat innocent litigants.

[43] The 3rd respondent agreed in the deed of guarantee and indemnity to pay \$120,000 to the purchaser in the event no damages were recovered from an action filed against the Registrar of Titles and/or the Attorney General. As no action was filed against the Registrar of Titles or Attorney General to claim damages, the 3rd Respondent is bound by the terms of agreement and to pay \$120,000 to the purchaser. However, the 3rd respondent considered conveniently that the Deed of Guarantee and Indemnity are cancelled.

[44] The 3rd respondent, although he prepared the Deed of Guarantee and Indemnity, it appears, never intended to be bound by its terms and the following question and answer reveals this truth.

Ms. Lidise: *“I suggest to you Dr. Sahu Khan that the meaning of this paragraph is that you would arrange the loan and that you would be responsible for the loan?”*

Dr. Sahu Khan: *“Certainly that is not correct...I will not be naive to pay for the purchase price when we had nothing to do with that...we were only supposed to arrange the loan”* (pg 980 of vol. 4 of RILSC). The above submissions of the learned counsel would only justify the findings of the learned Commissioner.

[45] The purchaser had given the 3rd respondent an irrevocable authority to file action for damages against the Registrar of Titles and/or the Attorney General. By not taking any action for a period of nearly one and a half years, it shows that the 3rd respondent never intended the terms of the Deed of Guarantee and Indemnity. The submission that the purchaser did not authorise the 3rd respondent to file action fails against the irrevocable authority given.

[46] The learned counsel for the 3rd respondent never raised any matters concerning the fictitious characters involved in this case.

[47] Considering the above submissions very carefully, I am of the view that there is no merit in this appeal. Hence the appeal is dismissed with costs.

Lecamwasam JA

[48] I agree with the reasons and the conclusions of Basnayake JA.

Balapatabendi JA

[49] I agree with the reasons and the conclusions of Basnayake JA.

Order of Court are:

[50] The appeal is dismissed with costs \$5000 to be payable to the Respondent-Respondent.

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Hon. Mr. Justice Eric Basnayake
Justice of Appeal

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Hon. Mr. Justice Susantha Lechamwasam
Justice of Appeal

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Hon. Mr. Justice Susantha Balapatabendi
Justice of Appeal