

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

**CIVIL APPEAL NO. ABU 103 of 2016**  
**(High Court of Loutoka Civil Action No. HBC 83 of 2008)**

**BETWEEN** : **PHUL KUAR aka PHUL KUMARI and SHIU NARAYAN**  
**aka SHIU NARAYAN aka SHIU NARAIN** as Administrators of  
the Estate of Pritam Singh aka Pritam Nand  
*1<sup>st</sup> Appellant*

**PREM SINGH** as the lawful Attorney of Phul Kumari and Shiu  
Narayan the Administrator of the Estate of Pritam Singh also  
known as Pritam Nand

*2<sup>nd</sup> Appellant*

**PRAJAY INVESTMENTS LIMITED** a limited liability  
company having its registered office at 1<sup>st</sup> Floor, Suite 6, Nadi  
Motel Complex, Main Street, Nadi

*3<sup>rd</sup> Appellant*

**AND** : **RAJEND SINGH**  
*Respondent*

**Coram** : **Chandra JA**  
**Basnayake JA**  
**Almeida Guneratne JA**

**Counsel** : **Mr. E. Maopa for the Appellants**  
**Mr. J.R. Connors with Mr. N. Kumar for the Respondent**

**Date of Hearing** : **11 September 2018**

**Date of Judgment** : **5 October 2018**

## **JUDGMENT**

### **Chandra JA**

- [1] I agree.

### **Basnayake JA**

- [2] The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants) filed this appeal to have the judgment of the learned High Court Judge dated 6 September 2016 set aside. Judgment was entered in favour of the respondent (plaintiff).
- [3] The case relates to the estate of one Pritam Singh. Pritam Singh died on 11 August 1973, leaving a last will. The estate of the deceased comprised a lease. This lease was issued on 1 October 1953 to the deceased party for a period of fifty years. The extent of the estate was 58 acres 2 roods and 32.65 perches with a sugarcane cultivation. According to the last will, the beneficiaries were the 1<sup>st</sup> party of the 1<sup>st</sup> appellants, the 2<sup>nd</sup> appellant and the respondent, that is, two brothers. The 1<sup>st</sup> party was the widow of the deceased and mother of the 2<sup>nd</sup> appellant and the respondent. This action was filed by the respondent on 12 May 2008. After the filing of this action, the 1<sup>st</sup> party (mother) died intestate on 15 April 2010. However no steps had been taken for substitution. The appeal was filed on 23 September 2016 as if there was no change in the status quo. I will discuss this matter later.
- [4] The probate in respect of the estate was granted by the High Court of Fiji to the 1<sup>st</sup> appellants (mother and one Shiu Narayan) on 24 June 1975. On 23 November 1988, the 1<sup>st</sup> appellants, who were the administrators, had executed a Power of Attorney in favour of the 2<sup>nd</sup> appellant. It was admitted at the pre-trial conference that all cane monies from the farm are being paid by the FSC Lautoka to ANZ Bank, Nadi branch. However the learned Judge disputed this admission (pg. 25 RHC) in the light of evidence of the Manager, ANZ Nadi Branch who denied the existence of such an account at present. The Manager had admitted to having such an account previously.

- [5] The 3<sup>rd</sup> appellant is a private company registered on 25 February 2005. This was formed by the 2<sup>nd</sup> appellant with a shareholding of 51%. The balance is held by the wife of the 2<sup>nd</sup> appellant. On 4 May 2006 the Director of Lands had issued an Approval Notice over the estate property in favour of the 3<sup>rd</sup> appellant.

#### **The respondent's case**

- [6] The respondent's complaint is that the 1<sup>st</sup> appellants (namely the 1<sup>st</sup> party and the 2<sup>nd</sup> party of the 1<sup>st</sup> defendants as administrators) failed and neglected to carry out their duties by not distributing the estate as per the last will. The respondent also complained that the 1<sup>st</sup> appellants failed to perform their duties under the Trustee Act (1966) and failed to keep a proper record of all the income received from the cane farm. The respondent moved inter alia to have the estate distributed as per the last will, to remove the 1<sup>st</sup> appellants (only the 2<sup>nd</sup> party of the 1<sup>st</sup> appellants is living) and to appoint the respondent as the sole trustee.
- [7] The respondent complained that although the original lease was for a period of fifty years, it was subject to an extension for another twenty years. The 2<sup>nd</sup> appellant failed and neglected to obtain the extension. The respondent states that it was a deliberate move by the 2<sup>nd</sup> appellant for the benefit of the 3<sup>rd</sup> appellant, who got an approval notice by the Director of Lands in May 2006. The respondent complained that the 2<sup>nd</sup> appellant obtained this approval notice fraudulently. The respondent states that on 8 March 2006 the 2<sup>nd</sup> respondent got Cadestral Solutions Limited to carry out sub division work on the estate property and obtained provisional approval. The respondent complained that the 2<sup>nd</sup> appellant committed fraud on the respondent as a beneficiary by selling part of the estate to "*West Mill*" supermarket, Signage (Vodafone) and failing to distribute the proceeds. The respondent also states that the income from the two houses and the warehouse in the estate property too were not distributed.



### **The defence**

- [8] In an amended statement of defence (16 January 2014) the appellants admitted that the last will bequeathed the estate in equal shares among three beneficiaries, including the respondent. The appellants admitted the extent of the estate and that it comprised a sugarcane cultivation. The appellant stated that the lease expired in 2003. However the sugarcane contract continued up to the harvesting of the crop. The appellants also admitted the registration of the 3<sup>rd</sup> appellant company and the fact of the execution of the Power of Attorney by the 1<sup>st</sup> appellants as administrators in favour of the 2<sup>nd</sup> appellant. Answering the averment that the 1<sup>st</sup> appellants have failed to discharge their duty by not distributing the estate, the appellants stated that they performed their duty under the will and the Trustee Act.

### **Judgment**

- [9] The learned Judge has dealt with the respondent's case and the appellants' separately in his judgment. The respondent produced 21 documents (PEX-1 to 21). The appellants marked two documents (DEX-1 & 2) while cross-examining the respondent's witnesses. The learned Judge has observed (Paragraphs "h" & "i" of 42 at page 24 RHC) that there is no evidence to support any of the grounds in the statement of defence filed by the appellants. The counter claim pleaded has not been pursued and no evidence has been given by or on behalf of the appellants.
- [10] The learned Judge has identified the issue as to whether the appellants have properly administered the Estate. *"The real issue is the failure of the trustees or the person holding their Power of Attorney, 2<sup>nd</sup> defendant (2<sup>nd</sup> appellant) to protect the interests of all the beneficiaries and do whatever was required to renew the existing lease or obtain a fresh lease"* (para 61 at pg. 28 RHC).

- [11] The learned Judge answered the issues raised in this case namely, Nos. 13, 15, 16, 19 and 22 concerning the failure to take steps to extend the lease period, in favour of the respondent. From paragraphs 29 to 36 (pgs. 20, 21 RHC) the learned Judge has explained step by step the failure and the manipulations by the appellants.
- [12] On 10 May 1978 the property was conveyed to the 1<sup>st</sup> appellants (PEX 6) on the strength of the probate granted to them. On 23 November 1988 the 1<sup>st</sup> appellants had executed a power of attorney in favour of the 2<sup>nd</sup> appellant. On 15 February 2001 a partial surrender of lease 58063 was registered on the application of the 2<sup>nd</sup> appellant (PEX 9). On 10 February 2005 the 3<sup>rd</sup> appellant company was formed. On 28 March 2006, the 2<sup>nd</sup> appellant has written the following letter seeking the land for the 3<sup>rd</sup> appellant which is as follows; *“Estate of late Pritam Nand has three beneficiaries and according to his last will, the beneficiaries have formed a limited liability company Prajay Investments Limited for the purpose of carrying out the subdivision. All the beneficiaries under the will of the deceased are the directors of the company and the reason for the development lease to be in the company name is solely to raise the necessary funds to develop the land as otherwise the estate will be restricted to borrowing up to \$10,000.00”* (PEX- doc 13). The company was formed by the 2<sup>nd</sup> appellant with his wife. The respondent did not play any role in the formation of the company. The respondent was not a director in the company either. This letter was found to mislead the Land Department to defraud the beneficiary.
- [13] On 18 April 2006 the Director of Lands issued an *“Approval Notice”* in the name of the 3<sup>rd</sup> appellant. On 4 May 2006 the acceptance of the approval notice was executed by the 3<sup>rd</sup> appellant. On 20 February 2008 and 3 March 2008 the 1<sup>st</sup> appellants representing the administrators of the estate authorized the Director of Lands to issue a development lease in the name of the 3<sup>rd</sup> appellant with respect to the property stating, *“Prem Singh the beneficiary”* (PEX 9 and 12). Prem Singh is the 2<sup>nd</sup> appellant. As per the document PEX-14, on a letter head of *“Premac Consultancy”* a letter is addressed to the Divisional Surveyor on behalf of the 3<sup>rd</sup> appellant. This letter states that, *“none of the beneficiaries attempted to re-apply for the said area except our client Company with the consent and*



*approval of the Administrators*". The learned Judge found that none of the beneficiaries had the capacity to seek an extension of the lease. The misrepresentations and falsehoods committed by the appellants for the purpose of gain for themselves and to deprive the respondent of the benefits that the respondent was entitled to from the last will were clearly visible to the learned Judge. These are some of the facts that helped the learned Judge to come to a finding with regard to the dishonesty and fraud on the part of the appellants.

- [14] The learned Judge in paragraph 56 (pg. 27 RHC) queries as to how the 2<sup>nd</sup> appellant, while allowing the lease to lapse and not renewing it for the benefit of all the beneficiaries, managed to acquire a lease fraudulently for the 3<sup>rd</sup> appellant company owned by the 2<sup>nd</sup> appellant and his wife. The learned Judge states that the appellants were not able to refute the allegations made against them. Thus the learned Judge held in favour of the respondent.

[15] **Grounds of Appeal**

- i. *That the learned judge erred in law and in fact in failing to apply the test of fraud as stated by Salmon J. in New Zealand Court of Appeal case of Waimiha Sawmilling co. Ltd v Waqione Timber Co. Ltd [1923] NZLR 1137; applied and adopted by the Court of Appeal in Watt v Charan (2013] FCA 132; ABU0027.12 (5 December 2013); Prasad v Hamid (2004] FCA 10; ABU 0059.2003 (19 March 2004); Sharma v Singh [2004] FJCA; ABU0027. 2003S (19 March 2004) and failed to give reasons for departing from citing such authority.*
- ii. *That the learned trial Judge erred in law and in fact when he allowed the 2 unregistered Powers of Attorney (P EX 14 and P Ex 15) to affirm the personal knowledge of the Plaintiff in regards to the facts by that person personally knows by the evidence of PW6 (pages 11 & 12 para 22) without any judicial authority and hence opening the flood gates.*
- iii. *That the learned trial judge erred in law and in fact in failing to apply the relevant law in regards to the legality and the evidentiary value of the unregistered/ unauthenticity of the Power of Attorney rather than re-citing the authority submitted by the parties.*

- iv. *That the trial judge erred in law and in fact in allowing PW6 to give evidence as it was the Plaintiff by virtue of the P EX 14 and 15.*
- v. *That the learned Judge erred in law and in fact when he described the 1<sup>st</sup> defendant as "trustees and not administrators or executors (page 19-para 50 line 6 also page 14 para 35) wherein the probate court grants letters of administration to the first defendant [P Ex 3] hence failed to consider the P Ex 3 & Ex 12 together.*
- vi. *That the learned trial judge erred in law and in fact when he said the expressed conduct of the first named defendant and the 3<sup>rd</sup> defendant (2<sup>nd</sup> defendant's and wife being the shareholders and directors on the above shows their willful gesture of dishonestly and fraud (at page 14 para 36) when there was no evidence by PW 6 adduced in that regard.*
- vii. *That he learned Judge erred in law and in fact in failing to apply the relevant legal principle applicable to the lifting of the company corporate veil in regards to allegation of fraud against the 3<sup>rd</sup> Defendant's limited liability company (para 36). There is absence of evidence against the company and the shareholder adduced by the plaintiff.*
- viii. *That the learned Judge and erred in law and in fact in considering sections 28 and 45 of Succession Probate and Assessment when he said such section do not convey a legal power to the 2<sup>nd</sup> Defendant to perform the formalities that he has already performed under it because the Powers confess by PEx5 in merely fictitious (page 15 para 39). There was no evidence of fictitious act hence such sections is irrelevant.*
- ix. *That the learned Judge erred in law and in fact in relying on section 50(5) of the Trustee Act Cap 65 to confirm P Ex5 is an act of dishonest and no legal authenticity at the time of its execution and its existence when there is absence of evidence of such act and no judicial authority to support such comment [page 15 para 41 & 42].*
- x. *That the learned Judge erred in law and in fact in considering the administrators of the estate and holder of the Power of Attorney have*



*fiduciary duty to protect the interest of the beneficiary and hence breach such duty by conniving with Lands Department to issue the lease in the name of the company, 3<sup>rd</sup> defendant without considering PEx 12 and any judicial authority. He also failed to consider whether there was a duty or relationship between them. [page 23 para 67].*

- Xi. That the learned Judge erred in law and in fact when he said the Power of Attorney [PEx5] was granted in 1978 wherein PEx 5 was granted in 1988 page 16 para d].*
- xii. That the learned judge erred in law and in fact when he finds the shareholders of the 3<sup>rd</sup> defendant's company are liable for fraud when there is absence of evidence of fraud.*
- xiii. That the learned judge erred in law and in fact when he made assumptions of the facts without any legal basis and without considering judicial authority [pages 12 para 23 line 4, p16 para c line 3, page 19 para 52 line 4, and 20 para 56 line 6].*
- xiv. That the learned judge erred in law and in fact when he said the trustees had the obligations to protect the interest of the beneficiaries and apply for a renewal of the lease or take the action that the defendant took for his own benefit (page 19 para 54 line 2) where there is no trustee of the estate and such land became the boundary of Nadi Town Council (page 18 para 49 line 4) hence he failed to consider PW 5 and PW7 evidence and the submission by the defence at para 36 of the said submission.*
- xv. That the learned judge erred in law and in fact when he said there is more evidence from the Plaintiff documents tendered which shows the 2<sup>nd</sup> Defendant either acting on Power of Attorney he held from the trustees of the estate or on his own right failed to renew the lease, apply for a fresh lease in the name of the trustees etc wherein he failed to specify those documents and there is not trustee of the estate [page 20 para 56].*
- xvi. That the learned judge erred in law and in fact when he said the fact that the 2<sup>nd</sup> defendant was able to obtain a lease in the name of the 3<sup>rd</sup> defendant is clear evidence that a lease could have been obtained by the trustees for the benefit of the beneficiaries and in satisfaction of*



*their fiduciary duty [page 21 para 62] wherein the trial judge failed to consider the evidence of PW5 and PW7 and the submission by the Respondent that the estate lease was expired and due to the mandatory provisions under ALTA and it was within the Nadi Town Council boundary hence no lease cannot be renewed for agriculture purpose.*

- xvii. *That the learned trial judge erred in law and in fact to find against the defendants when the evidence shows one of the administrators of the estate of Pritam Singh and donour of the Power of Attorney, the first named first defendant died interstate on 15<sup>th</sup> April 2010 [page 17 para 43 last line] without her estate being substituted when the matter was heard and judgment delivered.*
- xviii. *That the learned trial judge erred in law and in fact when he failed to consider the accounts of the estate of Pritam Singh on the cane proceeds from 1986 – 2005 filed in the Plaintiff's bundle of documents [PEx 11].*
- xix. *That the learned judge erred in law and in fact when he said even though it is considered that the lease expired thereafter, the defendants' acts are well within the period of the lease of the property in the estate. The plaintiff instituted this action in 2008. The first defendant is still the administrator of the estate and the second defendant still the holder of the power of attorney for the first defendant [page 26 para 84 line 4] wherein the lease expired in 2003, the defendants acts were outside 2003 and one of the administrator of the estate of Pritam Singh and donor of the power of attorney, the 1<sup>st</sup> named first defendant, Phul Kuar died in 2010. Hence he failed to consider the law regarding the revocation of the Power of Attorney.*
- xx. *That the learned judge erred in law and in fact when he said the 2<sup>nd</sup> defendant in breaching the currency controls by taking out of Fiji A\$50,000.00 in cash out of Fiji as testified by PW6, at least \$25,000.00 has taken out of Fiji by the 2<sup>nd</sup> defendant [PEx 16] and in making false declaration under the Political Parties (Registration, Conduct, Funding and Disclosures) Decree, shows a complete disregard for compliance with his legal obligations [page 21 para 70] wherein there was no evidence led that A\$50,000.00 was taken out of Fiji and how it was taken out. There is absence of which currency control and what was breach being mentioned by the trial judge. Also he failed to mention the specific provision he referred to in the Decree.*

- xxi. *The learned trial judge erred in law and in fact when he said that the 2<sup>nd</sup> defendant made a false declaration on 21<sup>st</sup> August 2014...and that the value of the company was \$500,000. He also included the declaration that the estate funds held with FSC in the sum of \$44,000.00 [page 19 para 55] wherein the 2<sup>nd</sup> defendant 51% share in the company was worth \$500,000 and the funds held under the name of the estate of Pritam Singh was worth \$44,000.00 which is from the cane proceed to the value of the estate land.*
- xxii. *The learned trial judge erred in law and in fact when he said this should be clearly a false declaration as to the value of the state land when P Ex 1 shows a value of \$2,226,000.00 for only 6.36 acres of the total 569 acres for which oral evidence of PW1 was that it would have a value of approximately \$5,000,000.00 wherein there is no longer an estate land with a total acres of 569 as the total area of the land is 17.2193 hectares.*
- xxiii. *That the learned judge erred in fact and in law when he failed to consider the evidence that the transaction of Australian dollars being given to PW6 occurred in Australia without any supporting document evidence produce before the Court.*
- xxiv. *That the learned judge erred in law and in fact when he failed to consider the submission of the defendants that due to the extended boundary of Nadi Town Council under the Local Rural Authority Act and the provisions of the ALTA (subsidiary) Section 3 and 4, the estate is unable to renew/extend or apply for a new lease for agriculture.*
- xxv. *That the learned judge erred in law and in fact when he said all most all the documents tendered by the plaintiff with relevance at issue by the parties... The Plaintiff's witness PW6 particular very accurately testify to the fact she knew personally and to the facts contains in the very documents she tendered wherein none or most of the documents and documents tendered by PW1 – PW5 & PW7 were never shown to PW6 for her comment or give evidence in regards to the those documents tendered (page 25 para 81).*
- xxvi. *The learned trial judge erred in law and in fact when he disagreed with paragraph 12 of the minutes for pre-trial conference when he considered the evidence of PW2 that there was no account for Pritam Singh but an account was previously so held wherein he failed to*



*consider there is an account for the estate of Pritam Singh (PEx11) in the plaintiff's bundles of exhibits.*

xxvii. *The learned trial judge erred in law and in fact when he accept the evidence of PW6 that 14 acres of the property was sold to Westmall and the proceeds of sale were not distributed to the beneficiaries [page 18 second line on top] wherein there was absence of sale and purchase agreement in regards to the said land.*

xxviii. *That the learned trial judge erred in law and in fact when he made assumptions on the plaintiff's exhibits to find against the plaintiff without properly analyzing the oral testimony of the witnesses and the exhibits."*

#### **Submissions of the learned counsel for the appellants and the respondent**

[16] Of the twenty eight grounds, the learned counsel for the appellant submitted that he is not relying on grounds Nos. 13 and 27. The remaining grounds have been made into several groups for convenience, making all eleven groups.

#### **Failure to renew the lease**

[17] Firstly the learned counsel for the appellant considered grounds No. 14, 16, 19 and 24. These grounds relate to the failure of the appellants in not renewing the lease. The learned counsel submitted that under section 13 of the Agricultural Landlord and Tenant Act (Cap 270) (ALTA) one was entitled to an extension of the lease for a period of 20 years. However section 13 of the ALTA has been exempted under ALTA Regulations 3, 4 and 5.

#### **The Regulations**

[18] Under the heading; Exemptions from the provisions of section 7 and 13 of the Act:

*“3. The provisions of section 7 and 13 of the Act shall not apply to any contract of tenancy which has an unexpired term of thirty years or more to run from the commencement of the Act.*

*Exemptions from the provisions of sections 6, 7 and 13 of Act*

*4. The provisions of sections 6, 7 and 13 of the Act shall not apply to any agricultural land-*

- (a) Situated within the boundaries of any city or town.*
- (b) Situated outside such boundaries which the director of Lands may by notice published in the Gazette declare to be land required for non-agricultural purposes;*
- (c) Not applicable.*
- (d) Approved by the Director of town and Country Planning for subdivision for residential or commercial purposes.”*

[19] The learned counsel submitted in the written submissions that the extension of the lease was impossible under section 13 of ALTA that came into force in 1977 (2 September 1977). It was further submitted that (as per PEx-1) lot 1 of DP 1978 lease No. 58063 comprising 17.3500 hectares was ratable by Nadi Town Council since 1974. It was submitted that the 1<sup>st</sup> and the 2<sup>nd</sup> appellants were not able to get an extension due to operation of the law (Regulations) before the tenancy period expired in 2003. The learned counsel also defends the action of the 2<sup>nd</sup> appellant for the reason that everything was done after the lease term lapsed.

[20] With regard to not extending of the lease the learned counsel for the respondent mentioned section 13 of the ALTA which is as follows:-

*“13 (1) Subject to the provisions of this Act relating to the termination of a contract of tenancy, a tenant holding under a contract of tenancy created before or extended pursuant to the provisions of this Act in force before the commencement of the Agricultural Landlord and Tenant (Amendment) Act 1976, shall be entitled to be granted a single extension (or a further extension, as the case may be) of his contract of tenancy for a period of twenty years, unless-*

- (a) During the term of such contract of tenancy has failed to cultivate the land in a manner consistent with the practice of good husbandry; or*



*(b) The contract of tenancy was created before the commencement of this Act and has at the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976 an unexpired term of more than thirty years: (emphasis added). ”*

- [21] The learned counsel for the Appellant submitted that the provisions of law had been in favour to obtain an extension. In terms of the Regulations, one is not qualified for renewal if the lease had more than thirty years validity. However in this case the validity period was less than thirty years and eligible for renewal. The learned counsel for the respondent questioned the ulterior motive on the part of the 2<sup>nd</sup> appellant. While pretending that the law prevented the 2<sup>nd</sup> appellant from obtaining an extension, the 2<sup>nd</sup> appellant got a lease for the 3<sup>rd</sup> appellant company owned by the 2<sup>nd</sup> appellant and his wife. The learned counsel for the respondent submitted how the officials had been tricked by the 2<sup>nd</sup> appellant with falsehood for his gain.

#### **Unavailability of accounts**

- [22] Referring to the unavailability of accounts on the cane proceeds (relating to grounds 18 and 26) from 1986 to 2005, the learned counsel for the appellant submitted that the respondent's bundle of documents (pgs. 107 to 126 in Vol. IV) (PEx 11) is proof to its existence. Ground 26 is with regard to the finding based on the evidence of PW 2 to the effect of nonexistence of an account for the estate currently. Referring to the accounts (ground 18 and 26) the learned counsel for the appellant submitted that the accounts contradict the evidence of PW 6 when she said that the plaintiff did not receive an income from sugarcane.
- [23] At the pre-trial conference it was agreed as No. 12 that all cane money from the farm are being paid by the FSC Lautoka to ANZ Bank, Nadi. However the Manager (PW 2), Nadi Branch testified that there is currently no bank account held at the bank in the name of the estate. This is the reason for the learned Judge to comment on the agreed fact No 12 at the pre-trial conference. The learned counsel for the appellant submitted that the accounts as to the proceeds of the cane farm are marked as FSC statements in PEx

(referring to pg. 70 of Vol IV item No. 11 RHC). No. 11 states “*FSC statements*”. It reflects in those statements that payments from cane income have been paid to the respondent up to the year 1997. From 1998 to 2005 no payments have been made to the respondent. The learned counsel for the respondent submitted that monies shown in the accounts were not paid to the respondent.

### **Fraud**

- [24] Referring to grounds 1, 6 and 7 the learned counsel for the appellants complained that the learned Judge failed to apply the test of fraud. However the authorities mentioned by the learned counsel relate to acts committed under the Land Transfer Act. The learned counsel for the respondent submitted that references were made by the learned Judge with regard to the conduct of the appellants. The learned counsel for the respondent submitted that the 2<sup>nd</sup> appellant caused the major assets of the estate to be placed in the 3<sup>rd</sup> appellant by deceiving the Lands Department as to the beneficiaries of the estate and the shareholders of the company (3<sup>rd</sup> appellant). The Lands Department was duped by the 2<sup>nd</sup> appellant with regard to the role the respondent played in the 3<sup>rd</sup> appellant company.

### **Power of Attorney**

- [25] Grounds 8, 9 and 11 are pertaining to the power of attorney (PEx5). The power of attorney was given by the 1<sup>st</sup> appellants to the 2<sup>nd</sup> appellant on 23 November 1988. It was a general power of attorney. The reason given in the power of attorney is an impending absence from Fiji. It states, “Intending shortly to leave and for a time to be absent from Fiji”. The learned Judge made reference to sections 28 and 45 (1) of the Succession Probate and Administration Act Cap 60 [SPAA] to make a point under what circumstances an executor or administrator could appoint another person by granting a power of attorney.
- [26] Section 28 states that, “*Where an executor or any person entitled to probate or administration is out of the jurisdiction but has some person within the jurisdiction*



*appointed under power of attorney to act for him, administration may be granted to such person....*” The learned Judge also referred to section 50 (5) of the Trustee Act (Cap 65 (pg. 22 RHC). According to the statement of defence dated 14 January 2014 (filed separately outside the RHC) the reason for the execution of the power of attorney is a difficulty that the 1<sup>st</sup> appellant had with the Agricultural Tribunal action and pressure from the Department of Lands to vacate the estate property.

- [27] The learned Judge in paragraph 42 (pg. 22 RHC) refers to this power of attorney as an act of dishonesty having no legal authority at the time of its execution and during its existence. The learned counsel for the appellant submitted that the law relied on by the learned Judge is not relevant. However the learned counsel does not refute the serious contradiction between the instrument (power of attorney) and what is stated in paragraph 14 of the statement of defence. The learned counsel for the respondent submitted that there is unchallenged evidence of PW 6 who stated that the 1<sup>st</sup> named 1<sup>st</sup> defendant namely, Phul Kumari left Fiji for the first time in 1991 (pg. 166 Vol. III RHC). This evidence has not been challenged. The appellants did not make any attempt to justify the reasons given in the power of attorney. I am of the view that the strong views expressed by the learned judge with regard to the power of attorney have not been challenged.
- [28] Grounds 2, 3 and 4 relate to the powers of attorney granted to PW 6 (PEx 14 and 15) by the respondent. The learned Judge in paragraphs 22 and 23 (pgs. 18 and 19 RHC) does not appear to place much reliance on the two documents marked PEx 14 and 15 as the evidence of PW 6 did not depend on the two documents. PW 6 gave evidence from her personal knowledge. The learned Judge had observed that no objection was taken for PW 6 giving evidence. Her evidence was not challenged as inadmissible. The two power of attorney documents gave authority to this witness to represent the plaintiff who could not be present in court due to illness and inability to travel from abroad. The plaintiff is residing in Australia.
- [29] The witness PW6 did not have to seek refuge under the two power of attorney documents. She testified to matters that were within her personal knowledge. She could

have given evidence in court even without the two documents PEx 14 and 15. The credibility of the evidence has to be weighed. The learned Judge has believed her evidence as her evidence was not challenged.

### **Trustees or Administrators**

- [30] Ground 5 refers to the references made by the learned Judge to the 1<sup>st</sup> appellants as trustees and not administrators. This ground is based on PEx 12, a letter dated 20 February 2008 addressed to the Director of Lands by the 1<sup>st</sup> appellants describing themselves as Administrators of the estate of Pritam Nand. The learned Judge in paragraph 50 (pg. 25 and 26 RHC) stated that the 1<sup>st</sup> defendants (1<sup>st</sup> appellants) had transmitted the real estate to themselves (PEx 6) and hence were trustees and not administrators or executors. The learned counsel for the respondent submitted that the estate was transmitted to the 1<sup>st</sup> appellants as administrators on 6 August 1976. The 1<sup>st</sup> appellants were appointed by the testator as “trustees of my will”. The learned counsel for the respondent submitted that by November 1988 (the time of execution of the power of attorney in favour of the 2<sup>nd</sup> appellant) it would appear that the assets of the estate had been collected by the executor/administrators. However no distribution of assets were done to the beneficiaries named in the will.
- [31] It was held in **McCaughey v Commissioner of Stamp Duties** (1945) 46 SR (NSW) 192 at 209 that, “*if having being appointed executor only, he continues to hold it after his executorial duties have been completed, he is regarded as then holding it as constructive trustee. If having being appointed trustee as well as executor, he continues to hold it when those duties are completed, he is regarded as holding it as express trustee*” (**Pagels v Mc Donald** (1936) 54 CLR 519 at 526 where Latham CJ said, “*When the executor has performed all his executorial functions...he may become a trustee merely by continuing to hold property after his functions as executor have been performed* (**In Re Timmis; Nixon v Smith** (1902) 1 Ch.176)”. As the 1<sup>st</sup> appellants became trustees by transmitting the estate to themselves, they became trustees to the beneficiaries. Therefore this ground does not hold water.



- [32] The learned counsel considered appeal ground No, 10. This ground too concerned the document PEx 12 wherein the 1<sup>st</sup> appellant wrote to the Director of Lands to issue a development lease in the name of the 3<sup>rd</sup> appellant which fact proved to be false and therefore this ground is rejected.
- [33] Appeal Grounds Nos. 15 and 26 were taken up by the learned counsel for the appellant together. Ground No. 15 is concerning the learned Judge not specifying the documents he relied on. This submission is connected to the failure on the part of the 2<sup>nd</sup> appellant in not renewing the lease. This point has already been dealt with. With regard to ground No. 25 the learned counsel states that the documents tendered by PW 1 to PW 5 and PW 7 were not shown to PW 6. The learned counsel does not refer to a particular item of evidence or a particular document which requires proof. This ground appears to be vague and has to be rejected.

### **Currency fraud**

- [34] Grounds 20, 21 and 23 are concerning the evidence of witness No. 6 with regard to the 2<sup>nd</sup> appellant taking out of Fiji either 50,000.00 or 25,000.00 AUD. The learned counsel for the appellant submitted that with regard to these amounts no documents were produced. It was further submitted that the learned Judge erred by concluding that the 2<sup>nd</sup> appellant breached currency regulations. The learned counsel for the respondent submitted that what the learned Judge did was to examine the conduct of the 2<sup>nd</sup> appellant.
- [35] The witness No. 6 said in evidence that she helped the 2<sup>nd</sup> appellant to open an account with ANZ Branch in Australia. Whether the amount was AUD 50,000.00 or 25,000.00 is not the issue. The essence of the evidence of PW 6 is that the 2<sup>nd</sup> appellant had taken some money abroad violating the laws in Fiji. This evidence had not been challenged. The 2<sup>nd</sup> appellant did not give evidence to counter his position nor call any witnesses. The learned Judge made reference to these amounts to show the conduct of the 2<sup>nd</sup> appellant.

Previously too we have seen various other acts done by the 2<sup>nd</sup> appellant including the misrepresentations made and falsehood uttered. It is not necessary to bring documents. Witnesses are entitled to give evidence of what they see and hear.

### **False Declarations**

- [36] Ground No 22 relates to a comment made by the learned Judge with regard to a false declaration made by the 2<sup>nd</sup> appellant. In a declaration made on 21 August 2014 the 2<sup>nd</sup> appellant has declared the value of the 3<sup>rd</sup> appellant company as \$500,000.00. The learned Judge made a comparison of this declaration with the valuation (PEx 1) done on the estate. According to this valuation an extent of 6.36 acres were valued at \$2,226,000.00. The learned Judge had also considered the approximate value given by PW 1 for the whole estate as \$5,000,000.00. It is in this context that the learned Judge referred to the declaration made by the 2<sup>nd</sup> appellant as a false declaration.
- [37] The disparity between these figures was highlighted to show the conduct of the 2<sup>nd</sup> appellant. Therefore I am of the view that this ground fails to make an impact on the decision of this court.

### **Failure to give evidence**

- [38] The learned counsel for the respondent made a point with regard to the appellants' failure to give or call evidence (Jones v Dunkel (1959) 101 CLR 298, FAI Insurance (Fiji) Limited v Prasad's Nationwide Transport Express Courier Limited [2008] FJCA 101. Although an attempt was made by the learned counsel for the appellant to show lapses on the part of the respondent's case, chose to keep his arms folded and mouth shut when it came to his turn. Evidence relating to the failure to renew the lease for the benefit of the beneficiaries, forming a company to obtain the lease for a company (3<sup>rd</sup> appellant) shares of which were owned by the 2<sup>nd</sup> appellant and his wife, misrepresentations made to the Lands Department to get the lease for the company and to take refuge under the company, selling part of the estate to "West Mall" super market and Vodafone and not



disclosing the income received and not sharing the income with the beneficiaries, not accounting the income from cane cultivation, taking currency abroad and violating regulations and not distributing the estate as per the last will of the deceased are some of the matters that the 2<sup>nd</sup> appellant could have adduced evidence on. Instead the 2<sup>nd</sup> appellant and the surviving 1<sup>st</sup> appellant chose not to give evidence and/or call evidence. There were 21 documents apart from oral evidence adduced for the respondent.

**Failure to take steps in respect of the deceased 1<sup>st</sup> party of the 1<sup>st</sup> appellants**

- [39] Of the grounds of appeal, No 17 is concerning the failure to substitute in place of the 1<sup>st</sup> party 1<sup>st</sup> appellant. The 1<sup>st</sup> party of the 1<sup>st</sup> defendants died intestate on 15 April 2010. The learned counsel for the appellant at page 10 of his submissions stated as follows:-“The findings of the learned trial Judge affects her interest but her share in the estate of Pritam Singh is not determined; She has been included as a party to the action and severally liable by the findings of the trial Judge rather than her estate. The learned counsel does not elaborate his submissions and does not state the result of pronouncing the judgment while no steps for substitution were taken.
- [40] The learned counsel for the respondent submitted that even if no steps were taken, it does not have an impact on the judgment against the other defendants (appellants). Death appears to have occurred long before the commencement of the trial although no steps were taken for substitution. The deceased 1<sup>st</sup> party was one of the executors of the “will” to whom probate was issued. However in this case there were two parties appointed as executors. The death of one party therefore did not seriously affect the appointment or the administration. The inheritance will automatically accrue to the heirs. But that will have no impact on the case itself. Therefore even if at the time of pronouncing the judgment steps were not taken for substitution it will not make any difference to the judgment. I find that this appeal was filed without making any amendment to the caption. The learned counsel for the appellant while making a ground of appeal (ground No. 17) with regard to the failure to make substitution thought it not fit to change the caption to make aware that

the 1<sup>st</sup> party of the 1<sup>st</sup> appellant is deceased which does not assist the Appellant in pursuing this ground.

- [41] For the aforesaid reasons I am of the view that this appeal is without merit and should be dismissed with costs in a sum of \$7500.00 payable by the 2<sup>nd</sup> party 1<sup>st</sup> appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants in equal sums (one party to pay \$2500.00) to the respondent.

**Almeida Guneratne JA**

- [42] I agree with Justice Basnayake's judgment that the appeal be dismissed.

**Orders of the Court are:**

*Appeal dismissed with costs in a sum of \$7,500.00 to the respondent by the 2<sup>nd</sup> party 1<sup>st</sup> appellant and 2<sup>nd</sup> and 3<sup>rd</sup> appellants.*



Hon. Justice S. Chandra  
**JUSTICE OF APPEAL**

Hon. Justice E. Basnayake  
**JUSTICE OF APPEAL**

Hon. Justice Almeida Guneratne  
**JUSTICE OF APPEAL**