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IN THE PRIVY COUNCIL

No. 4 of 1972

---

ON APPEAL  
FROM THE FIJI COURT OF APPEAL

---

B E T W E E N :

JAMES SUBBAIYA                      Appellant

- and -

PAUL NAGAIYA                      Respondent

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RECORD OF PROCEEDINGS

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UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
28 MAY 1974  
25 RUSSELL SQUARE  
LONDON W.C.1

CHARLES RUSSELL & Co.,  
Hale Court,  
Lincoln's Inn,  
LONDON WC2A 3UL.

Solicitors for the  
Appellant

MESSRS. WILSON FREEMAN,  
6/8 Westminster Palace  
Gardens,  
Artillery Row,  
Victoria Street,  
LONDON SW1P 1RL

Solicitors for the  
Respondent

(i)

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ON APPEAL  
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B E T W E E N :

JAMES SUBBAIYA                      Appellant

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RECORD OF PROCEEDINGS

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INDEX OF REFERENCE

Number	Description of Document	Date	Page
	<u>In the Supreme Court of Fiji</u>		
1.	Writ of Summons	22nd Feb. 1968	1
2.	Statement of Claim	17th May 1968	2
3.	Statement of Defence and Counterclaim	23rd May 1968	4
4.	Reply and Defence to Counter- claim	4th Feb. 1969	6
	<u>Plaintiff's Evidence</u>		
5.	James Subbaiya	4th Feb. 1969	7
6.	Meli Loganimoce	4th Feb. 1969	18
7.	Ram Rattan	4th Feb. 1969	20
8.	<u>Proceedings</u>	4th Feb. 1969	23

(ii)

Number	Description of Document	Date	Page
	<u>Defence evidence</u>		
9.	Paul Nagaiya	4th Feb. 1969	23
10.	Shiu Prasad	5th Feb. 1969	31
11.	Marayan Sami	5th Feb. 1969	33
12.	Judgment	27th March 1969	35
13.	Order	27th March 1969	42
	<u>IN THE FIJI COURT OF APPEAL</u>		
14.	Notice and Grounds of Appeal	20th August 1969	44
15.	Additional Grounds of Appeal	22nd October 1969	46
16.	Judgment of Gould, V.P.	7th November 1969	47
17.	Judgment of Marsack, J.A.	7th November 1969	53
18.	Judgment of Hutchison J.A.	7th November 1969	58
19.	Order on Judgment	7th November 1969	59
20.	Order granting final leave to appeal to the Privy Council	14th September 1971	60

EXHIBITS

Number	Description of Document	Date	Page
"1"	Certificate of title No.11689	12th March 1965	61
"2"	Certificate of title No.11690	12th March 1965	62
"3"	Sale and purchase agreement	13th November 1939	64
"4"	Bundle of receipts		68-75
"5"	Marriage Certificate of Respondent		76-77

(iii)

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date
<u>In the Supreme Court of Fiji</u> Proceedings	5th February 1969

IN THE PRIVY COUNCIL

No. 4 of 1972

ON APPEAL  
FROM THE FIJI COURT OF APPEAL

B E T W E E N :

JAMES SUBBAIYA Appellant

- and -

PAUL NAGAIYA Respondent

RECORD OF PROCEEDINGS

NO. 1

In the Supreme  
Court of Fiji

No. 1

WRIT OF SUMMONS

Writ of  
Summons

22nd February  
1968

IN THE SUPREME COURT OF FIJI

No. 30 of 1968

BETWEEN:

JAMES SUBBAIYA s/o  
Pedwaru Venkat Sami  
Plaintiff

A N D :

PAUL NAGAIYA s/o  
Pedwaru Venkat Sami  
Defendant

ELIZABETH II, by the Grace of God of the  
United Kingdom of Great Britain and  
Northern Ireland and of Her other Realms  
and Territories Queen, Head of the  
Commonwealth, Defender of Faith.

To PAUL NAGAIYA s/o Pedwaru Venkat Sami  
of Levuka in the Colony of Fiji,  
Businessman.

WE COMMAND YOU, That within eight days after the  
service of this Writ on you inclusive of the day  
of such service you do cause an appearance to be  
entered for you in an action at the suit of JAMES  
SUBBAIYA s/o Pedwaru Venkat Sami of Levuka in the  
Colony of Fiji, Business man and take notice that  
in default of your so doing the plaintiff may  
proceed therein, and judgment may be given in your  
absence.

In the Supreme Court of Fiji

No. 1

Writ of Summons

22nd February 1968

continued

WITNESS the Honourable CLIFFORD JAMES HAMMETT Chief Justice of our Supreme Court, at Suva, this 22nd day of February, 1968.

(L.S.)

R A M R A K H A S

Per: (Sgd.) K.O. Ramrakha Solicitors for the Plaintiff.

N.B. This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards. 10

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the Supreme Court Registry at Suva.

GENERAL ENDORSEMENT OF CLAIM

The Plaintiffs claim is against the defendant for a declaration that land known as Lot 2 on Deposited Plan number 2908 situate in the province of Ovalau in the Colony of Fiji and being the whole of the land comprised in Certificate of Title Number 11690 is communal family property and the defendant holds the same as trustee nominee or agent of the plaintiff AND for an injunction to restrain the defendant his servants or agents from interfering with the occupation of the plaintiff with such property. AND DAMAGES AND COSTS. 20

No. 2

Statement of Claim

17th May 1968

No. 2

STATEMENT OF CLAIM

IN THE SUPREME COURT OF FIJI No. 30 of 1968

B E T W E E N : JAMES SUBBAIYA s/o Pedwaru Venkat Sami PLAINTIFF

A N D: PAUL NAGAIYA s/o Pedwaru Venkat Sami DEFENDANT

30

STATEMENT OF CLAIMIn the Supreme  
Court of FijiNo. 2Statement of  
Claim

17th May 1968

continued

1. The plaintiff, and the defendant, are both brothers and reside at Levuka, Ovalau in the Colony of Fiji.

10 2. Since about the year 1939, the plaintiff and the defendant lived communally until recently, and defendant purchased in his own name land comprised and described in Certificate of Title Volume 54 Folio 5387 containing 38 perches more or less and situate in the Town of Levuka in the Colony of Fiji but despite such purchase the defendant knew and understood, and did in fact purchase the said property either as nominee for himself, his parents, and other immediate members of his family, or as their agent or trustees.

20 3. Situate on the property at the time of the purchase was a wood and iron dwelling house which house was thereafter substantially improved by family labour and funds and the plaintiff himself has contributed to the said improvements.

4. The parents of the parties hereto died in 1963 and 1965 respectively, and the said land was thereafter divided into two blocks one of them being Lot 1 on Deposited Plan 2908 comprising 7.46 perches and being the whole of the land comprised in certificate of title number 11689.

30 5. The defendant has at all times until recently, and after the death of his parents, freely acknowledged that the said property described in paragraph 2 hereof was joint family property, but now seeks to eject the plaintiff.

6. The plaintiff presently lives in the said property on the said basis, and has never paid rent to the defendant in respect of the same.

WHEREFORE the Plaintiff claims :-

(a) A declaration that the property mentioned in paragraph 2 hereof, and any subsequent subdivisions thereof is joint family property and for consequential relief.

40 (b) An Injunction to restrain the defendant, his servants or agents, or any person claiming by

In the Supreme Court of Fiji

No. 2

Statement of Claim

17th May 1968

continued

through or under him from ejecting or interfering with the plaintiff's quiet use and enjoyment in respect of the said premises.

(c) Costs.

DELIVERED this 17th day of May, 1968.

R A M R A K H A S

Per: (Sgd.) K.C. Ramrakha

Solicitors for the Plaintiff

No. 3

Statement of Defence and Counterclaim

23rd May 1968

No. 3

STATEMENT OF DEFENCE AND COUNTERCLAIM

10

IN THE SUPREME COURT OF FIJI

No. 30 of 1968

BETWEEN:

JAMES SUBBAIYA s/o  
Pedwaru Venkat Sami

PLAINTIFF

A N D :

PAUL NAGAIYA s/o  
Pedwaru Venkat Sami

DEFENDANT

STATEMENT OF DEFENCE

1. The defendant admits paragraph one of the Statement of Claim.

2. The defendant denies paragraph 2 and every part thereof of the Statement of Claim: the defendant says that he did purchase for himself Certificate of Title Vol. 54 Folio 5387 ("C.T. 54 Folio 5387") together with a dwelling house thereon ("Dwelling house") and is the beneficial owner thereof; that the plaintiff or any one on the plaintiff's behalf has no right, title or interest and never had any right title or interest in the said C.T. 54 Folio 5387.

20

3. The defendant denies paragraph three and every part thereof of the Statement of Claim.

30

4. The defendant admits paragraph 4 of the Statement



of Claim but says that the death of the defendant's parent has no connection with the subdivision of C.T. 54 Folio 5387.

In the Supreme Court of Fiji

No. 3

Statement of Defence and Counterclaim

23rd May 1968

continued

5. The defendant denies paragraph 5 and every part thereof of the Statement of Claim but admits that he is praying to the Court that the plaintiff be evicted from the said "C.T.54 Folio 5387" And "the said dwelling house".

10

6. The defendant denies paragraph six and every part thereof of the Statement of Claim but admits that the plaintiff has refused to pay rent to the defendant despite repeated demands for same.

7. The defendant therefore prays that the plaintiff's claim be dismissed with costs to the defendant.

COUNTER-CLAIM

1. The defendant repeats paragraph one to six both inclusive of the Statement of Defence herein.

20

2. The defendant says that he permitted the plaintiff and some other members of the defendant's family to occupy a part of the "said dwelling house" free of rent on certain terms and conditions. The defendant further says that in 1965 the defendant demanded that the plaintiff do vacate the part of the said "dwelling house" occupied by him the plaintiff. That the plaintiff has refused and still refuses to leave.

30

3. The defendant says that the part of the "dwelling house" occupied by the plaintiff could be rented out at a monthly rental of £10.0.0 per month.

4. The defendant says that the plaintiff has no right or interest in the said C.T. 54 Folio 5387, and or to the said "dwelling house".

WHEREFORE the defendant prays :

(a) Vacant possession of the part of the "dwelling house" occupied by the plaintiff.

(b) A Declaration that the plaintiff's right to use the defendant's said land "C.T. 54 Folio 5387" or any part thereof or the

40

In the Supreme Court of Fiji

No. 3

Statement of Defence and Counterclaim

23rd May 1968 continued

"dwelling house" or any part thereof has been determined.

- (c) An injunction restraining the plaintiff by himself his servant or agent from using, occupying or otherwise dealing with "C.T. 54 Folio 5387" or any part thereof AND the said "dwelling house" or any part thereof.
- (d) Mesne Profits.
- (e) General Damages.

D A T E D this 23rd day of May, 1968.

10

SHERANI & CO.

Per: F.M.K. Sherani

Solicitors for the Defendant

To the above named plaintiff and/or to his solicitors Messrs. Ramrakhas, Marks Street, Suva.

No. 4

Reply and Defence to Counterclaim

4th February 1969

No. 4

REPLY AND DEFENCE TO COUNTERCLAIM

IN THE SUPREME COURT OF FIJI

No. 30 of 1968

BETWEEN: JAMES SUBBAIYA s/o  
Pedwaru Venkat Sami

PLAINTIFF

20

A N D : PAUL NAGAIYA s/o  
Pedwaru Venkat Sami

DEFENDANT

REPLY

1. The plaintiff joins issue with the defendant on his defence except insofar as the same consists of admissions.

DEFENCE TO COUNTERCLAIM

2. In answer to paragraph 2 of the Counterclaim the plaintiff says that he occupies the house in question because he has an interest in it, and it is a family home.

30

3. The plaintiff admits in answer to paragraph 3 of the Counterclaim that the premises can be rented out, but does not know what rent it would fetch.

4. The plaintiff denies in answer to paragraph 4 of the Counterclaim that he has no right or interest in the house.

DELIVERED this 4th day of February, 1969.

R A M R A K H A S

Per: K.C. Ramrakha

This Reply and Defence to counterclaim is delivered by RAMRAKHAS the solicitors for the Plaintiff.

In the Supreme  
Court of Fiji

No. 4

Reply and  
Defence to  
Counterclaim

4th February  
1969

continued

No. 5

Plaintiff's Evidence

JAMES SUBBAIYA

P.W.1. JAMES SUBBAIYA s/o Pedwaru Venkat Sami, Hindu, sworn on Ramayan, states (Hindu interpretation): I live at Levuka. I am a bus proprietor.

I am 54 years old, not 54 but 48. The Defendant is my brother. I had 5 brothers and 3 sisters. The Defendant is the eldest.

In an Indian family the eldest brother is in charge of all the things in the house.

In 1939 property was bought. At that time both my parents were alive. My mother died 3 years ago and my father 4 years ago.

When the land was purchased there was a house on it. There was store premises in the front and two bedrooms.

In 1939 I was attending school. The Defendant was employed in the P.W.D. I think that he was earning sh. 5/- per week at that time.

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Examination  
4th February  
1969

In the Supreme  
Court of Fiji

          
No. 5

Plaintiff's  
Evidence

James Subbaiya  
Examination  
4th February  
1969

continued

My mother gave the money to the Defendant to purchase the property. He did so. My parents were illiterate.

My eldest sister, Ram Rattan's wife gave the money to the Defendant to buy the property.

The Defendant bought it for all the brothers. He bought it in his own name. He said that it would be for the benefit of the brothers. My mother said in his presence that it was to be bought for her sons as the daughters would be married. The Defendant said that the house belonged to all the brothers.

10

The Defendant had no money of his own to buy the property. My father provided the money. Ram Rattan's wife kept the money. Ram Rattan was living with us; at that time he was not married to my sister. He married her later. Ram Rattan was not living with us at that time. My eldest sister was; her name is Nagamma. She got married 5-6 years after the property was bought.

20

We started to live on that property 4-5 months after its purchase. We closed the shop and altered the building into bedrooms. My brothers, Ram Krishna and Sangaiya, and I paid for the alterations. They were made after the big hurricane; I cannot remember the date. It was the biggest hurricane. I cannot remember how long it was after the purchase.

The building was damaged by the hurricane. The roof was blown off. We repaired the building. I was working then, driving my own taxi.

30

Before the hurricane damaged the building no alterations were made to it.

While my parents were alive there was no trouble about the property.

After his marriage Ram Rattan stayed with us. He came to us before the marriage. He was driving my father's car. He stayed with us. Then he married my sister. He was not in Levuka when the property was purchased.

While my parents were alive, the Defendant never said that the property was his and no one else had an interest in it. Since their deaths he has

40

done so. He wants me to leave the place.

The land has been divided into two blocks.  
Exhibit "1" and "2" are the two titles.

I have stayed in the same house throughout. All of us stayed there. The Defendant lived in another house for the last 20-25 years, at my guess. He stays now in the same house in which I am staying. He has repaired that house and made it into two flats. I live in one; he lives in the other. He has let the other house in which he was living. That house is on land which belongs to him alone.

Our land is divided into two blocks. On one is the old house. It is now two flats. Since the repairs after the hurricane I have not done any repairs. I have put in a sink.

There were two big hurricanes. The one I am referring to is the first one.

The land is in two blocks. I have used gravel and sand to fill it as it was sea-side before. I used my own truck. I bought gravel and sand back from the job I was doing in Levuka. I employed four labourers, Meli, Alusio, Taniela and other man, a Fijian, whom I do not know. An Indian named Narayan worked for one month and then got ill and left. The work of filling that block took 5-10 loads, every afternoon for three months. If I had charged for the work it would have cost not less than £800. Since I filled it a concrete building used for Levuka Club was put up on that land. The Defendant built it with his money. He has since sold it to the members of the club. He paid me nothing for the work I did.

When I was doing the filling, it was because the Defendant told me to do so. I paid the labourers and used my own trucks. The Defendant has a taxi business. I run Ovalau Better Bus Co. I have three buses. There is no other bus service on the island. The business belongs to my brothers, Ram Krishna and Sangaiya, and myself.

The Defendant first asked me to leave the house one year after my mother died. He said that the property belonged to him and he wanted to clear the house. We had no trouble before. I still have no trouble with him. We talk.

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Examination  
4th February  
1969

continued

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Examination  
4th February  
1969

continued

Cross-  
Examination

I claim that the land on which I stay is family property and that the Defendant cannot put me out.

Cross Examined by Sherani

I am 48, not 54. I made a mistake. I have five brothers, Paul, Ram Krishna, Sangaiya, James Venkataiya and myself. We are five including myself. My sisters are Nanki, Devi and Nagamma.

When the property was purchased all the brothers and sisters were alive. Ram Krishna is the youngest. He is now about 28-29 years old. The youngest sister, Devi is about 30. 10

In 1939 none of my brothers and sisters, other than the Defendant, was married.

One brother, Chinsami, has been living separate and apart for a long time. He is my brother but was given as a child to someone else to bring up. He was not in the house when the property was purchased.

My mother said that the property belonged to all the brothers. I am claiming that it does so, that it belongs to the sons but not the sisters. I told my counsel that it was a family house. I thought that that meant that it belonged to the brothers. I did not know that family meant brothers and sisters. I do not speak English well. I thought family meant brothers but not sisters. Indians commonly use the English word "family". I agree that that is so. I went to school for three years. I have been a taxi-driver and a bus-driver. I am now the owner and do not drive except on occasions. 20

Q. When the word "Family" is used, do you understand it to exclude the females? 30

A. Yes.

I have a family, one son and one daughter.

(Sherani: I wish interpreter to say whether he used the word "family".

Interpreter: Yes, I did.)

My wife is my wife, not my family.

I am bringing this action on behalf of all my

brothers and not for myself alone. It is a representative action on behalf of all of us. The four of us all agreed to bring it. We discussed it and then we agreed that I should issue the writ. I have instituted this action in a representative capacity with their consent.

(Sherani: I mention that I shall be taking this point of law that action is invalid as writ not endorsed that it is a representative action. It might be better if it were agreed now.

Ramrakha: I do not consent to it in the middle of testimony of this witness. Questions framed in legal manner. Whether witness appreciates that he is agreeing to this matter of law is another matter.

Court: Evidence will continue to be taken.)

While my father was alive, he was the head of the family. After our marriage he did not direct us; we were separate. He did not direct any brother after he got married. The brother ran his own life. My father could have interfered but he did not. After marriage each brother maintained his own family and ran it as he liked. Matters were referred to my father and mother. My father gave advice and guidance. I do not know whether he could or could not have directed us but he did not. I am sure of that.

The next brother to get married after the Defendant was Changaiya. He got married 8 years ago. That was his first marriage. I also married eight years ago. James Venkataiya is not married yet. Ram Krishna is not married legally; he is keeping a de facto wife.

I have at home the date my father died. I cannot remember it.

I was very young when the Defendant got married; it was roughly 35 years ago. I was not very young.

In 1939 the Defendant was not married. He was married after the property was purchased. I am sure. He got married about 4-5 months after the property was bought. I do not think that he was married in 1938.

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Cross-  
Examination  
4th February,  
1969

continued

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Cross-  
Examination

4th February  
1969

continued

In 1939 my father was an active man, a fisherman. He was intelligent. He carried on a fishing business. He was the head of the family then.

Q. If the Defendant was married when the property was bought, would your father refrain from intervening in his affairs?

A. Yes.

In 1939 my father controlled my mother. I had left school at that time. I was going to school when the property was purchased. I left some time later. Only Ram Krishna of my brothers was attending school at that time. James Venkataiya was working as a cook in a hotel. He was driving a car at that time before he was a cook. Sangaiya wanted to go overseas. He came to Suva and after 3-4 months returned home. He was at home when the property was purchased. He was not going to school; he used to go fishing with my father. 10

My father earned £2 - £2.10.0. per day. It is not correct that he went only occasionally and made that every week. He went daily. The Defendant may have been earning sh. 9/- per day. Labourer's wages were then sh. 2/- a day. 20

My father knew that my mother had given the Defendant the money to buy the house. He was there when my mother said that it was for all the sons. The amount was £250. My sister counted it. I saw it. There were some notes and some silver. They were counted every month. Before it was given to the Defendant, only my sister and I were there with my mother and father when it was counted. My sister was most clever and counted it. 30

She did not give the whole amount to the Defendant, only part of it. Some was given, not all £250. It is not true that all £250 was given. I was not very smart at that time. I did not know how much was handed over. I do not know how much was counted. There was £250 there altogether that was counted. It was exactly £250.

I have no idea how much of it was handed to the Defendant. I did not hear how much it was. No one said how much it was. My mother never mentioned the amount to me, nor did anyone else. Notes and 40



silver were handed over to the Defendant. My sister retained mostly silver but also some notes. I did not hear anyone say how much was paid for the property. I do not know now how much was paid. No one has ever mentioned the amount.

A few months after the purchase the family moved in. We were not living in it before it was purchased. There were two other houses on that property.

10 (11 a.m. Adjournment)

(11.15 a.m. Hearing resumed.  
Both Counsel present)

Before the purchase of that property we were renting a house next door to that property, all the family including the Defendant. I do not know the rent. My father used to pay it.

20 My father had no property. The property was intended for the brothers, my father and my money. When my mother gave the money we expected the property to be in the names of my father and my brothers. For some time thereafter I believed that was in all the names.

(Ramrakha: Submit confusing way question put.

Court: Quite clear.)

30 When the property was purchased my parents said that it was to be bought for all the brothers. When it was bought I thought that all our names were in the title. I found out that not all our names were in the title at the time when the Defendant told us to vacate the house. That was when he sent a letter to us through his solicitors, Messrs. Sherani & Co. We were told either to purchase the house or vacat it. That was in 1967. I did not reply to that letter. I then received a second letter giving us notice to vacate. I did not reply to that. I told my solicitors. I did not reply but I instructed my solicitors.

40 It was in May, 1967, that I first learned that the property was not in all our names. That letter conveyed it to me. Before that the Defendant had told us to vacate the house. I

In the Supreme  
Court of Fiji

\_\_\_\_\_  
No. 5

Plaintiff's  
Evidence

James Subbaiya  
Cross-  
Examination  
4th February  
1969

continued

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya

Cross-

Examination

4th February  
1969

continued

inquired from the Defendant and he told me that the title was in his name.

In 1939 the Defendant was working and got wages. He started work in 1930 as an apprentice at sh.10/- per week. I know that he gave the money to my mother as she controlled the household affairs. He kept sh.1/- - 2/- for his pocket expenses.

The first hurricane may have been in 1941. That was the only occasion on which repairs were effected; heavy repairs were carried out. Later on I put in a sink and repaired the floor. Once a lorry bumped the side wall; that was repaired; it was repainted. 10

Changaiya, Ram Krishna and I paid for the repair of the hurricane damage. We repaired it. The Defendant contributed nothing by way of money or labour. He was a skilled carpenter. He took no part in carrying out the repairs. He was busy all the time in his studio; so no one asked him. He was running a photo-studio.

When the hurricane came, I was a hawker with a licence. I also had a taxi, my own. It was an 8 passenger van. I bought the car and registered it in the name of James but it was my car and James accounted to me in respect of the business. I kept the profits and paid the expenses. The business of hawker was my own. It was a long time ago. I think that it was during the war. 20

From my hawker's business and selling jewellery, I used to make £400-£500 in one month. It was wartime, I kept on with that hawking business for five months. 30

The car was a Chevrolet van.

My father had a car, a Plymouth. It was a taxi, in my father's name. That was at the time that Ram Rattan married my sister. My father still did fishing. The car was second-hand, bought in Lautoka. Part of the purchase price was secured by a bill of sale. My father executed it. It was before the war, after the property was purchased, 3-4 months afterwards. I do not know the amount of the deposit he paid. The price was about £450, he said. 40

When the land was being divided into two blocks,

the Defendant did it without my consent. I did not approve of it; he did not ask us. I did not know that it was being sub-divided. I found out when the building was erected on it, the one sold to Levuka Club. Our house is not on that block.

I know that the Levuka Club building has been sold. I am a member. I want the house; at the moment I am not concerned about the club. That is so with all the other brothers.

10 The filling was done with waste brought from a project in Levuka. Our land was about  $\frac{3}{4}$  miles away from that project. A lot of people were interested in getting that waste. It is not true that very little filling was carried out. Their wages were paid by the transport business owned by us three brothers. They were not paid by the Japanese company.

20 The bus service originally belonged to me. I purchased it about 25 years ago with my own money. No one else had a share in it. I did not sell shares to my brothers. I gave them to them as a gift. I gave them to those two brothers because they had been working with me. The others worked elsewhere.

30 It is not true that the property was purchased by the Defendant with his own money for himself. I do not believe that he paid £30 borrowed from his father-in-law or that he paid £4 per month thereafter to clear the debt. He may have paid monthly but he may have borrowed it from someone else. He took it from my parents.

It is not true that, when the property was built, the family was living in that house.

My father went out fishing every day at that time.

It is not true that the Defendant contributed towards the living expenses of the family because my father's income was insufficient. It was a big income then.

40 My parents had that money, £250 in the house.

I started work first as a labourer for the

In the Supreme  
Court of Fiji

—  
No. 5

Plaintiff's  
Evidence

James Subbaiya  
Cross-  
Examination  
4th February  
1969

continued

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Cross-  
Examination  
4th February  
1969

continued

P.W.D. at £2.10.0. a week but that was only for 2 weeks. That was before the start of the war. I was a carpenter, not a labourer. I had had training as a carpenter. I learned it at school. I do not know the year. It was after the purchase of the house about 10 years. That was my first job. That was my first employment. I had previously had the hawker's business. I had only the hawker's business. The next source of income was work for the P.W.D. I worked for 2 weeks. Then I left and resumed my hawker's business. My brother-in-law was running the business on my behalf. At that time my income was not about £400 a month. That was a month later. I made £400 nett for 4-5 months. The money was not all profit. It included expenses. If I invested £100 I made £300. I made £300 profit a month for 4-5 months. It was after I left the job with the P.W.D. It was about 3 weeks after I left that job. 10

It is not true that the Defendant left the house in 1949 because another brother and I used to get drunk all the time. He lived in Government quarters. That was for six months. Then his building was ready and he moved into it. I do not remember the year. 20

After the purchase of the property the other two houses on it were rotten and condemned. I did not see tenants in them.

Q. I put it to you that the Defendant collected rent from tenants of them up to 1956? 30

A. I did not see them.

Q. I put it to you that the repairs were affected after the second hurricane in 1952?

A. No after the first hurricane.

The Defendant did not tell us to repair it because we lived in it rent-free. The repairs cost £850. My parents asked us to do them.

It is not true that the value of the filling was only £30-£40.

On 24/5/67 I was living in that house. So was James Venkataiya. Ram Krishna was there but left; 40

before he received the notice he was told by the Defendant to leave and did so.

I do not know Parshu Ram. I did not negotiate with him that I should buy that property.

10 In February, 1968, Shiu Prasad was working on the property, carrying out repairs, I stopped him from working because my belongings were in the house. I did not come to Suva then. I did not tell him, "Stop working; I am going to buy this property". I did tell him that I was going to Suva to see my solicitor but not that on my return I would pay the Defendant off. I came to Suva after a week. On my return Shiu Prasad was working. I did not tell him that the Defendant wanted £900 and I could not get that such together.

20 Narayan Sami was employed by the Japanese people, but only for one month. He was my labourer. He used to work for the Japanese people. His father is Permal. He lived in our house while my mother was alive but only on Saturdays and Sundays. I know him well. He lived there some of the time when my father was alive. He and Shiu Prasad are not on bad terms with me.

30 I did not discuss with Narayan Sami the purchase of the property by my brothers and myself. I did not ask him to go and see the Defendant and ask if he would sell the house. He did not come and say that the Defendant wanted £900. I did not say that I could afford only £600. I did not say that I should look for another house and move away.

I know Naidu. He has flats in Borudamu. I did not engage a flat there for 2 months.

I am not trespassing in the house.

The part of the house which I occupy has a rental value of about £6 a month. It is an old house and rotten.

Re-examined

40 We did the repairs to the house after the hurricane before the war. It was about 15 years ago.

In the Supreme Court of Fiji

No. 5

Plaintiff's Evidence

James Subbaiya  
Cross-  
Examination  
4th February  
1969

continued

Re-examined

In the Supreme  
Court of Fiji

No. 5

Plaintiff's  
Evidence

James Subbaiya  
Re-examination  
4th February  
1969

continued

I made a very large profit out of the hawking business. I kept the money in the bank. I bought a lorry with it and started my bus business. My brothers had no share in the hawking business.

I know what a representative action is. No. I do not know.

I am claiming an interest for all the brothers, including myself.

I have had no written note from Ram Krishna or Changaiya or James Venkataiya about this action. 10  
Changaiya had been to Mr. Ramrakha's office before this action was commenced. Neither of the other two came.

I got the waste material partly from the Japanese people and partly from Bureta. The Defendant asked me to cart it and unload it there. The Japanese did not ask me to take that waste material away. Those four Fijians loaded the truck and unloaded it. I paid their wages; the Japanese did not. Sometimes 6-7 trips were made, sometimes 9, 20  
sometimes 10. That was in the evening after the work for the Japanese was finished. I was carting gravel for the Japanese during the day.

(Sgd.) I.R. Thompson

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No. 6

MELI LOGANIMOCE

No. 6

Meli Loganimoce  
Examination  
4th February  
1969

P.W.2 MELI LOGANIMOCE, Christian, sworn on Bible, states (Fijian interpretation):

I live at Bureta, Levuka. I am a villager. I sometimes do labouring work. 30

I know where the Plaintiff stays and the place where Levuka Club stands. I did filling work there. We made some blocks. Before we built the house we made the foundations by filling soil. Four of us, myself, Alusio, Danieli and an Indian named Narayan, did the work. Narayan worked for one month then

became ill. He was replaced by Walasi, a Fijian.

10 We got the filling from the Japanese, about 2 chains away. The gravel was by the boundary of the Japanese land. We carted it in a truck. We travelled not very far before unloading it. I cannot measure the distance well. It was as from here to the beach beyond the hotel opposite. We did that work sometimes at night from 9 p.m. or 10 p.m. It was after we had finished our usual work. In the daytime the Plaintiff used to employ us to cart gravel for the Japanese from a village to the Japanese land. When we had finished that work we did the carting and filling for the Plaintiff. Sometimes we finished at 10 p.m., sometimes at 11 p.m. It took about 2 hours. That work continued every day for about six months. The Plaintiff paid our wages.

20 After I had finished working for the Plaintiff I did work for the Defendant. We made some blocks. We worked for him for only about 2 weeks.

Cross-Examination by Sherani

I was the Plaintiff's lorry-boy. I was paid wages on a daily basis. In the evenings when we were free I helped out doing this work for him.

Q. Your wages were for the day-time.  
You were only helping out at night?

A. Yes.

Q. You were not paid for the night work?

A. I was paid.

30 I cannot remember how much I was paid. I was paid weekly. I did not get the same amount at the end of every week. Some weeks I got more; some weeks I got less. When I got less it was because I had been absent at work for one day.

I did not get more wages for helping out at night. It did not go on every night, only some nights. We did not work on Saturday and Sunday nights.

40 We got the filling only from that one place over the fence.

In the Supreme  
Court of Fiji

\_\_\_\_\_  
No. 6

Plaintiff's  
Evidence

Meli Loganimoce  
Examination  
4th February  
1969

continued

Cross-  
Examination

In the Supreme  
Court of Fiji

No. 6

Plaintiff's  
Evidence

Meli Loganimoce  
Re-examination  
4th February  
1969

continued

Re-examined

I do not know the name of the place where we got the filling. The Japanese own it. It is quite a big place. It is part of Levuka, a suburb. Its size is from here to the hotel and then round Government Buildings.

I know what overtime is. The Plaintiff was paying us overtime. We started work at 8 a.m. and usually knocked off at 5 p.m.

(Sgd.) I.R. Thompson

10

(12.55 p.m. Adjournment.  
2.15 p.m. Hearing resumed.  
Both Counsel present.)

No. 7

Plaintiff's  
Evidence

Ram Rattan  
Examination  
4th February  
1969

No. 7

RAM RATTAN

P.W.3. RAM RATTAN s/o Gudri, Hindu, sworn on Ramayan, states (Hindi interpretation):

I live at 75 Suva Street, Toorak. I am a driver. I am married to Nagamma, the Plaintiff's eldest sister. I lived on their property at Levuka from 1939 for one year. I went back and married Nagamma in 1941 I think. I stayed there for 1-2 weeks. 20

I know the house about which they are having trouble now. There were 3-4 houses there then; I stayed in one of them.

I heard that the house had been purchased 1-2 years before. I do not know when the papers were made. I regarded it as belonging to my parents-in-law and my brother-in-law. They were living together as one family. There was no trouble. 30

My father-in-law used to fish and sell fish. He was making money, £1-£1.10.0. per day. He was fishing regularly, every day except Sunday. By the standards of those days he was well off in the eyes of people outside.



The property was damaged by hurricane, in 1952 or 1953 I think. The house was badly damaged. I went and saw it. I think that the Plaintiff and his brothers employed carpenters and repaired the house. I have never been a carpenter. The house was very old. It was almost renewed.

In the Supreme  
Court of Fiji

—  
No. 7

Plaintiff's  
Evidence

Ram Rattan  
Examination  
4th February  
1969

Trouble first arose between the brothers-in-law 4-5 years ago, before my parents-in-law died, but not this trouble.

10 When this trouble arose I tried to settle it. I suggested to the Defendant that there was no such trouble with his parents and he had a house of his own there was no trouble. I asked him to let them have the house for £200-£300. He said that he would not give it for that price as he had sons and daughters. I said that I would try to give him £800. He did not agree. I said that I would try to give £1,000. We had this discussion in Suva. He agreed to £1,000.

continued

20 When we went to Levuka the Defendant's sons and daughters did not agree to the price of £1,000.

In Fiji when a family buys property it is not usual to give the daughters a share. They are looked after until marriage. The daughters may be given a share, if it is put in writing.

Cross Examined by Sherani

Cross-  
Examination

30 That custom varies from man to man. Sometimes a father may give property to daughters only, sometimes only to sons. It all depends on what is in writing.

Income of £1-£1.10.- per day; living was cheap then; they lived in a house; I do not know to whom it belonged. I understood that it belonged to the parents and to the brothers.

40 In 1967 the Defendant began to have the house pulled down when the Plaintiff did not vacate it. The Plaintiff came to me and asked where they could go. I suggested settlement. I went to the Defendant who said that the Plaintiff and the others could buy the place where the Plaintiff was living. The Defendant asked for £800. I went to the Plaintiff. He agreed to buy for £800. I returned

In the Supreme  
Court of Fiji

          
No. 7

Plaintiff's  
Evidence

Ram Rattan  
Cross-  
Examination  
4th February  
1969

continued

and told the Defendant that the Plaintiff had agreed to buy the property for £800. The Defendant said that he did not want to sell then as he had one son and one daughter and he would give one house to one and one house to the other. I told the Defendant that he had changed and it was not a good thing. I went back and told the Plaintiff that the Defendant had refused to sell. The Plaintiff said that he would not get out of the house. He did not say that he would find out whether his father's money had been invested in the purchase of the house. He said that the money was invested.

10

On 28th February, 1968 I made a written statement to Mr. Sherani. It is the document now shown to me. I signed it. I cannot read English. I kept on telling how it happened. That statement was read back to me. When I signed it I put the date.

(Sherani reads from statement)

I am not saying that Mr. Sherani made up that point about finding out but I may not have understood what I was asked. I told Mr. Sherani, as I understand, that the Plaintiff said that his father's money was invested in the property. I cannot recollect whether I said that the Plaintiff said that he would find out. I could have said it. The Plaintiff may have said that.

20

The statement was made a year ago. My memory of those events was fresher then than now. I had no trouble with any of them. If I said that it must have been true. I am not saying that Mr. Sherani "cooked it up".

30

Mr. Sherani read the statement over to me. I cannot read English.

(Sgd) I.R. Thompson

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No. 8PROCEEDINGSIn the Supreme  
Court of FijiNo. 8Proceedings  
4th February  
1969RAMRAKHA: That is my case.SHERANI: I submit that the action is invalid.RAMRAKHA: Must elect.SHERANI: Submission on law, not on fact. I say  
action invalid under rules. No need to elect.10 COURT: What is the authority for that? I refer  
to Verrier v. D.P.W. (Fiji Court of Appeal) as  
case in which legal submission was made.SHERANI: I am merely repeating submission made  
earlier.COURT: You must elect, unless you can satisfy  
me on authorities that you have no need to do so.SHERANI: It is common-sense that it should be  
possible to raise a point of law at any stage.COURT: Not in interests of litigation to deal with  
various aspects of the defence piecemeal.SHERANI: I shall call the Defendant.

20

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No. 9PAUL NAGAIYANo. 9Defendant's  
EvidencePaul Nagaiya  
Examination  
4th February  
1969D.W.1. PAUL NAGAIYA s/o Pedwaru Venkat Sami, Hindu  
sworn on Ramayan, states (Hindi interpretation):30 I live at Levuka. I am a taxi-driver now. I  
am a retired civil servant. I am now over 55 years  
old. I joined the P.W.D. in 1930. My wages were  
sh.10/- per week as an apprentice. On 13th November,  
1939 I entered into the sale and purchase agreement  
(Exhibit "3"). My wages then were sh.9/- per day.  
I was a leading hand in the carpentry, road and

In the Supreme  
Court of Fiji

No. 9

Defendant's  
Evidence

Paul Nagaiya  
Examination  
4th February  
1969

bridges sections. I paid a deposit of £30. I agreed to the Certificate of Title now sub-divided into two Certificate of Titles, Exhibit "1" and "2".

I bought it £125. I paid £30 cash, which I borrowed from my father-in-law. There was interest of 7% on the balance. I paid £4 a month to clear that and the balance.

In 1939 my father was fishing. He could not have earned as much as £1 a day. There was not much business. I was contributing to household expenses. No other brother was working in 1939. 10

Before we bought the house we were living there paying rent. I paid it in my name. It was £2 per month. There were other houses on the land, 2 others. I collected rent from tenants of those houses for 2-3 years after 1939.

I never knew that there was £250 in that house. No money was handed to me to buy that property. There was no cash lying around in the house. Life was difficult. There were five brothers and four sisters in the house at that time. The fourth sister is Pappa. She is alive, married, in Levuka. There were eleven people in our family including my parents; I was married in 1938. We all lived in that house. I tender my marriage certificate (Exhibit "5"). 20

I continued to pay the instalment. Exhibit "4" contains some of the receipts I received for those payments.

I sub-divided the land in March, 1965. I got a surveyor, Lawrence Peterson, to make the survey. He did it in the day-time. He came there once. 30

I paid all the instalments myself with my own money. The account was paid off; I cannot remember when.

I lived in the house until 1949. I then moved from there into my own house which I had built. That was because my brothers had trouble with me all the time while they were drunk.

My father and mother stayed in the house. I did not support them after I moved. 40

My father died in 1952, I think. My mother died in 1965. My father died in 1962 or 1963, 2 years before my mother.

I went back to live in that house before my father died. I went there in 1963. I have been living there since. I occupy two rooms.

10 After I bought the house there was a hurricane but the house was not damaged. I have repaired the house, before 1968. My brothers did repairs; I did the labouring. My brothers repaired it between 1945 and 1947. I did not pay for the repairs they did. They were living there. I told them to repair it.

20 I gave notice in May, 1967, either to buy the house or vacate it. Ram Krishna left. I began to repair it in 1968. I employed Shiu Prasad. The cost of the repairs I did was more than £800. I have now converted the house into two flats. I occupy one; my two brothers occupy the other. That flat could fetch not less than £10 per month.

Before I gave the notice on 24th May, I had told the Plaintiff and the others on many occasions to leave my house.

I left the P.W.D. in 1964, with a pension.

I told Shiu Prasad that I would sell the house to my brothers if they requested. He came back and told me something.

30 There has been some filling on the land. It was waste material. The value of the work is about £20.

40 I did not intend to buy the property for anyone other than myself. There were rates and taxes levied on the property. The rates were paid to Levuka Town Board. The rates were levied in my name. I always paid myself. I built a new building on one of the blocks. I started it in 1964. I had to have plans approved by the Township Board. I came to Suva and got the plan approved. It was registered in my name. I let the building from 1st August, 1967 for £24 a month. I received that rent myself. My brothers have never asked me to account for that money.

In the Supreme  
Court of Fiji

No. 9

Defendant's  
Evidence

Paul Nagaiya  
Examination  
4th February  
1969

continued

In the Supreme  
Court of Fiji

No. 9

Defendant's  
Evidence

Paul Nagaiya  
Examination  
4th February  
1969

continued

Cross-  
Examination

When I left that house in 1949, I did not thereafter support my parents. I told the others that I was leaving the house free of rent for my parents to live in and that the others must support them.

I am asking that the Plaintiff be ordered to vacate the premises and that he pay mesne profits from the time he received notice, from the second notice in September, 1967; also for an injunction.

Cross Examined by Ramrakha

10

I asked the Plaintiff to repair the property in 1945. It was sinking. I got the plan and specifications made for repairing it. I did the repairing and told them to buy the materials. The materials cost roughly £300. Materials were quite cheap then. New concrete pile and new flooring was used. Property was dear in 1945.

I remember the hurricane in 1952. I was in the P.W.D. at Levuka. That house was not damaged. The Plaintiff and P.W.3 have given false evidence.

20

I asked the others to put £300 into the house. They were staying there. I did not regard it as the family's house but they were living there free. I was living there too at that time. We were not all using one kitchen. There were two kitchens. I made one with a lean-to roof for myself. We were all eating from one pot. We were cooking and eating together. We were not living as one family. We were never united.

I did not bring my wages home and give them to my parents. I was paying rent for the house. I bought groceries, not for everyone, just for myself. We were not cooking in one pot. I had a separate kitchen with a lean-to roof from 1942. We cooked and ate separately after that. I made a mistake earlier, a slip of the tongue.

30

We cooked separately because I was not on good terms with my brothers. I was on good terms with my parents. They used to eat usually with the brothers but sometimes with me.

40

I was the eldest in the house; I was head of the house if they regarded me as that. The custom of

the eldest son ruling the other sons has gone. My status in 1938 was just that of son of my parents.

I was born in 1913. I was renting the house in my own name for 4 years. I paid rent. I have receipts for £4 instalments but not for the £2 rents.

We did not agree to rent the property before we moved in. We made the agreement in Levuka. I did not come to Suva.

10 We started living in the house in 1935. My father was fishing. I regarded him as head of the house. I arranged that house. We had no place to live. We kept moving from place to place. I arranged to rent it for us all to stay in together.

20 When the house was bought it was not as a family home. There was no money there. I bought it to live in myself. The others had no plan to live, so I allowed them to stay there. I expected them to do so as long as my parents were alive. While they were alive I never asked the Plaintiff to leave. I left it to my parents to allow anyone they wished to stay in that house.

My father died in 1963. While my mother was alive I told my brothers to vacate the house. My mother begged me to let her stay until she died.

I am quite happy to throw them out. They gave me a rough time. They abused me.

30 The filling is of about half a chain square. One of the Japanese was my friend and said I could have the waste. I asked the Plaintiff to cart it when his truck was free. The work did not take six months. At the most it took 2 months. It was done at night. I did not pay the Plaintiff anything. I was working for "James Subbaiya Bros." and used to prepare their yearly annual income tax returns and prepare their bills at the end of the month. I was not paid by the Plaintiff.

I did not ask the Plaintiff to do the filling because it was family land.

40 I agreed to sell it for £1,000. That was before I spent £800 on it. My children made me change my mind.

In the Supreme Court of Fiji

No. 9

Defendant's Evidence

Paul Nagaiya  
Cross-  
Examination  
4th February  
1969

continued

In the Supreme  
Court of Fiji

—————  
No. 9

Defendant's  
Evidence

Paul Nagaiya  
Cross-  
Examination  
4th February  
1969

continued

The part which the Plaintiff is living in was not renovated. It is not uninhabitable. Repairs have to be carried out to the floors.

I did not try to turn the Plaintiff out by force. I sent a notice. I did not go and speak to him. We have not been talking for 2-3 years. I sent messages through friends. Paras Ram took a message before the notice was issued, in 1967 I think. Before that I sent no message.

Before 1967 I told my mother to tell my brothers 10  
to vacate the house.

After my mother died in 1965 I did nothing until 1967. I told my mother, whenever there was trouble and they were drunk. That was after my father died in 1963 and early 1964.

My parents both knew that I had told them to tell my brothers to leave the house, in 1963 and 1964. My father died in 1963. I told him before that, in 1962, in 1961-62. Nearly every month there was trouble and I spoke to my parents. 20

In 1949 they were young and not working. Some of them were going to school, Ram Krishna and Changaiya, I think. In 1949 the Plaintiff was doing nothing. He stayed with the family. At times he went fishing with my father. He behaved just like a son. I had no trouble with him in 1949, 1950, 1951. I cannot remember the year. It was not 1949. I think that it was 1951 or 1952. They caused trouble. I told the Plaintiff in front of everyone to leave the House. My parents begged me and they kept him. I 30  
could not overrule them.

In 1949 James Venkataiya and I were working. He earned £2 a week in a restaurant. The others were not working. They had not worked before 1949.

They bought materials of £300 in 1945, between them and 1948. All my brothers and my father contributed to the cost of the material. I think that my father did not put any money in. He had none. The Plaintiff had bought a car and the four of them were driving. My father bought the car, a Plymouth. I also helped to buy it. My mother had 20 sovereign which she sold. I helped her with £40. The Plaintiff did not put money in; he had none. 40



My father had no money.

They bought the car in 1939, when I bought the house. In 1945 they spent £300 on the house. For the car they paid a deposit of £60. The rest was paid by instalments. They earned money with the car. In 1939 we were not cooking together. We cooked separately. That is the year I built the lean-to kitchen. There was only one lean-to kitchen. We cooked separately in 1939; that was a year after we got married. We had a court wedding, no religious wedding. We had no money for such a wedding. I was not married by a priest. I swear to that.

In the Supreme  
Court of Fiji

No. 9

Defendant's  
Evidence

Paul Nagaiya  
Cross-  
Examination  
4th February  
1969

continued

10

Q. You said earlier that you build your kitchen in 1942?

A. I made a mistake.

I was separate from the rest of the family but helped them out from time to time. It is usual to separate after marriage. Two or three women cannot stay together.

20

I was earning sh.9/- per day. I paid no tax in those days. I got £2.14.0. a week. Sometimes I helped my family. I paid the instalments. The family did not help me. I lived on the rest of my income. I collected the rents, sh.15/- - £1.10.0. per month. I got rent until 1944 or 1945, for 6-7 years, not for 2-3 years. I got it for 4 years, from 1939 to 1942. Four years after the purchase I demolished those houses. It was not in 1956. I cannot remember my counsel suggesting to a witness that I got rent until 1956. I got rent until the beginning of 1945. It was roughly for 4 years. I cannot remember. Those two houses were condemned. After that I did not receive rent. They were not condemned until 4 years after I bought the property.

30

The materials for the spares were purchased from M.H. Ltd. I do not know on whose account it was. It is not true that it came to about £800. Materials were cheap then. The most they spent was £200-£300, I cannot say exactly.

40

After I moved I sometimes helped my parents when they were in need. My brothers did minor repairs to the house all the time. The property was mine but I told them that they could stay until my

In the Supreme  
Court of Fiji

No. 9

Defendant's  
Evidence

Paul Nagaiya  
Cross-  
Examination  
4th February  
1969

continued

parents died. I kept to that promise. After my mother died I asked them to leave. That was the first time I told them to do so. That was in 1965. I told my mother that they could live in the house as long as she was alive. I asked them one year after my mother died. I spoke to the Plaintiff and Changaiya. After the notice was served I did not speak to them. In 1965 I was on good terms with them. After the death of my father they began to get drunk and make trouble. They were drinking before that, from 1964. That was when they began to get drunk and make trouble. Before that they may have done so; I cannot remember. 10

When I moved in 1949 they were only young and were behaving all right. There was some minor trouble between the womenfolk. They might have got worse. I did not leave because my brothers were making a nuisance of themselves and forced me to leave the house. I told them to stay and we should go. That was not because it was a family house. I told my parents to stay there. 20

Q. It would be false to say that you left in 1949 because my brothers were getting drunk and making a nuisance of themselves?

A. Yes. It is not true.

Q. Is that not what you said earlier?

A. I said that in later years they were a nuisance. I do not think that I said that I left in 1949 because they were getting drunk and making a nuisance of themselves. 30

No Re-examination.

(Sgd.) I.R. Thompson

ORDER: Adjourned until 5th February, 1969, at  
10.30 a.m.

(Sgd.) I.R. Thompson

4.2.69.

NO. 10SHIU PRASADWednesday 5th February, 1969 at 10.30 a.m.

Mr. K.C. Ramrakha for the Plaintiff.  
Mr. Sherani for the Defendant.

Hearing resumed.

D.W.2 SHIU PRASAD s/o Lala Rajput Rai, Hindu,  
sworn on Ramayan, states (Hindi interpretation):

10 I live at Levuka. I am a part-time carpenter.  
I have been such since 1948.

In January, 1968, I was working at Levuka as a carpenter. The Defendant approached me. I started some work at his house at Levuka. The Plaintiff and the Defendant were living in that house. It was 29th January, 1968 when I started the work.

20 After I had started, on the same day, the Plaintiff came to me at the house. He said that I was not to touch any goods, chattels or furniture in the house and had better stop work. He said that the house belonged to him, he was living in it and he was going to Suva next day to arrange to buy the house. He said that he would come back and that on his return he would buy the house.

I stopped working. The Defendant was not there. I rang him up to tell him what had happened.

30 Next day I went to work. The Plaintiff was not there. I saw him go with a Qantas bag to the wharf and get onto the Ovalau launch. I saw him on his return, on Thursday. That was 3 days later. He was at the house. I had gone there. It was the afternoon. I inquired every day whether he was there as I was supposed to work there.

The Plaintiff said that he was not going to buy the house because the price was very high, £900. He said that he was offering £600.

I did not go then to see the Defendant. I went on with my work. After seeing the Plaintiff

In the Supreme  
Court of Fiji

No.10

Defendant's  
Evidence

Shiu Prasad  
Examination  
5th February  
1969

In the Supreme  
Court of Fiji

No.10

Defendant's  
Evidence

Shiu Prasad  
Examination  
5th February  
1969

continued

I went and spoke to the Defendant.

I worked there for 2 months adding an extension to the building; I replaced the ceilings, joists and floors. Two labourers and two carpenters were working with me. The Defendant paid my wages and the wages of the others.

I have done only painting contracts, apart from carpentering. The repairs would have cost £700-£800.

The Plaintiff is a good friend. He did not stop me working again. I saw him many times while I was working there.

10

Cross-  
Examination

Cross-examined by Ramrakha

I have lived in Levuka all my life. I know the Plaintiff, the Defendant and their family quite well. I do not know whether the house was family property. I know that the house belonged to the man who pays for my work. I knew that there was a dispute between the brothers. Sometimes it was about the bus, sometimes about the house. The dispute about the house was whether it was family property or not. The Plaintiff said that the house belonged to him. He was seeing if he could buy his brother out. The Defendant was happy to sell for £900. The Defendant said that, if they were not prepared to allow him to repair the house, they could buy it.

20

There was no discussion between the Plaintiff and myself about the house. Whatever he told me I have said. I was working there; that is why he spoke to me. There were others there. He told Paras Ram.

30

The value of the repairs I did was £700-£800. I took 8 weeks to do it. I was paid £7 a week. I got £56, more or less. The other carpenters got £5 per week each. The labourers were paid £4 per week each. I have no record of the materials used. New materials were used, new joists, plates, ceilings, floors.

(Sgd.) I.R. Thompson

NO. 11NARAYAN SAMIIn the Supreme  
Court of FijiNo.11Defendants  
EvidenceNarayan Sami  
5th February  
1969

D.W.3 NARAYAN SAMI s/o Permalu, Hindu, sworn on  
Ramayan, states (Hindi Interpretation):

10 I live at Rewa Street, Suva. I am unemployed.  
I lived in Levuka for 18 years. I know both the  
Plaintiff and the Defendant. I knew their parents.  
I used to live with the Plaintiff for 5-6 months. I  
slept there when the parents were alive. I regarded  
them as my father and mother.

I remember the Plaintiff's father and mother  
dying. I do not know the years.

20 After the mother died, the Plaintiff said that  
his brother gave him notice and he would buy the  
house if the Defendant would sell it. I went and  
told this to the Defendant. He agreed to sell it  
for £900. I went back and told the Plaintiff. He  
said the price was high and offered £600. I told  
the Defendant. He refused to sell for £600. I  
told the Plaintiff. He said nothing.

Later the Plaintiff said that he would find  
another house and move out. I know Naidu's flat at  
Borudamu. I went there and saw his goods and things  
in that flat. The Plaintiff was there. He had a  
welding plant there. He did not live there. I  
went there after he went there. I went there two  
or three times.

The Plaintiff's children were not there. He  
occupied that flat after the mother died.

30 Cross-examined by Ramrakha

Cross-  
Examination

It was a month after the mother died. The  
Plaintiff had the flat for 2 months. I used to go  
there.

I have lived at Rewa Street since just before  
Christmas. I am here only on a visit.

I am sick. I do not work now. I did not  
work last year. My son works. I get destitute  
allowance. I do not cadge around for food.

In the Supreme  
Court of Fiji

          
No.11

Defendant's  
Evidence

Narayan Sami  
5th February  
1969

continued

I do not know the year when the talk of selling took place. It was one month after the death of the mother. I was there. I was living with the Plaintiff and working for another brother. I lived with the family for 5-6 months 18 years ago.

The father was a good man but a poor one. He used to fish. I do not know whether the Plaintiff helped him fish.

I went there first about 18 years ago. It was after the war, much later; I do not know how many years after. 10

They lived together as one family. At the beginning the Defendant stayed separately. Then he came back and stayed with them. They stayed in place but not live in unity. Many times I heard the Defendant tell them to leave the house. He told the Plaintiff to leave. The father was dead by then; the mother was alive.

I first went to live with them while the father was alive. The Defendant did not chase the other brothers away while the father was alive. The brothers cooked separately and did not talk together. There was one kitchen but they used separate primuses. 20

I am not lying. I was living with them.

The Plaintiff provided me with food and cigarettes.

Re-  
examination

Re-examined

The Defendant used to cook on the other side; there was a partition in between. The Plaintiff used to cook in the kitchen. 30

The father was a poor man. He used to go fishing some times, when he was in good health.

Life was very difficult for them when the father was alive.

(Sgd.) I.R. Thompson

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NO. 12In the Supreme  
Court of FijiJUDGMENTNo.12IN THE SUPREME COURT OF FIJI Civil JurisdictionAction No. 30 of 1968Judgment  
27th March  
1969Between : JAMES SUBBARIYA Plaintiff

- and -

PAUL NAGAIYA DefendantMr. K.C. Ramrakha for the Plaintiff  
Mr. F.M.K. Sherani for the Defendant.

10 The Plaintiff and the defendant are brothers  
The claim relates to land at Levuka and a house that  
stands upon that land. In 1939 the land with the  
house on it was sold by its previous owners to the  
defendant. The Plaintiff claims that the  
defendant bought it as trustee for, or nominee of,  
his father and all the brothers including himself.  
He seeks a declaration that the property is joint  
family property and an injunction to restrain the  
defendant from ejecting him from that property or  
20 interfering with his quiet use and enjoyment of it.

The defendant denies that he bought the land  
as trustee or nominee and states that he bought it  
as beneficial owner. By way of counterclaim he  
seeks vacant possession of the part of the house at  
present occupied by the plaintiff, a declaration that  
the plaintiff's right to use the land and house has  
been determined, an injunction restraining the  
plaintiff from occupying or dealing with the land or  
the house and an order for the payment of mesne  
30 profits for the period during which the plaintiff has  
continued to occupy part of the house since he was  
told to quit. The defendant is also claiming  
general damages.

The plaintiff gave evidence as P.W.1. He said  
that a substantial sum of money was given to the  
defendant from out of the family savings of £250 in  
order that he might buy the house and that at that  
time his parents said that it was to be bought for  
all the brothers. He has given evidence that after  
40 the purchase the whole family, that is the mother,

In the Supreme  
Court of Fiji

—  
No.12

Judgment  
27th March  
1969

continued

father, five brothers (including the defendant) and three sisters, and also the defendant's wife, occupied the house together for about 10 years; at the end of that time the defendant left the house, built a house for himself on other land which belonged to him and lived there until about 1963-65. He said that the other members of the family continued to live in the house on the land the subject of the present claim and several of them, including himself, were still doing so at the time of the death of the father in 1962 or 1963 and of the mother in 1965. 10

The plaintiff gave evidence that he was not aware until 1967 that the land had been purchased in the name of the defendant alone. He said that, after a major hurricane had damaged the house, he and his brothers repaired the damage at considerable expense. He said also that, apparently in about 1965, he carried out at his own expense a good deal of work on part of the land in order to fill it so that a building, subsequently sold to Levuka Club, could be built there. 20

He gave evidence that his father was by no means a poor man as he earned a considerable income from fishing. He said further that in 1939 his father owned a Plymouth motor car which was driven by a driver employed by him.

Evidence corroborating the plaintiff's regarding the work done to fill the land in preparation for building was given by one of the labourers employed by the plaintiff to do that work. The man who drove the father's car in 1939 (and who later married the parties' sister) gave evidence that he had always believed, as he put it, that the house "belonged to his in-laws". 30

The Defendant gave evidence that in 1939 his father had to struggle financially to maintain the family and that he himself was the only member of the family with a substantial income; it is not disputed that he was a carpenter employed by the Public Works Department at a wage of 9/- a day. He said that the family had all moved into the house on the land, the subject of this action, before he bought it and were paying rent to the previous owners; and that he bought the land himself without any assistance from his parents or other members of the family. He pointed out that under the sale and purchase agreement 40



(Exhibit 3) he had to pay only an initial lump sum of £30 and thereafter to pay the balance by monthly instalments. He said that he borrowed £30 from his wife's father and paid the instalments out of his own earnings. He agreed that he permitted his parents and his brothers and sisters to remain in the house, initially to live together with himself and his wife and latterly to stay there without them. He admitted that the plaintiff and his brothers paid about £300 for materials to be used in repairing the house and said that he did the carpentry work himself. He denied that these repairs were necessitated by the hurricane and said that he told the plaintiff and his brothers that they must pay for the materials because they were enjoying the use of the house.

In the Supreme  
Court of Fiji

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No.12

Judgment  
27th March  
1969

continued

The defendant gave evidence that he had told his parents that they could occupy the house as long as they lived and that he did not object to other members of the family living in it with his parents as long as his parents were alive but told the brothers that after his father had died they must leave the house. He said that subsequently at his mother's request he agreed to their continuing to live there as long as she was alive.

He admitted that the plaintiff had carried out a certain amount of work filling in the land but, whereas the plaintiff asserted that work had taken several months with several trips a day being made on several days each week, the defendant stated that the amount of work done was very small indeed.

The defendant gave evidence that in 1967, after he had told the plaintiff to vacate the part of the house that he occupied, the plaintiff wanted to buy the house from him and that he was willing to sell it but they were unable to agree on the price. The plaintiff was cross-examined regarding negotiations for purchase of the house and denied that he had tried to negotiate its purchase. The plaintiff also denied that he had rented a flat for a period of two months.

The defence called two witnesses in addition to the defendant. The first of these was a carpenter and painter who was engaged by the defendant to do work at the house in 1967. He gave evidence that the plaintiff told him to stop work because he was going to buy the house and that subsequently the plaintiff told him that the price asked by the defendant was too high and that in consequence he was

In the Supreme  
Court of Fiji

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No.12

Judgment  
27th March  
1969

continued

not going to buy the house. The other witness called by the defence, D.W.3, was a man who had lived there from time to time with the parties' parents and done work for the family. He said that he regarded them as his father and mother. The witness gave evidence that some time after the mother had died the plaintiff told him that the defendant had given him notice and that he would buy the house if the defendant would sell it. He said that he then acted as a go-between trying to negotiate the sale, that the defendant wanted £900 but the plaintiff would offer only £600 and that they were unable to reach an agreement. He said that the plaintiff told him that he would find another house and move and that subsequently he saw the plaintiff's possessions in a flat but that the plaintiff did not actually live there.

10

Cross-examined by Mr. Ramrakha, D.W.2 agreed to a suggestion put to him that the plaintiff said that the house belonged to him and that he intended to see whether he could "buy his brother out". It is to be noted that the plaintiff did not himself give evidence that he tried to buy the defendant's interest in the house but denied completely having had conversations with, or carried on negotiations through D.W.2 and D.W.3.

20

In the course of cross-examination the plaintiff was asked whether or not he was bringing the action on behalf of all his brothers or himself alone. The record of his evidence in reply to this question and those which followed it reads "I am bringing this action on behalf of all my brothers and not for myself alone. It is a representative action on behalf of all of us. The four of us all agreed to bring it. We discussed it and then agreed that I should issue the writ. I have instituted this action in a representative capacity with their consent."

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It must be stressed that the whole of this passage is the reduction to narrative form of a series of questions to which the plaintiff answered simply "yes". Learned defence counsel has submitted as a result of that evidence that it is a representative action and that, because the writ has not been endorsed to that effect, the claim must for that reason by itself fail. With respect I am unable to accept this submission. The defendant was served

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10 with the Statement of Claim. If he considered that there were other persons who had an interest in the claim and who should have been joined with the plaintiff he should have taken steps before the action came for trial to have those persons joined. The questions put to the plaintiff by learned defence counsel regarding whether or not this was a representative action were couched in technical terms. As I have already observed they were answered by simple affirmative replies. As a representative action can be brought only where there are numerous parties having a similar interest, it is clear that the plaintiff was replying to the questions from a layman's point of view and not in fact agreeing in legal terms. I, therefore, reject learned defence counsel's submission that the action must fail because of the alleged defect in the pleadings. It is necessary for it to be determined on its merits.

20 A number of facts are not in dispute. These are that the price to be paid for the property in 1939 was £125 of which £30 was paid in a lump sum and the balance by instalments of £4 a month; that in 1939 the father of the parties had bought a Plymouth car which he operated as a taxi with a paid driver while continuing to work himself as a fisherman; that all the family lived in the house from 1939 to 1949 when the defendant went to live in another house belonging to him; that at some  
30 time between 1942 and 1952 the plaintiff and his brothers paid a substantial amount, at least £300, in respect of repairs carried out to the house; that the parents continued to occupy the house until they died and the plaintiff and other brothers also continued to occupy it; that the plaintiff carried out work to fill part of the land at his own expense in or about 1955; that the defendant sub-divided the land into two parts in 1965 and has subsequently sold to the Levuka Club a building which he put up  
40 on one of the parts, where the plaintiff had carried out the filling work.

Having seen and heard both parties and their witnesses give evidence, I am satisfied that in about 1967 the plaintiff did offer to buy the house from the defendant but they were unable to agree on a price. I find as fact also that the plaintiff did tell D.W.2 that the house belonged to him and that he was seeing if he could buy his brother out. I

In the Supreme  
Court of Fiji

No.12

Judgment  
27th March  
1969

continued

find that the plaintiff has not told the truth with regard to these transactions.

It is clear that there have been disputes between the plaintiff, his other brothers and the defendant over a number of family matters, including the bus business run by the plaintiff and two of his other brothers, for some considerable number of years. It is not disputed that the defendant moved back into part of the house at about the time of the mother's death. I accept his evidence that from then on he told the plaintiff and the other brothers that they must leave the house. This does not necessarily conflict with the plaintiff's evidence that he was not aware until 1967 that the title to the land was in the defendant's name alone, as it is clearly not unusual for the eldest brother in an Indian family to exercise some measure of control over the way in which the family lives, or at least to try to do so.

10

In view of the fact that the father of the parties had bought a car and was operating it as a taxi in 1939, I do not accept the evidence of the defendant that he was a very poor man. I consider it likely that the plaintiff, possibly due to the effluxion of years and the fact that he was a mere youth at the time, has inflated the amount of money that was in the house as savings in 1939, but I accept his evidence that there was a sum of money available, and that the defendant was given money from those savings to pay the £30 lump sum at the time when the property was bought. Thereafter, during the time when the instalments were being paid off the whole family was living in the house together and no doubt the instalments were part of the joint family expenses, although possibly paid by the defendant.

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30

The defendant has said that he required the plaintiff and his brothers to spend the money on the house because they were living in it. Even allowing for inflation of property values between 1939 and the date when the repairs were carried out. I am satisfied that the amount spent by the plaintiff and his brothers was very large in proportion to the total value of the property. It is unlikely that they would have spent so much if they had not believed that the property belonged to them. The defendant has given no explanation why the plaintiff should have spent money on filling part of the land if he had no interest in it, or did not at least

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believe that he had. I accept the plaintiff's evidence, corroborated as it is by that of the labourer, that a great deal of work was done. Again I regard it as most unlikely that the plaintiff would have done that work if he had not believed that the property belonged to himself as well as to the defendant.

In the Supreme  
Court of Fiji

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No.12

Judgment  
27th March  
1969

continued

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Having carefully weighed all the evidence and notwithstanding my finding that the plaintiff has not told the truth in denying that he offered to buy the defendant's share in the house, I am satisfied that the plaintiff's evidence that the defendant bought the house for all the brothers and made the first payment for the house with money which his parents gave him for that purpose is true. I disbelieve the defendant's evidence in this respect and also in respect of the circumstances in which the plaintiff carried out the repairs to the house and filled the land.

20

Learned defence counsel has drawn attention to the fact that the plaintiff has sought at the trial to establish that the land was bought for only the male members of the family and not for the female members but that the Statement of Claim alleges that it was purchased as joint family property and that the claim is for a declaration that it is joint family property. It is unsatisfactory that the claim should be so loosely worded; possibly the term "joint family property" has a precise meaning in Hindu family law but that was not proved and, in any case, it is a very loose term to use in pleadings. However, in view of the evidence of the plaintiff, it is clear that it was his intention that his solicitors should plead that it was the joint property only of a limited number of male members of the family. The defendant was not misled or prejudiced in any way. I have considered whether the pleadings are so defective that the plaintiff's claim must fail for that reason but have come to the conclusion that the Court can properly make orders in the terms which the plaintiff obviously intended to seek. I therefore grant the declaration that the property purchased in the name of the defendant and comprised and described in the Certificate of Title volume 54 folio 5387 containing 38 perches more or less and situated in Levuka and the subsequent subdivisions thereof were and, to the extent that any subdivision has not been already alienated, are still

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In the Supreme  
Court of Fiji

                      
No.12

Judgment  
27th March  
1969  
continued

held by the defendant as trustee for the plaintiff, himself and his other brothers. I grant the injunction sought to restrain the defendant, his servants or agents or any person claiming by, through or under him from ejecting or interfering with the plaintiff's quiet use and enjoyment in respect of that part of the land on which the house stands which is at present occupied by the defendant and the plaintiff.

The defendant's counterclaim is dismissed. I order the defendant to pay to the plaintiff his costs of this action to be taxed if not agreed. 10

(SGD.) I.R. Thompson  
ACTING PUISNE JUDGE

SUVA,  
27th March, 1969.

No.13

Order  
27th March  
1969

NO. 13

ORDER

IN THE SUPREME COURT OF FIJI      Action No. 30 of 1968

<u>BETWEEN</u> :	JAMES SUBBAIYA s/o Pedwaru Venkat Sami	<u>PLAINTIFF</u>	20
<u>A N D</u> :	PAUL NAGAIYA s/o Pedwaru Venkat Sami	<u>DEFENDANT</u>	

O R D E R

BEFORE THE HONOURABLE MR. JUSTICE THOMPSON  
DATED AND ENTERED THE 27th MARCH, 1969

THIS ACTION having on the 4th and 5th days of February, 1969 been tried before the Honourable Mr. Justice Thompson without a Jury at the Supreme Court, Suva, in the Colony of Fiji and the said Mr. Justice Thompson on the 27th day of March 1969 adjudged that the property purchased by the defendant and comprised and described in the Certificate of Title Volume 54 Folio 5387 containing 38 perches more or less and situated in Levuka and the subsequent subdivisions thereof were, and to the extent that any subdivision 30

has not already alienated are still held by the defendant as trustee for the Plaintiff, himself and his other brothers  
AND IT IS ORDERED that the defendant his servants or agents or any person claiming by, through or under him be restrained from ejecting or interfering with the plaintiff's quiet use and enjoyment in respect of that part of the land on which the house stands which is at present occupied by the defendant and the plaintiff AND IT IS FURTHER ORDERED that the defendant's counterclaim be dismissed and that the Plaintiff do recover from the defendant his cost of this action to be taxed if not agreed.

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In the Supreme  
Court of Fiji

                      
No.13

Order  
27th March  
1969

continued

(L.S.)

BY THE COURT

(Sgd.) S. Sajjananand

DEPUTY REGISTRAR

FILED  
29.7.69.

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In the Fiji  
Court of  
Appeal

NO.14

NOTICE AND GROUNDS OF APPEAL

No.14

IN THE FIJI COURT OF APPEAL

Notice and  
Grounds of  
Appeal  
20th August  
1969

Civil Jurisdiction

ON APPEAL from the Supreme Court of Fiji  
in Civil Action No. 30 of 1968

Civil Appeal No.19 of 1969

BETWEEN: PAUL NAGAIYA s/o  
Pedwaru Venkat Sami APPELLANT

A N D : JAMES SUBBAIYA s/o  
Pedwaru Venkat Sami RESPONDENT

10

TAKE NOTICE that the Court will be moved at the expiration of 14 days from the service upon you of this notice, or so soon thereafter as Counsel can be heard for the abovenamed Appellant for an Order, that the whole of the judgment herein of the Honourable Mr. Justice Thompson given on the trial of this action on the 27th day of March, 1969 whereby it was adjudged, inter alia, that the Respondent should have judgment against the Appellant, be set aside or varied, and that the judgment may be entered in the said action for the Appellant against the Respondent with costs.

20

AND for an order that the costs of this Appeal be paid by the Respondent to the Appellant and for such further or other order as the Court of Appeal shall seem just.

AND FURTHER TAKE NOTICE that the grounds of the Appeal are :-

1. The verdict is unreasonable and cannot be supported having regard to the weight of the evidence adduced.
2. In view of the contradictions and inconsistencies in the evidence of the plaintiff his evidence was incapable of belief and the learned trial Judge erred in not holding accordingly.
3. The evidence of the plaintiff that his father

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had advanced a certain sum of monies to purchase C.T. Vol. 54 Folio 5387 was neither sufficient nor convincing and the learned trial Judge erred in not holding accordingly.

In the Fiji  
Court of  
Appeal

            
No.14

- 10      4.    The learned trial Judge misdirected himself in holding, inter alia, "...as it is clearly, not unusual for the eldest brother in an Indian family to exercise some measure of Control over the way in which the family lives, or at least to try to do so," because no evidence was adduced in support of such a finding.

Notice and  
Grounds of  
Appeal  
20th August  
1969

continued

- 20      5.    The defendant is and was for a number of years the registered proprietor of C.T. Vol. 54 Folio 5387. Fraud was neither pleaded nor alleged by the plaintiff in evidence. In the circumstances the learned trial Judge erred in adjudging that C.T. Vol. 54 Folio 5387 was held in Trust by the Appellant.

20      PRESENTED this 20th day of August, 1969.

(sgd.) F.M.K. Sherani

Counsel for the Appellant

To: The abovenamed Respondent and/or to his Solicitors Messrs. Ramrakhas, 77 Marks Street, Suva.

In the Fiji  
Court of  
Appeal

NO.15

ADDITIONAL GROUNDS OF APPEAL

No.15  
Additional  
Grounds of  
Appeal  
22nd October  
1969

BETWEEN: PAUL NAGAIYA s/o Pedwaru Venkat Sami  
Appellant  
AND : JAMES SUBBAIYA s/o Pedwaru Venkat Sami  
Respondent

TAKE NOTICE that this Honourable Court will be moved in the Supreme Court, Government Buildings, Suva on the 3rd day of November, 1969 at the hour of 9.30 o'clock in the forenoon or soon thereafter as Counsel can be heard by Counsel for the abovenamed Appellant for an Order that the Appellant be at liberty to allege and reply upon the following Additional Grounds of Appeal:-

10

1. The Respondent's instant Action was a representative one and the Writ not having been so endorsed ought to have been struck out by the learned trial Judge.

2. The Plaintiff's General Endorsement of Claim stated that the Certificate of Title No. 11690 is a "communal family property": it was alleged in the plaintiff's Statement of Claim that the defendant "did in fact purchase the said property either as nominee for himself, his parents, and other immediate members of his family, or as their agent or trustee:" the plaintiff's Defence to Counter-Claim alleged that "it is a family home:" the plaintiff's own version in evidence, inter alia, was - firstly, "that the property was bought for all the brothers;" secondly, "that it is a family property;" thirdly, "that we expected the property to be in the name of my father and my brothers". In view of the pleadings and the evidence of the plaintiff the learned trial Judge erred in law in adjudging that Certificate of Title Volume 54 folio 5387 are still held by the Appellant as trustee for the plaintiff, himself and his other brothers.

20

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DATED at Suva this 22nd day of October, 1969.

SHERANI & CO.

Per: F.M.K. Sherani  
Solicitors for the Appellant

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To: the abovenamed Respondent and/or his Solicitors  
Messrs. Ramrakhas, 77 Marks Street, Suva.

In the Fiji  
Court of  
Appeal

This motion was filed by Sherani & Co. the  
Solicitors for the Appellant whose address for  
service is at 297 Victor Parade, Suva.

No.15  
Additional  
Grounds of  
Appeal  
22nd October  
1969

continued

NO.16

JUDGMENT OF GOULD, V.P.

No.16

Between:

Judgment of  
Gould V.P.  
7th November  
1969

10

PAUL NAGAIYA  
s/o Pedwaru Venkat Sami Appellant

- and -

JAMES SUBBAIYA  
s/o Pedwaru Venkat Sami Respondent

Date of Hearing: 3rd November 1969.

Delivery of Judgment: 7th November, 1969.

F.M.K. Sherani for Appellant.  
K.C. Ramrakha for Respondent.

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This is an appeal from the judgment of the  
Supreme Court of Fiji in an action between two  
brothers in which the learned Judge made a  
declaration that certain property purchased in the  
name of the defendant was held by him in trust for  
the plaintiff, the defendant and their brothers.  
The appellant in this appeal was the defendant in  
the action and I shall continue to refer to the  
parties as "plaintiff" and "defendant".

30

It is not in dispute that land, upon which  
there was a house, was bought in the defendant's  
name in the year 1939. The price was £125 of  
which £30 was paid to the vendors as a deposit  
and the balance by monthly instalments of £4 each.  
The receipts were in the name of the defendant and  
the freehold title under the Land (Transfer and  
Registration) Ordinance (Cap. 136 - Laws of Fiji,  
1955) was also in his name.

In the Fiji  
Court of  
Appeal  

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No.16  
Judgment of  
Gould V.P.  
7th November  
1969  
continued

After the purchase the whole family, consisting of the father and mother of the parties, five brothers and three sisters, and the wife of the defendant occupied the house for about 10 years. The defendant then left, built a house for himself on other land belonging to him and lived there until about 1963-65. The other members of the family continued to live in the house in question in the suit and some, including the plaintiff, were still doing so at the time of the death of the father in 1962 or 1963 and the mother in 1965. 10  
The defendant said that after the mother's death he told the others they would have to move out, and he moved back himself into part of the house.

It was common ground that between 1942 and 1952 the plaintiff and his brothers paid a substantial amount, at least £900, in respect of repairs carried out to the house. In 1965 the plaintiff carried out work to fill part of the land at his own expense; and in 1965 the defendant sub-divided the land into two parts, erected a building on the part which the plaintiff had filled, and has since sold that part to the Levuka Club. There have been disputes between the plaintiff, his other brothers, and the defendant over a considerable number of years. The plaintiff claimed not to have known until 1967 that the title to the land was in the defendant's name alone. 20

This is a most unsatisfactory case in which patently the whole of the facts has not been disclosed and the learned Judge was constrained to find that lies had been told on both sides. There was conflict of evidence about where the money came from to make the original purchase: the defendant said that he borrowed the £30 deposit from his wife's father and paid the instalments out of his own earnings, it being common ground that he was employed at 9/- per diem. The Plaintiff said that a substantial sum was given to the defendant from his family savings and that the house was to be bought for all the brothers. He was vague about the amount of the deposit but said his elder sister counted out the money to the defendant; he said the defendant may have paid monthly instalments but got the money from their parents. At the same time he admitted the defendant was in employment and gave his earnings to the mother "as she controlled the household affairs" retaining 1/- or 2/- for his own expenses. 30  
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The general findings of the learned Judge are

summarised in his judgment as follows :-

In the Fiji  
Court of  
Appeal

\_\_\_\_\_  
No.16

Judgment of  
Gould V.P.  
7th November  
1969

continued

10 "In view of the fact that the father of the parties had bought a car and was operating it as a taxi in 1939, I do not accept the evidence of the defendant that he was a very poor man. I consider it likely that the plaintiff, possibly due to the effluxion of years and the fact that he was a mere youth at the time, has inflated the amount of money that was in the house as savings in 1939, but I accept his evidence that there was a sum of money available, and that the defendant was given money from those savings to pay the £30 lump sum at the time when the property was bought. Thereafter, during the time when the instalments were being paid off the whole family was living in the house together and no doubt the instalments were part of the joint family expenses, although possibly paid by the defendant.

20

The defendant has said that he required the plaintiff and his brothers to spend the money on the house because they were living in it. Even allowing for inflation of property values between 1939 and the date when the repairs were carried out, I am satisfied that the amount spent by the plaintiff and his brothers was very large in proportion to the total value of the property. It is unlikely that they would have spent so much if they had not believed that the property belonged to them. The defendant has given no explanation why the plaintiff should have spent money on filling part of the land if he had no interest in it, or did not at least believe that he had. I accept the plaintiff's evidence, corroborated as it is by that of the labourer, that a great deal of work was done. Again I regard it as most unlikely that the plaintiff would have done that work if he had not believed that the property belonged to himself as well as to the defendant.

30

40

Having carefully weighed all the evidence and notwithstanding my finding that the plaintiff has not told the truth in denying that he offered to buy the defendant's share in the House, I am satisfied that the plaintiff's

In the Fiji  
Court of  
Appeal

No.16

Judgment of  
Gould V.P.  
7th November  
1969

continued

evidence that the defendant bought the house for all the brothers and made the first payment for the house with money which his parents gave him for that purpose is true. I disbelieve the defendant's evidence in this respect and also in respect of the circumstances in which the plaintiff carried out the repairs to the house and filled the land."

On the appeal the main argument of counsel for the defendant was that the judgment was unreasonable and ought not to be supported having regard to the evidence. He called attention to the evidence of the plaintiff that after their marriage each brother ran his own family and life as he liked. If the defendant had been married when the property was bought the father would have refrained from interfering in his affairs. He also said that the defendant got married after the property was purchased. The defendant, however, put his marriage certificate in evidence showing that he was married in January 1938 - the date of the agreement for sale in the defendant's favour was the 13th November, 1939 - almost two years later. 10 20

Counsel submitted also that it lay upon the plaintiff to call the elder sister who, the plaintiff alleged, counted out the purchase (or deposit) money to the defendant. Equally of course it lay upon the defendant to substantiate his version of where he got the deposit. Counsel also pointed to the evidence that in 1939 the father was an active man, he had bought a second hand car after the property was purchased (though subject to a bill of sale), earned a substantial living as a fisherman and had paid the rent for the house the family had previously occupied. He argued from those circumstances that there was no reason at all for the father not to have acquired the new property in his own name unless the defendant had in fact provided the money. 30

Counsel further criticised the case for the plaintiff by comparing his pleadings with various portions of his evidence. The general indorsement of claim describes the property as "communal family property"; the statement of claim states that the defendant "did in fact purchase the said property either as a nominee for himself, his parents, and other immediate members of his family, or as their agent or trustee". Then in the plaintiff's evidence 40

are the various statements that the property was bought for all the brothers, that it was a joint family property and thirdly that he expected the property to be in the name of his father and his brothers. It is fair to add that the plaintiff explained that he thought that "family house" meant that it belonged to the brothers.

In the Fiji  
Court of  
Appeal

—  
No.16

Judgment of  
Gould V.P.  
7th November  
1969

continued

10 There is one other point, raised by the Court and not by counsel. It appears strange, if the plaintiff's claim is genuine, that in his evidence he disclaimed any interest in the part of the land which had been sold by the defendant to the Levuka Club. In the passage in his judgment quoted above the learned Judge commented that the defendant had given no explanation why the plaintiff should have spent money on filling part of the land if he did not believe he had an interest in it. Yet this part is that which has been sold to the Levuka Club, presumably to the benefit of the defendant.

20 It was excluded from the declaration made by the learned Judge, though title has not yet been transferred, presumably on the strength of the disclaimer by the Plaintiff. I think I can only assume that the learned Judge would otherwise have supported the plaintiff's claim to the whole but was giving effect to his desire to maintain his claim to the house property only.

30 The question is whether the aspects of the evidence upon which counsel has relied provide a basis upon which this court should interfere with the decision of the learned Judge in the Supreme Court. It is a case in which the questions of fact had to be decided partly by inference (an area in which this Court might more readily interfere) but more by the assessment of the credibility of the witnesses by the Judge based upon his observation of them and the impression he gained from their evidence as it was given.

40 I think, after full consideration, that the challenge by counsel for the appellant to the evidence falls rather in the latter category than the former. It might be said that the matter of the date of the marriage of the defendant raises an inference in favour of the defendant but that would have to be weighed against the rest of the evidence including both inference and direct assessment of credibility. Though the learned Judge did not mention the point it cannot be assumed

In the Fiji  
Court of  
Appeal

          
No.16

Judgment of  
Gould V.P.  
7th November  
1969

continued

that he overlooked it. I have given thought to the fact that the defendant had the title in his name for a substantial period of years unchallenged, but, on the other hand, no earlier occasion for challenge appears to have arisen while the residence of the plaintiff in the suit property continued unqueried. Again, I have kept in mind that there is a substantial onus upon one seeking to establish a trust after so many years, and this I consider is the strongest point in the appellant's favour.

10

Nevertheless, having considered those factors, I am of opinion that the case is one in which this Court would not be justified in interfering with the judgment in the Supreme Court. There was a great deal of evidence and I take the view that the advantage enjoyed by the learned Judge of hearing and seeing the witnesses outweighs any considerations which counsel for the appellant has been able to raise by his argument.

I would advert only briefly to another argument of counsel for the appellant. It is based on the fact that in cross-examination the plaintiff said he was bringing the action on behalf of his brothers (presumably excluding the defendant) and not for himself alone. Counsel claimed that it was therefore a representative action and that as the writ was not so endorsed it should have been struck out. This episode in the evidence was fully explained by the trial Judge in his judgment and he found that it was not a representative action. In this I need only say that I agree with him. It was not framed as a representative action and the result binds nobody but the two parties. The other interested parties ought undoubtedly to have been joined either as plaintiffs or defendants but it is too late to remedy this, and their absence does not render the proceedings a nullity.

20

30

I would dismiss the appeal with costs: as my opinion is in the minority the appeal will be allowed and there will be the order proposed by Marsack, J.A.

40

T.J. GOULD  
VICE PRESIDENT

SUVA,  
7th November, 1969.

Solicitors for Appellant: Sherani & Co.  
Solicitors for Respondent: Ramrakhas.



NO.17

JUDGMENT OF MARSACK, J.A.In the Fiji  
Court of  
AppealNo.17

Between:

PAUL NAGAIYA s/o Pedwaru  
Venkat Sami Appellant

- and -

JAMES SUBBAIYA c/o Pedwaru  
Venkat Sami RespondentJudgment of  
Marsack, J.A.  
7th November  
1969Date of Hearing: 3rd November, 1969.10 Delivery of Judgment: 7th November, 1969.F.M.K. Sherani for Appellant.  
K.C. Ramrakha for Respondent.

20 I have had the advantage of reading the careful judgment of the learned Vice President and do not find it necessary to set out again a statement of the facts. I agree with the learned Vice President that this is a most unsatisfactory case in which the whole of the facts had obviously not been disclosed and lies had been told on both sides. With regard to the conclusions reached in that judgment I regret, however, that I am of a different opinion.

30 It is common ground that the title to the land in question was registered in the name of appellant under the Land (Transfer and Registration) Ordinance, Cap. 136, in 1939. It is also common ground that for 28 years no claim was made by any other person against the appellant that he was not the beneficial owner of the land but held it as trustee for others as well as himself.

40 Although under section 14 of the Land (Transfer and Registration) Ordinance, Cap. 136, an instrument of title upon a genuine dealing is conclusive evidence that the proprietor is the absolute and indefeasible owner unless fraud or misrepresentation is proved against him, yet it is no doubt perfectly competent for the Court to decide that the registered proprietor is holding the lands as trustee and not as beneficial owner. That is the basis of respondent's claim which was upheld by the

In the Fiji  
Court of  
Appeal

No.17

Judgment of  
Marsack, J.A.  
7th November  
1969

continued

learned trial Judge. But if it is sought to establish that the registered proprietor is in fact holding as trustee then, in my view, there must be cogent and compelling evidence of the existence of such a trust. This evidence should prove how the trust came into existence and who are the persons on behalf of whom the property is held by the trustee. In my view the evidence falls far short of establishing these two facts with reasonable certitude.

As to the facts surrounding the creation of the alleged trust, the evidence is thoroughly unsatisfactory. It must be emphasized that the onus of proving the existence of the trust, and its terms, lies on the person propounding it, the respondent. The first question that arises is this: who provided the moneys paid by way of deposit on the purchase in 1939? Respondent says in his evidence - 10

"My mother gave the money to the Defendant to purchase the property .....  
My eldest sister, Ram Rattan's wife, gave the money to the Defendant to buy the property.....  
The Defendant had no money of his own to buy the property. My father provided the money. Ram Rattan's wife kept the money .....  
My father knew that my mother had given the defendant the money to buy the house. The amount was £250. My sister counted it.....  
She did not give the whole amount to the Defendant, only part of it .....  
I have no idea how much of it was handed to the Defendant." 20 30

That is the whole of the evidence for respondent as to the source of the money comprising the deposit. As against that appellant deposed that he paid £30 down and this sum he had borrowed from his father-in-law.

On this evidence the learned trial Judge said that, notwithstanding the lies told by respondent in other parts of his evidence, he was satisfied that appellant had made the first payment for the house with money which his parents gave him for that purpose. 40

The second branch of the evidence relating to the creation of the trust concerns the actions of the different members of the family in respect of the property in dispute. The evidence of respondent was that he and his brothers understood all along that the property really belonged to all the brothers. It is thus necessary to examine the evidence for the purpose of finding if their conduct throughout had been consistent with that understanding.

In the Fiji  
Court of  
Appeal

\_\_\_\_\_  
No.17

Judgment of  
Marsack, J.A.  
7th November  
1969

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The evidence as to the repairs carried out by respondent and his brothers may, I think, be regarded as inconclusive. It might be held to support the claim by respondent that he and his brothers really owned the house despite the claim by appellant that the expense incurred by respondent and his brothers on the repairs amounted merely to a payment in return for their use and occupation of the premises.

continued

20

But it can in no sense be regarded as consistent with the fact, as found by the learned trial Judge, that in 1967 respondent offered to buy the house from appellant but they were unable to agree on a price. There is considerable evidence, obviously accepted by the learned trial Judge, that the offer to buy the house had come from respondent - without any qualification that he was acting on behalf of his brothers as well as himself - and that after a certain amount of negotiation the deal fell through on one point only, that of price. The obvious inference from that evidence is that respondent regarded appellant as the sole owner, in his own right.

30

40

Furthermore it cannot be regarded as consistent with the fact that part of the land was sold by appellant to the Levuka Club to the knowledge of the other members of the family; and neither respondent nor any other member of the family had made, or now makes, any claim to the purchase price or any part of it. It is recognised that the purchase price will be paid solely to appellant.

No direct evidence as to the existence of a trust was given by any other witness.

I turn now to the further question of the proof that any trust said to have been set up was in favour of certain particular persons. In my view,

In the Fiji  
Court of  
Appeal

No.17

Judgment of  
Marsack, J.A.  
7th November  
1969

continued

the creation of a trust cannot be said to have been proved unless the evidence establishes with certainty, inter alia, on whose behalf the registered proprietor is holding the lands comprised in his title. Here again it is necessary to look at the evidence on this aspect of the matter in dispute. In his Statement of Claim respondent alleges that "the defendant knew and understood, and did in fact purchase the said property either as nominee for himself, his parents, and other immediate members of his family or as their agent or trustee". His claim is for a declaration that the property is "joint family property". In the course of his evidence, however, he said that appellant bought the property "for all the brothers". Further on in his evidence respondent says "when my mother gave the money we expected the property to be in the name of my father and my brothers". 10

Ram Rattan, brother-in-law of the parties, said in evidence that he regarded the property as belonging to his parents-in-law and his brother-in-law; but this statement is of no evidential value as proving what persons were the cestuis que trust. 20

No other evidence was tendered on behalf of respondent on this point. In his judgment the learned trial Judge says -

"It is unsatisfactory that the claim should be so loosely worded; possibly the term "joint family property" has a precise meaning in Hindu family law but that was not proved and, in any case, it is a very loose term to use in pleadings. However, in view of the evidence of the plaintiff, it is clear that it was his intention that his solicitors should plead that it was the joint property only of a limited number of male members of the family. The defendant was not misled or prejudiced in any way". 30

He then proceeded to make a declaration that the property was held in trust for respondent, appellant and "his other brothers". 40

With the greatest respect to the learned trial Judge and to the care with which he prepared his judgment, I am of opinion that the evidence was insufficient to establish in the first place that the property was purchased on terms that appellant would

10 be a trustee only, and in the second place who were  
 the beneficiaries under any such trust. In  
 saying this I am mindful of the advantages the  
 learned trial Judge had in hearing the witnesses  
 and observing their demeanour. I am fully aware  
 of the reluctance of an appellate tribunal to  
 interfere with the findings of fact made in the  
 Court below, particularly when those findings are  
 based upon the opinion of the Court as to the  
 credibility of the witnesses. Even so an appeal  
 Court must sometimes do so as a matter of justice  
 and of judicial obligation; and the Court is less  
 reluctant to interfere when the findings, or some  
 of them as is the case here, are inferences drawn  
 from the accepted evidence. Keeping these  
 principles in mind I would hold that the existence  
 of a trust in favour of respondent and his brothers  
 has not been established; and that therefore the  
 title of appellant to the land is not subject to  
 20 any such trust.

For these reasons I would allow the appeal  
 and order that judgment be entered in favour of  
 appellant with costs here and below.

G. MARSACK

JUDGE OF APPEAL

SUVA,

7th November, 1969.

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Solicitors for Appellant: Sherani & Co.  
 Solicitors for Respondent: Ramrakhas.

In the Fiji  
 Court of  
 Appeal

          
 No.17

Judgment of  
 Marsack, J.A.  
 7th November  
 1969

continued

In the Fiji  
Court of  
Appeal

NO.18

JUDGMENT OF HUTCHISON, J.A.

No.18  
Judgment of  
Hutchison J.A.  
7th November  
1969

Between: PAUL NAGAIYA Appellant  
s/o Pedwaru Venkat Sami  
- and -  
JAMES SUBBAIYA Respondent  
s/o Pedwaru Venkat Sami

Date of Hearing: 3rd November, 1969.

Delivery of Judgment: 7th November, 1969.

F.M.K. Sherani for Appellant  
K.C. Ramrakha for Respondent

10

I have had the opportunity of reading the judgments of my brethren in this case. I am aware of the caution required on the part of an appellate tribunal before it interferes with the judgment of the trial Judge on matters of fact, and I confess that, bearing that in mind, my opinion has, during my consideration of the case, swung from side to side. However, I have finally come to the view taken by Marsack, J.A. and for the reasons which he gives. I therefore agree with him that the appeal should be allowed with costs here and below. 20

J.P. HUTCHISON

JUDGE OF APPEAL

SUVA,

November, 1969.

Solicitors for Appellant: Sherani & Co.  
Solicitors for Respondent: Ramrakhas.

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NO.19

ORDER ON JUDGMENT

In the Fiji  
Court of  
Appeal

BETWEEN: PAUL NAGAIYA s/o Pedwaru Venkat Sami  
Appellant

No.19

- and -

JAMES SUBBAIYA s/o Pedwaru Venkat Sami  
Respondent

Order on  
Judgment  
7th November  
1969

Before the Honourable Sir Trevor Gould (President)

Mr. Justice Hutchison, and Mr. Justice Marsack

10 UPON READING the Notice of Motion by way of appeal on behalf of the abovenamed Appellant dated the 20th day of August, 1969 and the Judgment herein-after mentioned

AND UPON READING the Judge's Notes herein

AND UPON HEARING Mr. F.M.K. Sherani of Counsel for the Appellant and Mr. K.C. Ramrakha of Counsel for the Respondent the Court doth declare that the Judgment of the Supreme Court of Fiji herein dated the 27th March, 1969 be set aside

20 AND IT IS FURTHER ORDERED that the respondent's claim do stand dismissed with costs in favour of the appellant in the Supreme Court of Fiji, and the Fiji Court of Appeal.

DATED the 7th day of November, 1969.

BY ORDER

Sgd.

REGISTRAR.

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In the Fiji  
Court of  
Appeal

NO.20

ORDER GRANTING FINAL LEAVE TO APPEAL  
TO THE PRIVY COUNCIL

No.20

Order granting  
final leave to  
appeal to the  
Privy Coun cil  
14th September  
1971

BETWEEN: PAUL NAGAIYA s/o Pedwaru APPELLANT  
Venkat Sami  
A N D : JAMES SUBBAIYA s/o Pedwaru RESPONDENT  
Venkat Sami

Before the Honourable Sir Clifford James Hammett  
Chief Justice of the Supreme Court of Fiji  
The 14th day of September, 1971

10

UPON READING the Notice of Motion for an Order  
Granting final leave to appeal on behalf of the  
abovenamed Respondent dated 1st day of September,  
1971

AND UPON READING the Judges Notes herein

AND UPON HEARING Mr. F.M.K. Sherani of Counsel for  
the Appellant and Mr. H.M. Patel of Counsel for the  
Respondent

IT IS ORDERED that the final leave to appeal to the  
Judicial Committee of Privy Council be and is hereby  
granted to the Respondent 20

AND IT IS FURTHER ORDERED that the Respondent do  
pay to the Appellant the costs of the Application  
fixed at \$8.00 (Eight Dollars).

BY ORDER

Sgd. Illegible

REGISTRAR

\_\_\_\_\_



"1"  
CERTIFICATE OF TITLE NO. 11689

Exhibits

"1"

Reference to previous  
Title C.T. 5387

No. 11689

Certificate  
of Title  
No. 11689  
12th March  
1965

F I J I  
CERTIFICATE OF TITLE

P A U L N A G A Y A

(Father's name Pedawaru Venkatsami)

of Levuka, in the Colony of Fiji, Landlord

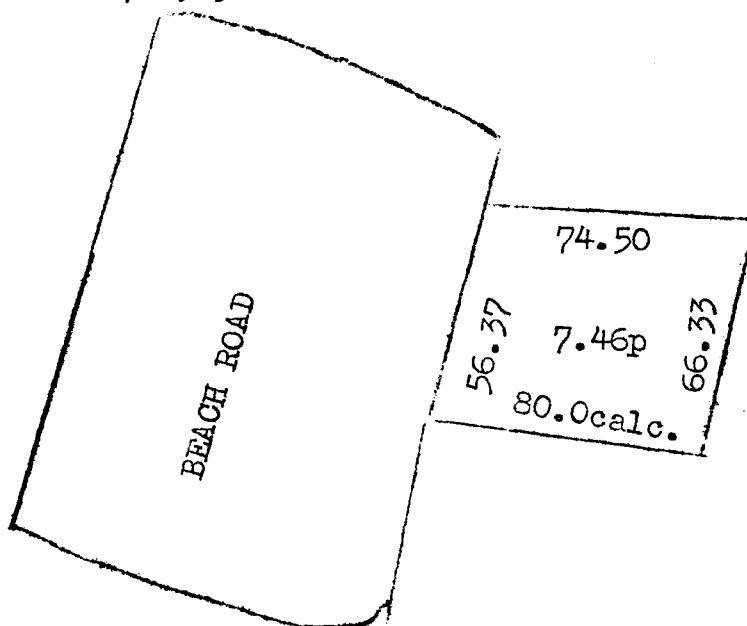
10 Pursuant to Request No. 90636 is now proprietor  
subject to the provisions and reservations con-  
tained in Crown Grant No. E - 868 and subject to  
such leases mortgages and encumbrances as are  
notified by memorial underwritten or endorsed  
hereon of that piece of land known as and contain-  
ing Seven perches and forty-six hundredths of a  
perch be the same a little more or less and situate  
in the District of Levuka in the Island of Ovalau  
and being Lot 1 on deposited plan No. 2908 and  
20 shown in diagram hereon.

In witness whereof I have hereunto signed my  
name and affixed my seal,

(LS)

(Sgd) A.G. Edwards  
Dep. Registrar of Titles

Suva 12th March, 1965.



C.T.11690

Scale 50 LINKS per inch. All measurements are in links.

Exhibits

"2"

Certificate  
of Title  
No. 11690  
12th March  
1965

"2"  
CERTIFICATE OF TITLE NO. 11690

Reference to previous  
Title C.T. 5387

No. 11690

F I J I

CERTIFICATE OF TITLE

P A U L N A G A Y A

(Father's name Pedawaru Venkatsami)

of Levuka, in the Colony of Fiji - Landlord

Pursuant to Request No. 90636 is now proprietor  
subject to the provisions and reservations contained  
in Crown Grant No. E - 868 and subject to such leases  
mortgages and encumbrances as are notified by  
memorial underwritten or endorsed hereon of that  
piece of land known as and containing Thirty perches  
and fifty-four hundredths of a perch be the same a  
little more or less and situate in the District of  
Levuka in the Island of Ovalau and being Lot 2 on  
deposited plan No. 2908 and shown in diagram hereon.

10

In witness whereof I have hereunto signed my  
name and affixed my seal,

20

(LS)

(Sgd) A.G. Edwards

Dept. Registrar of Titles

Suva 12th March, 1965.

/See over

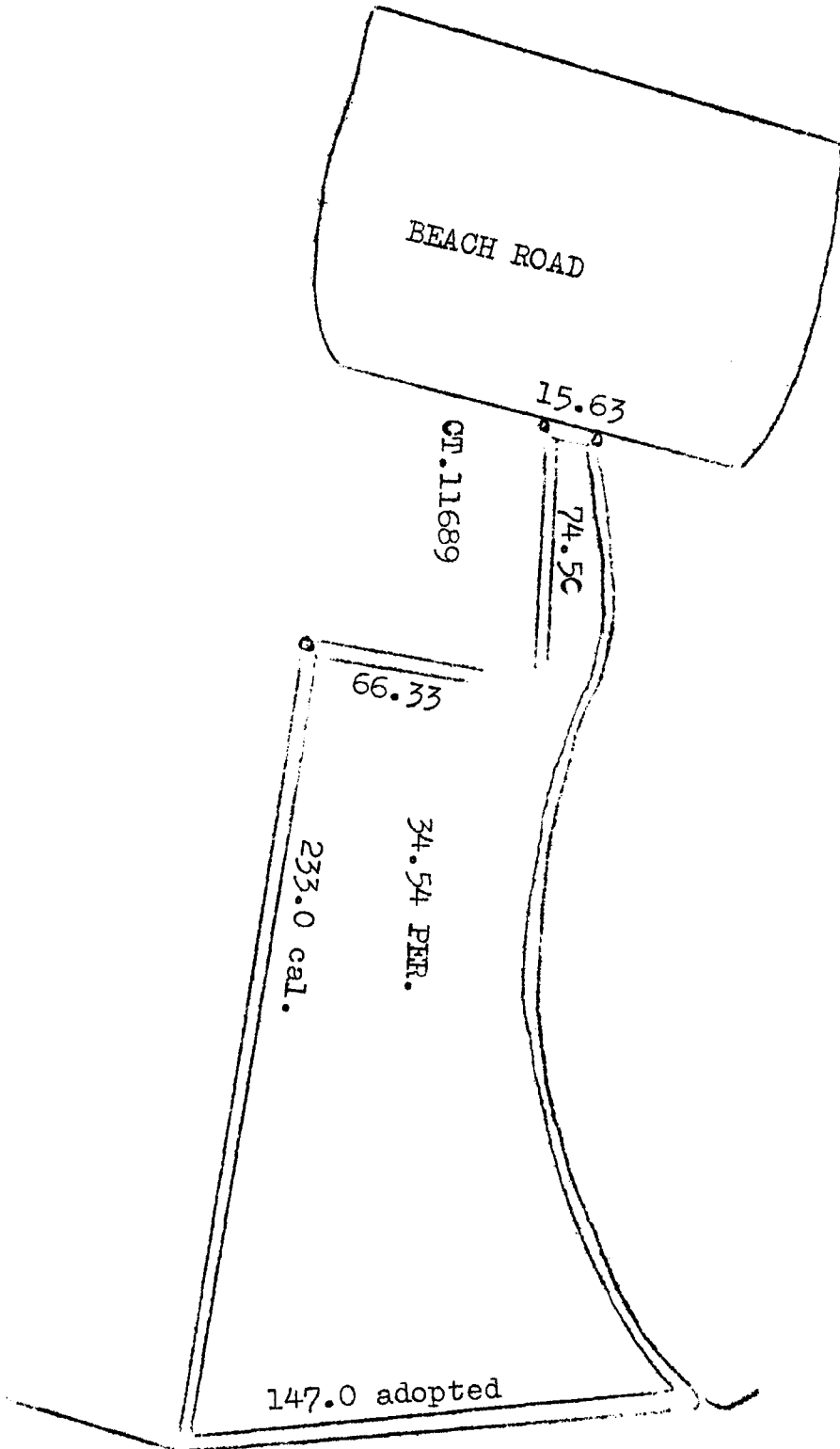
Exhibits

"2"

Certificate  
of Title  
No. 11690  
12th March  
1965

continued

Scale 50 LINKS per inch. All measurements are in links.



Exhibits

"3"

"3"

SALE AND PURCHASE AGREEMENT

Sale and  
Purchase  
Agreement  
13th November  
1939

MEMORANDUM OF AGREEMENT made the 13th day of November 1939 BETWEEN LESLIE MURRAY MCLEOD of Rowena New South Wales Stationowner and SANEY ALICE GLEN MCLEOD his wife as Trustees (hereinafter called "the vendors") of the one part AND PAUL NAGAYA (Father's name Pedori Vankatsami) of Levuka in the Colony of Fiji Plumber (hereinafter called "the purchaser") of the other part

WHEREBY IT IS AGREED as follows :-

10

1. The vendors will sell to the purchaser who will purchase ALL THAT the freehold estate and interest of the vendors in that piece or parcel of land situate in the Town of Levuka in the Island of Ovalau containing 38 perches more or less and being the whole of the land comprised and described in Certificate of Title Volume 54 Folio 5387 at or for the price of £125.0.0. (one hundred and twenty-five pounds) which shall be paid and satisfied by the purchaser in the manner following :

20

- (a) The sum of £30.0.0. has been paid to the vendors as a deposit and in part payment of the said purchase price (the receipt of which sum the vendors do hereby acknowledge).
- (b) The balance or sum of £95.0.0. shall be paid by monthly instalments of £4.0.0. each payable on the 1st day of each month the first of such payments to be made on the 1st day of December now next.

2. The purchaser will pay to the vendors interest on the said sum of £95.0.0. or on so much thereof as shall from time to time remain owing calculated at monthly rests at the rate of £7.0.0. per centum per annum and payable on the 1st day of each month the first of such payments to be made on the 1st day of December now next and to be calculated from the 1st day of October 1939.

30

3. Upon payment of the said purchase money and all interest thereon and other moneys (if any) then due hereunder the vendors and all other necessary parties (if any) will execute a proper assurance of the said land to the purchaser or his nominee free from all

40

encumbrances such assurance to be prepared by and at the expense of the purchaser and to be tendered to the vendors for execution.

Exhibits

"3"

Sale and  
Purchase  
Agreement  
13th November  
1939

continued

4. Possession of the said land shall be deemed to be given and taken as at the 1st day of October 1939 and rents rates insurance premiums and other outgoings shall be apportioned between the parties as at that date.

10 5. The purchaser will duly and punctually pay and discharge all rates taxes charges impositions insurance premiums and other outgoings levied charged or imposed on the said land or the buildings thereon or the owner or occupier in respect thereof and will keep the vendors indemnified in respect thereof.

20 6. Whilst any moneys shall remain owing by the Purchaser to the vendors under this Agreement the Purchaser shall not be entitled to mortgage charge sell assign transfer or part with the possession of the said property or any part thereof or his interest hereunder without the consent in writing of the vendors first had and obtained.

7. The vendors and their agent or agents shall at all reasonable times during the continuance hereof be at liberty to enter upon the said land and to inspect the state and condition thereof.

30 8. The purchaser will insure and keep insured against loss or damage by fire in the names of the vendors in an insurance company to be nominated by the vendors all buildings for the time being on the said land in their full insurable value and will deposit any policy of such insurance with the vendors and will duly and punctually pay all premiums for such insurance as and when they shall fall due.

9. The purchaser shall be at liberty at any time during the continuance of this agreement to pay off the whole or any part of the balance purchase moneys then remaining owing hereunder to the vendors.

40 10. Time shall be of the essence of this agreement.

11. If the Purchaser shall make default in payment

## Exhibits

"3"

Sale and  
Purchase  
Agreement  
13th November  
1939

continued

of the purchase moneys or any instalment thereof hereby agreed to be paid or in the performance or observance of any other stipulation or agreement on the part of the purchaser herein contained and such default shall be continued for the space of fourteen days then and in any such case the vendors without prejudice to their other remedies hereunder may at their option exercise any of the following remedies namely :

- (a) May enforce this present contract in which case the whole of the purchase money then unpaid shall become due and at once payable or 10
- (b) May rescind this contract of sale and thereupon all moneys theretofore paid shall be forfeited to the vendors as liquidated damages and
  - (i) May re-enter upon and take possession of the said land without the necessity of giving any notice or making any formal demand and
  - (ii) May at the option of the vendors re-sell the said land and property either by public auction or private contract subject to such stipulations as they may think fit and any deficiency in price which may result on and all expenses attending a re-sale or attempted re-sale shall be made good by the purchaser and shall be recoverable by the vendors as liquidated damages the purchaser receiving credit for any payments made in reduction of the purchase money. Any increase in price on re-sale after deduction of expenses shall belong to the vendors. 20

12. The costs of and incidental to the preparing and stamping of this Agreement and one counterpart thereof shall be paid and borne by the purchaser.

13. The expression "the vendors" and "the purchaser" where used herein shall except where the context requires a different construction respectively mean include and bind the vendors their successors and assigns and the purchaser and his executors administrators and assigns. 40

AS WITNESS the hands of the parties.

SIGNED by the said  
LESLIE MURRAY MCLEOD  
and the said SANEY  
ALICE GLEN MCLEOD as  
vendors in the  
presence of :-

(sgd.) A.D. Leys

Solicitor  
Suva.

Leslie Murray McLeod  
by his Attorney  
R.F. Pickering.  
Saney Alice Glen McLeod  
by her Attorney  
R.F. Pickering.

Exhibits

"3"

Sale and  
Purchase  
Agreement  
13th November  
1939

continued

SIGNED by the said  
PAUL NAGAYA as  
purchaser in the  
presence of :-

(sgd.) Paul Nagaya

(sgd.) Cyril King  
J.F.  
Levuka.



Exhibits

"4"

Bundle of Receipts

BUNDLE OF RECEIPTS

No. 1


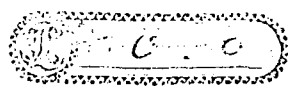
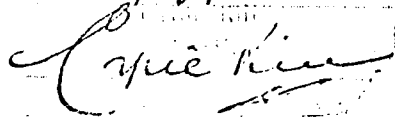
Received from *Mr. P. Nagaya*

the sum of *Four* pounds

shillings and \_\_\_\_\_ pence

*Instalment payment for purchase of*

*Cyrie Kum*

No. 19


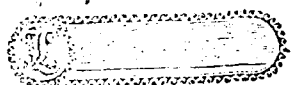
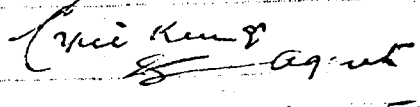
Received from *Mr. P. Nagaya*

the sum of *Four* pounds

shillings and \_\_\_\_\_ pence

*for purchase of on a/c*

*Cyrie Kum & agent*

No. 19


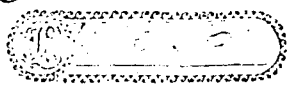
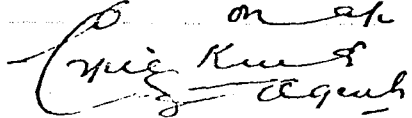
Received from *Mr. P. Nagaya*

the sum of *Four* pounds

shillings and \_\_\_\_\_ pence

*for purchase of Instalment on a/c*

*Cyrie Kum & agent*

No. 19


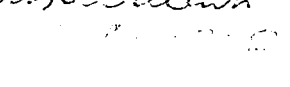
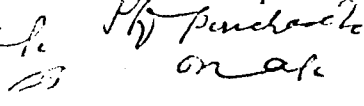
Received from *Nagaya a/c*

the sum of *Four* pounds

shillings and \_\_\_\_\_ pence

*Instalment on a/c for purchase of*

*on a/c*



No. 62. 22. 7. 1940.

Received from Mr. P. Nagaya

the sum of Five pounds

ten shillings and Seven pence

Instalment on a/c £4.0.0  
Interest of 24/6/40. 1.10.1  
Balance 13.9

*Cyrie Kinnaird* Agent

No. 77. 2. 9. 1940

Received from Mr. Paul Nagaya

the sum of Four pounds

shillings and pence

Instalment payment July a/c

*E. W. W. W. W. W.*  
*Cyrie Kinnaird* Agent

No. 94. 26. 9. 1940

Received from Mr. Paul Nagaya

the sum of Four pounds

shillings and pence

Instalment payment on a/c.

*Cyrie Kinnaird* Agent

"4"

Bundle of Receipts

No. 118. - 19

Received from *M. P. Nagara*

the sum of *Four* pounds

shillings and \_\_\_\_\_ pence

Instalment - on a/c

*11-0-0*

*Yue Kuen & Co. Agents*

No. 129. - 19

Received from *M. Paul Nagara*

the sum of *Four* pounds

shillings and \_\_\_\_\_ pence

Instalment on a/c

*11-0-0*

*Yue Kuen & Co. Agents*

No. 130. - 19

Received from *M. Paul Nagara*

the sum of *One* pounds

*Six* shillings and *Nine* pence

Interest a/c to 30.9.40.

*11-0-0*

*Yue Kuen & Co. Agents*

No. 130

19

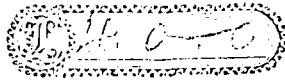


Received from Mr. Paul Nagasa

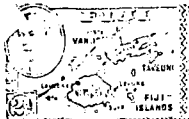
the sum of Four \_\_\_\_\_ poun

shillings and \_\_\_\_\_ p

Instalment of Nakaube Pli.



*Cyic Kuu*  
*S. S. agent*



FEB 24 1919

Mr Paul Nagasa

the sum of four \_\_\_\_\_ Pounds

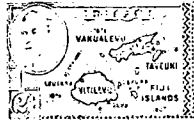
Shillings and \_\_\_\_\_ Pence

Instalment on a/c.

L 4-0-0

*Cyic Kuu*  
*S. S. agent*

No. 31



MAR 1919

Received from Mr. Paul Nagasa

the sum of four pounds \_\_\_\_\_

Instalment on a/c Pli purchase

of Nakaube on a/c

L 4. 0. 0

*Cyic Kuu*  
*S. S. agent*



Exhibits

"4"

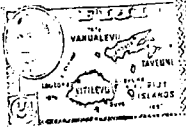
Bundle of Receipts

No. 10 CYRIL KING LEVUKA

Received from Mr. Paul Nagara  
 the sum of Four pounds  
Instalment parment - Nakauke of Ag  
on ac  
£4. 0. 0 Cyrie King

No. 10H CYRIL KING LEVUKA JUN 30 1941

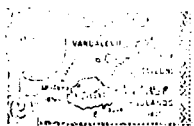
Received from W.P. Nagara  
 the sum of Four pounds  
Instalment re Nakauke plg - per Ag  
on ac  
£4-0-0 Cyrie King  
S. Agant

 E.W. N. & Coy. Agents  
Levuka, Fiji. AUG - 7 1941

194

Received from W.P. Nagara  
 the sum of Four pounds  
Instalment on ac  
£4. 0. 0 Cyrie King  
S. Agant

156



Levuka, Fiji.

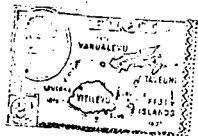
SEP 2 1941 194

Received from Mr. Paul Nagasa  
the sum of Four pounds.

Instalment on a/c.

£ 4-0-0

Cyrie Kiri  
Agent



Levuka, Fiji.

NOV 7 1941 194

Received from Mr. Paul Nagasa  
the sum of Four pounds.

Instalment on a/c.

£ 4-0-0

Cyrie Kiri  
Agent

Levuka, Fiji.

DEC 20 1941 194

Received from Mr. P. Nagasa  
the sum of Four pounds.

Instalment on a/c.

£ 4-0-0

Cyrie Kiri  
Agent



"4"

Bundle of Receipts

N<sup>o</sup> 251. GYRI KING  
LEVURA

MAR 1 1942 19

Received from Mr. P. Nagara  
the Sum of Four Pounds  
Shillings and Pence  
Instalment on a/c.



4-0-0 Gyri King &  
Agents

N<sup>o</sup> 329

AUG 19 1942 19

Received from Mr. P. Nagara  
the Sum of Two Pounds  
Shillings and Pence  
Naikambe purchase p/a/c.

2-0-0 Gyri King &  
Agents

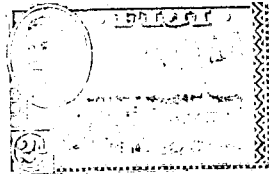
N<sup>o</sup> 402.

JAN 1943 19

Received from Mr. Paul Nagara  
the Sum of Two Pounds  
Shillings and Pence  
Naikambe of instalment on a/c.

2-0-0 Gyri King &  
Agents

N<sup>o</sup> 10



APR 23 1844

19

Received from M<sup>r</sup> Paul Nagara  
the Sum of Ten Pounds  
Shillings and Pence

Nashua N<sup>h</sup> ply of E. W. W. Coy. & Co.  
Blue ink post.

L 10-0-0  
Wm. K. & Co. Agents



Exhibits

"5"CERTIFICATE OF MARRIAGE

5958

Marriage  
Certificate  
of  
Respondent

PARTICULARS	BRIDEGROOM	BRIDE
When and where married ..	14th January, 1938	Levuka Court House
Name and Surname in full ..	PAUL NAGAYA	MINATCHI
Age .. ..	23 Years	15½ years
Birthplace ..	Labasa	Savusavu
Condition ..	Bachelor	Spinster
Profession ..	Plumber	Domestic Duties
Place of residence	Levuka	Levuka
Father's name and Surname ..	Venkatsami	Ramani Nair
Father's profession ..	Cultivator	Mail Carrier
Mother's name and maiden surname	Gangamma	Kaluamma

10

Married according to law this 14th day of January 1938, after the delivery to me of the Certificate for Marriage required by the Marriage Ordinance (Cap.39), by

20

Sgd. WILLIAM BURROWS  
(Signature of Marriage Officer)

This marriage was solemnized between us { Sgd. PAUL NAGAYA  
Manatchi her left thumb mark

In the presence of { Sgd. D.R. SUKHU  
Sgd. V. WILLIAMS  
Names of witnesses.



I hereby certify that the above is a true copy of an entry in a Register of Marriages kept at the Registrar-General's Office, Suva, Fiji, and extracted this 4th day of February, 1969.

(L.S.) Sgd. ?  
Atg. Asst. Registrar-General

R.G. 17/38 BA

Exhibits

"5"

Marriage  
Certificate  
of  
Respondent  
continued

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ON APPEAL  
FROM THE FIJI COURT OF APPEAL

---

B E T W E E N :

JAMES SUBBAIYA                      Appellant

- and -

PAUL NAGAIYA                      Respondent

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RECORD OF PROCEEDINGS

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CHARLES RUSSELL & Co.,  
Hale Court,  
Lincoln's Inn,  
LONDON WC2A 3UL.

Solicitors for the  
Appellant

MESSRS. WILSON FREEMAN,  
6/8 Westminster Palace  
Gardens,  
Artillery Row,  
Victoria Street,  
LONDON SW1P 1RL

Solicitors for the  
Respondent