

IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL PETITION No. CBV 006 OF 2015
(Court of Appeal No. ABU 0026 of 2012)

BETWEEN : **PRADEEP SINGH**

Petitioner

AND : **RAJENDRA SINGH**

1st Respondent

AND : **BALVINDAR KAUR**

2nd Respondent

Coram: Hon. Justice Priyantha Fernando, Acting President of the Supreme Court
Hon. Justice Sathya Hettige, Justice of the Supreme Court
Hon. Justice Suresh Chandra, Justice of the Supreme Court

Counsel : Mr. V. M. Mishra for the Petitioner
Mr. Samuel K. Ram for the Respondents

Date of Hearing : 09 June 2016

Date of the Judgment: 23 June 2016

JUDGMENT OF THE COURT

Fernando, AP

[1] I agree with the reasoning and conclusions of the judgment of Hettige J.

Sathya Hettige JA

Background

[2] The petitioner in this application was one of the beneficiaries under the Estate of his deceased father, Battan Singh (hereinafter referred to as the deceased) .
The first respondent and the second respondent were the brothers of the

petitioner. The deceased executed a last will on the 31st March 1981 distributing his residual properties among his sons and Channan Kaur, the mother.

[3] After the deceased died testate on the 9th September 1985 his entire Estate consisting of money and real Estate both in Fiji and India dealt with in the last will dated 31 March 1981 were managed by the widow, the Petitioner's mother as the trustee, having obtained probate in the Estate of the deceased on the 5th of December 1985.

[4] The petitioner who was 22 years old at the time of the death of the deceased was studying in India from June 1981 to June 1984. The deceased had been born in India and had been a soldier serving in the British Army.

[5] The deceased by his last Will dated 31 March 1981 had devised and bequeathed his property as follows:

- a) *To look after, maintain and educate his grandchildren Jasindra Kaur and Ramini Kaur until they are married;*
- b) *To pay for education of his son Pradeep Singh from monies held by him in Lakshmi Commercial Bank in India and if necessary from Insurance monies receivable from Life Insurance Corporation of India;*
- c) *To give all his property in India at Govindpur, Jallundar, Punjab to his sons Autar Singh, Balwant Singh, Rajendra Singh and Pradeep Singh in equal shares absolutely;*
- d) *To allow his wife Channan Kaur and his sons Balwant Singh, Rajendra Singh and Pradeep Singh to live and occupy the house site presently occupied by him and each shall have equal share in it and no one shall his or her share to any outsider provided however each of them may sell his or her share to other partners if the majority of them agree;*
- e) *To give the rest and residue of his property in Fiji as follows:*
 - (i) *½ of the rest and residue to his son Pradeep Singh;*
 - (ii) *¼ of the residue to his wife Channan Kaur;*
 - (iii) *¼ of the residue to his son Rajendra Singh.*

- [6] The Petitioner's mother died on 20th October 2006 and the First Respondent became the Administrator of the Estate of the deceased by way of chain of administration as the mother had named him as her trustee in her last will. Since the petitioner did not receive any advice about his entitlements in the Estate after the death of the mother, the petitioner sued the First Respondent who had become the Trustee of the Estate. He had not got any response to the notice that he had sent to the First Respondent, and had discovered through the Office of the Registry of Titles that there was a Deed of Renunciation whereby he was deemed to have renounced his share in the estate in favour of the mother.

Proceedings in the High Court

- [7] In the present legal proceedings that were initiated by the petitioner, he in his statement of claim filed in the High Court at Lautoka pleaded that the mother had fraudulently and in collusion with the first respondent transferred the estate of the deceased to the first respondent depriving him of his entitlement under the last will.
- [8] As to whether the petitioner together with other beneficiaries had renounced all their rights under the Estate in favour of the mother by a deed of renunciation dated 16th September 1985 was disputed. The mother, was the only person who was residing in Fiji at the relevant time and all the properties had been transferred by way of the renunciation deed to the mother. The petitioner stated that when he signed the Deed of Renunciation that he had not been told that it was to gift his share away. The petitioner's evidence at the trial was that his older brothers the First respondent and Dr. Balwant Singh Rakka had said that he had to sign that document for release of funds for his father's funeral rites.
- [9] The trial Judge at paragraph 7 of the Judgment at p.12 Vol.1 of the FCA record said as follows:
- “evidence in the case sheds light as to the circumstances that deprived the plaintiff of his entitlement to the property under clause 3 of the Last Will . Court is tasked with the finding of answers to the applicable issues , as*

formulated by parties in terms the Minutes of Pre-Trial Conference dated 01 February 2011, and decide whether such deprivation of the plaintiff of his shares under the Last Will of the late Battan Singh is permissible under the law.”

[10] After trial the learned trial Judge by judgment dated 19 March 2012 allowed the petitioner’s action and upheld the allegation of fraud and found that the deed of Renunciation was invalid and unenforceable in law and that it had no legal effect in so far as respondent’s shares, interest and rights were concerned under the Last will and testament of the deceased.

[11] The petitioner’s action which was filed in the High Court at Lautoka only after the death of the mother was based on the following main causes of action:

- (a) Fraud and collusion on the part of the respondents
- (b) Plea of “*non est factum*”.(denial of signing Deed of Renunciation)
- (c) Breach of fiduciary duties on the part of the mother and the First Respondent.

[12] The learned trial judge held that the plea of “*non est factum*” was made out because the petitioner thought that he was signing a document for release of money for the funeral rites the deceased. The trial judge also held that the first respondent and the mother acted fraudulently in having the deed executed and that the petitioner only became aware of the fraud after the death of the mother.

GROUND OF APPEAL IN THE COURT OF APPEAL

[13] The respondents being dissatisfied with the decision, appealed the decision of the High Court dated 19 March 2012 on several grounds of appeal. (Vide pages 3 to 6 of the Court of Appeal Record Volume 1).

- [14] The Fiji Court of Appeal, per Callanchini P, Almeida Guneratne JA and Prematilaka JA, having considered the submissions of the petitioner and the respondents overturned the decision of the High Court dated 19 March 2012 on the basis that there was no evidence adduced before the trial Judge to prove fraud and collusion or the plea of “*non est factum*”.

Special Leave to Appeal

- [15] In this application, the petitioner is seeking special leave to appeal against the decision of the Court of Appeal dated 2 October 2015 on the grounds set out in the petition of appeal. Before we deal with the grounds of appeal it is incumbent on this court to examine and see as to whether the petitioner’s application is a fit case to grant special leave and the leave criteria contemplated in section 7 (3) of the Supreme Court Act No. 14 of 1998 have been met,.

Section 7 (3) provides as follows:

“In relation to a civil matter (including a matter involving a constitutional question), Supreme Court must not grant special leave to appeal unless the case raises-

- (a) A far reaching question of law*
- (b) A matter of great general or public importance;*
- (c) A matter that is otherwise of substantial general interest to the administration of civil justice.”*

- [16] The Supreme Court derives power to hear and determine appeals from the final judgments of the Court of Appeal under section 98(3) and (4) of the Constitution of the Republic of Fiji.

Section 98 (3) thereof provides that:

“The Supreme Court –

- (a) Is the final appellate court*
- (b) Has exclusive jurisdiction, subject such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal : and*
- (c) has original jurisdiction to hear and determine constitutional questions referred under section 91(5).”*

Section 98 (4) provides thus:

“An appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.”

Section 98 (5) reads as follows:

“In the exercise of its appellate jurisdiction, the Supreme Court may-

- (a) Review, vary, set aside or affirm decisions or orders of the Court of Appeal, or
- (b) Make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs.

Section 98 (6) provides that decisions of the Supreme Court are, subject to sub section 7 binding on all other courts of the State.

- [17] The Supreme Court of Fiji in number of cases has interpreted the special leave to appeal threshold criteria enumerated in section 7 (3) of the Supreme Court Act and the leave to appeal criteria has been settled.

In **Ganesh Chand v Fiji Times** Civil Appeal No. CBV 005 of 2009 the court observed as follows:

*“In applying these provisions the Supreme Court of has adopted in decisions such as **Bulu v Housing Authority (2005) FJSC 1 2004S** (8 April 2005) the criteria enunciated by the Privy Council in **Daily Telegraph Newspaper Company Limited v McLaughlin (1904) AC 776**. Which was first case in which special leave to appeal from a decision of the High Court of Australia had been sought. Lord Macnaghten, at page 779 of his judgment, after observed that the same principle should apply as they did for an appeal from the Supreme Court of Canada referred to the case of **Prince v Gagnon** (1882) 83 AC 103 in which it was stated that the appeals would not be admitted-*

“Save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.”

- [18] As stated above the stringent threshold criteria in section 7(3) of the Supreme Court has been discussed and decided in a catena of cases in the Supreme Court of Fiji.

See Bulu v Housing Authority (2005) FJSC 1 CBV 0011.2004S 8 April 2005 and Pravin BP Service Station Ltd. v Fiji Gas Ltd. (6th April 2011)

It can be observed from the above decisions that special leave is not granted unless the case is one of gravity involving a matter of public interest, or some important question of law.

- [19] I observe that it is also relevant to consider the provisions contained in Article 136 of the Indian Constitution which grants entirely a discretionary power to the Indian Supreme Court whether to grant special leave or not in a particular case as the Indian Supreme Court is not a regular Appeal Court. The relevancy of the provisions in Article 136 of the Indian Constitution is extra-ordinary discretionary power exercised by the Indian Supreme Court which is similar to the exclusive discretionary power in Fiji Supreme Court in leave to appeal applications. The Article 136 of Indian Constitution reads as follows:

“Notwithstanding anything in this chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India”

- [20] In Chandrasingh v State of Rajasthan AIR 2003 SC 2889 (vide paragraphs 43 and 45) the Court observed that under Article 136 it was not bound to set aside an Order even if an order is not in conformity with the law since the power under Art.136 was discretionary.

- [21] The exclusive jurisdiction conferred upon the Supreme Court which is meant to deal with more important issues involving questions of law of general importance by the provisions in section 98 (3) of the Constitution will be exercised sparingly and in furtherance of justice in cases where the greater burden on the petitioner to satisfy the threshold requirements under section 7(3) is fulfilled.

[22] Now we will proceed to consider the grounds of appeal submitted by the petitioner to the Supreme Court challenging the decision of the Court of Appeal dated 12 March 2012:

- (a) The Judges of the Fiji Court of Appeal erred in law in not applying the fundamental principle that a trial Judge's findings of fact where he has observed the demeanour of witnesses is rarely overruled.
- (b) The Judges of the Fiji Court of Appeal erred in law over-ruling the trial judge's decision and findings of fact and failed to apply the principle that there is a presumption that a Judge's decision is correct and that a favourable interpretation of his findings ought to be taken.
- (c) The judges of the Fiji Court of Appeal erred in substituting their own decision and views rather than reviewing the trial judge's decision and the law on which he had based it on They fell into error by substituting their own views and opinions in place of that of the trial Judge without having had the advantage of hearing and seeing the witnesses given evidence and seeing their demeanour during cross-examination.
- (d) The judges of the Fiji Court of Appeal erred in law in holding that there was a high standard of proof on the Petitioner to show fraud where a Trustee/beneficiary relationship in law existed with the Trustee getting the benefit of the Beneficiary's share in the subject Estate.
- (e) The Judges of the Fiji Court of Appeal erred in law in failing to uphold the fundamental principle that with persons inheriting there is a presumption that a transaction whereby another get the benefit of an heir's inheritance cannot stand as lawful and legitimate unless the person claiming the benefit of it proves positively (onus of proof being on him) that it is just fair and reasonable.

- (f) The Judges of the Fiji Court of Appeal erred in law over-ruling the Trial Judge when he had accepted the law as stated by the Privy Council in Permanent Trustee of NSW Ltd vs Bridgewater 1936 Vol. 3(1) ER Page 501 that a bargain with a beneficiary of an Estate (as here) even with some consideration must be accompanied with independent and informed legal advice to be legitimate and binding.
- (g) The Judges of the Fiji Court of Appeal erred in law in not accepting that there was a presumption that the Deed was bad unless it was shown the Petitioner had independent advice and in not holding that there was a special relationship between Channan Kaur and the First Respondent and the Petitioner.
- (h) The Judges of the Fiji Court of Appeal erred in law in holding there was no breach by Mrs Channan Kaur as a Trustee of the fiduciary duty she owed the Petitioner and that she acted in breach of her fiduciary duties as Trustee in transferring the property ultimately to the First Respondent.
- (i) The Judges of the Fiji Court of Appeal erred in law in holding that the plea of non est factum did not assist the Petitioner and he had lied in his evidence and he lacked credibility.
- (j) The Judges of the Fiji Court of Appeal erred in law in holding that Sections 9 and 10 of the Limitations Act applied and the Petitioner's Action was time barred.
- (k) The Judges of the Fiji Court of Appeal erred in law in not considering the Petitioner's Respondent Notice even though it was out of time in the circumstances of this case.

[23] In answer to a clarification sought by court, learned senior counsel for the petitioner indicated that there is an overlapping of the grounds of appeal and he was willing to confine himself to the grounds of appeal nos.(f) (g), (h) and made submissions on the issue of fraud, breach of fiduciary duty, the deed of renunciation

and matters relating to fraud. The learned counsel gave much emphasis to the issue of presumption of fraud with reference to judicial precedents. We will deal with the ground of appeal on fraud since this issue was strenuously argued in court both by the petitioner and the respondents.

Fraud

- [24] The Court of Appeal in paragraph 17 of the Judgment set out how the learned trial Judge relied on the passage in Halsbury's Laws of England on "Bargains with Heirs"

"The court will always relieve against the fraud which infects unconscionable bargains made with heirs, reversioners or expectants on the security of their expectant or their reversionary interests in property, and fraud always is presumed in such cases from the circumstances of the partiesnamely weakness on the one side and on the other usury, extortion or advantage taken of their weakness. Fraud does not in these cases mean deceit; it means an unconscionable use of the powers arising out of the attendant circumstances and conditions and where the relative position of the parties is such as prima facie to raise this presumption the transaction cannot stand unless the person claiming the benefit of it can prove it to be in fact fair, just and reasonable" (P. 345 Halsbury's Laws of England 4th Edi. Vol.18)(emphasis is mine)

The learned High Court Judge referring to the said passage observed as follows:

"However, in my view facts of this case transcend the usual boundaries of unconscionable conduct where a party makes use of the weakness of another and of the attendant circumstances only to raise a presumption of fraud against that party. Instead, the of deceit itself is made out in this case in the wake of the plaintiff's evidence that he was misled to the belief that the document that he was signing on was a document to withdraw money from the bank." (P. 41, HCR) The trial court however, failed to consider the fact that the petitioner was not an illiterate person and that he could not have been misled. The solicitor in his affidavit has stated in the impugned deed that it was read over and explained to the petitioner and all other beneficiaries regarding the nature of the document that was signed by the parties.

- [25] Learned counsel heavily relied on the judgment in Ishwar Nand v Sunil and Ramesh Kumar and Another SC CBV 0006 of 2011(16 August 2012) and submitted that this was binding authority in Fiji to establish fraud in matters relating to administration of Wills, breach of Trust and fiduciary duty. It is relevant to note in this case that special leave to appeal was refused as there was no far reaching question of law. Ishwar Nand case was one involving a settlement reached on 22 March 1992 and 24 March 1992 which was tainted with undue influence and fraud. The court by way of obiter said that the presumption of fraud was not rebutted.
- [26] Learned counsel for the respondent contended with reference to the case of Ishwar Nand (supra) that it is not the relationship of the parties but the “*circumstances of the contracting parties that has to be considered. The law very clearly provides that fraud is presumed in such cases from the circumstances of the parties contracting...*” Counsel further argued that “such cases” referred to in the passage in Halsbury’s Laws of England (supra) refers to “*bargains made with heirs, reversioners or expectants on the security of their expectant or reversionary interests in property...*” The Deed of Renunciation was not a bargain made on the security of the expectant or reversionary interests of the petitioner.
- [27] The petitioner’s claim is that in view of the relationship between the petitioner and the mother as the trustee, the presumption of fraud arises. However, it can be argued as to how can the trial court consider the issue of fraud to be presumed as alleged by the petitioner, when the mother was dead. The first respondent became the trustee of the estate after the death of the mother. By the time the first respondent became the trustee of the Estate, the Deed of Renunciation had been executed to which the petitioner was a signatory.
- [28] The learned trial Judge in paragraph 85 of the judgment has observed that “*The purported Deed of Renunciation was the outcome of a fraud perpetrated by the First defendant (first respondent) and the late Balwant Singh to make the plaintiff*

disentitled to his existing rights that he was otherwise entitled to under the late Battan Singh's last will dated 31 March 1981."

[29] This court is unable to comprehend as to how the trial court came to the conclusion that there was a fraud without sufficient evidence elicited at the trial. The petitioner has not given any evidence on the issue of fraud. The law says for there to be presumption of fraud there must be weakness on the side of one party and advantage is taken of that weakness by other party. Can we conclude that the petitioner had a weakness. He was a young man of 22 years old studying medicine in a foreign country at the time of signing the deed of renunciation and educated in English. We would reproduce paragraph 26 of the Court of Appeal judgment which is relevant to mention.

"What was the *"artful device"* on the part of the first defendant, the late Balwant Singh and Channan Kaur (deceased mother) practised on the appellant respondent in getting him to sign the deed of renunciation of his proprietary rights under the last will of Battan Singh.?"

[30] We agree with the conclusion the Court of Appeal reached that there was no evidence of fraud at the hearing of the trial Court. If there was an allegation of fraud that matter would have been investigated prior to the institution of the legal proceedings and before the mother died. There must be evidence that the mother and the first respondent fraudulently acted and colluded prior to the signing of the deed of renunciation. Mere assumption of a fraud based on the conduct of the parties is not sufficient to establish a fraud. It is to be noted even the trial Judge did not decide the case on the basis of fraud. There was no evidence that the petitioner made any effort or exercised due diligence to discover any fraud after the signing of deed of renunciation for a period of nearly 22 years which was after the death of the mother. It appears that the petitioner had slept over his rights for such a long period of time which deprived him of his inherited property.

- [31] The petitioner in his evidence at the trial court denied that he signed the deed of renunciation and the evidence of a hand writing expert was required to prove his signature and finally he admitted that the signature on the deed was his. This denial of the petitioner's signature on the deed and his subsequent admission of the signature should have been seriously considered by the trial Judge regarding credibility of his evidence. Despite the above evidence, in paragraph 49 of the trial court Judgment the learned trial Judge holds that the petitioner was truthful in his evidence and the petitioner's version was consistent with his pleadings set out in the statement of claim.
- [32] The House of Lords decision in **Saunders et al v. Anglia Building Society** (1970) 3 All E R 961 is authority on the principle of "*non est factum*" on which the learned trial Judge relied. In that case the House of Lords explained and laid down how and to whom the "*non est factum*" plea should be applicable. House of Lords stated that a man of full age and understanding who can read and write cannot be allowed to repudiate his signature to a document, which he knows will have legal consequences if he signs it without reading it. The petitioner being a literate and educated person cannot deny his signature placed in the deed. By signing the deed of renunciation all the beneficiaries decided to put the entire family property in the hands of the mother. The petitioner cannot rely on and plead the defence of *non est factum* because he was a literate and educated person and the judgment cited by the learned counsel for the petitioner hardly supports his case.
- [33] With regard to the defence of '*non est factum*' the petitioner relied on, the learned trial judge formed the opinion and concluded saying that the petitioner's testimony was unchallenged and the document the petitioner signed was one only to withdraw money from the bank on 16 September 1985 at the instance of the late Balwant Singh and the first respondent to meet the funeral expenses of the late Battan Singh. The trial Judge has completely disregarded the evidence given by hand writing Expert and the evidence given by the petitioner admitting his signature on the deed of renunciation in court. The evidence that was elicited at the hearing in

the trial court was that the document that was signed by the petitioner was the deed of renunciation. (Vide Para 78 of the trial court judgment)

- [34] There was no evidence at the hearing in court of a different document the petitioner alleged to have signed. Such document as alleged by the petitioner was never produced in court. Only the evidence of the impugned deed of renunciation was in evidence. The evidence in court was that the petitioner and the other beneficiaries had signed the deed of renunciation in question. The petitioner's grievance that he signed the deed with no consideration as to its terms cannot be accepted because he was not an illiterate and uneducated person. Accordingly, I hold that the petitioner had signed the deed of renunciation with knowledge that it was a renunciation of rights. Thus it is not open to him, in the absence of fraud and misrepresentation on the part of any of the parties, to rely on the plea of "*non est factum*". It appears that the trial Judge has erred in law and we agree with the conclusion arrived at by the Court of Appeal on that issue. In that regard I found the case in **Blay v Pollard and Morris** (1930) KB 628 CA to be useful.

Fiduciary duty

- [35] What are the tests that are commonly applied to determine any breach of fiduciary duty as constituting fraud on the part of the deceased mother. Where is the evidence to establish that the mother made unconscionable use of her power arising out of attendant circumstances of trusteeship? Mr. Mishras's contention was that, by the conduct of the respondents it could be presumed that their design of the deed of the renunciation and the transfer of the property in the name of the first respondent was to achieve unconscionable bargains towards the petitioner who was an heir which amounted to a breach of fiduciary duty. What is fraud? It consists of a false statement which is made by "C" to "D" (**Bissett v Wilkinson** (1927) AC 177). What is the false statement the mother made to the petitioner. There was no evidence of such a false statement.

[36] In paragraph 93 of the trial court judgment, the learned trial Judge has agreed with the submission made by the counsel for the petitioner that the deceased mother had acted in breach of the fiduciary duties as the trustee which I reproduce as follows:

“I agree with the submission of Mr. Mishra as supported by the legal texts and judicial precedents, that the late Ms Channan Kaur (deceased mother) acted in breach her fiduciary duties as the sole trustee and the executrix of the lat will of the late Battan Singh towards the plaintiff when she transferred the property absolutely in the name of the first defendant notwithstanding the shares that the plaintiff was entitled to under the Last Will.”

[37] A fiduciary must not profit from his or her position as a fiduciary. What is the profit the deceased mother obtained on account of the impugned deed of renunciation? (Please see **Keech v Stanford (1726)**, in Snell’s “Equity, John McGhee, 30th Ed. Sweet & Maxwell. There was no evidence that the mother made any profit out of the transfer of property.

[38] Furthermore, In **Bristol West Building Society v Mothew**, (1998) Chancery Div. P.1 The court observed that the following tests should be applied in determining any breach of fiduciary duty.

- i) Failure to act in good faith
- ii) Acts, omissions or concealments which may be deemed to constitute constructive fraud.

From the evidence elicited in the trial court we find that none of the above tests are applicable to the mother of the petitioner.

[39] It was submitted by the respondents that the person who would have benefitted initially from the proceeds of the Estate of the deceased was the deceased mother as the trustee. Therefore, if the petitioner’s position was that there is a presumption of fraud simply because of a trustee/beneficiary relationship the presumption would be that the mother committed the fraud as a result of which the petitioner was induced to sign the Deed of Renunciation. There was no evidence in court to establish any fraud.

[40] As such I hold that there was no evidence of fraud or a breach of a fiduciary duty as alleged by the petitioner and the defence of “non est factum” was not available to the petitioner.

[41] The Privy Council in **Permanent Trustee of NSW Ltd. v Bridgwater** (1936) Vol. 3 ER Page 501 wherein the court said that a bargain with a beneficiary of an Estate even with some consideration must be accompanied with independent and informed legal advice to be legitimate and binding.

In the above case the petitioner, a 22 year old man who was in a foreign country sold his benefit under an Estate at an undervalue. He had been dealing with a person with whom he was indebted. Unlike the petitioner in this case the young man in the **Bridgwater** case was looking for employment and did not have sufficient money. The court in that case held that the expectant heir must have proper independent legal advice. The facts in that case were not similar. The transaction did not deal with a family arrangement. In the case before us the petitioner was a medical student and literate person and waited till the deceased mother died to pursue his entitlements. There was no evidence that the petitioner was in a disadvantaged position nor in financial difficulties prior to signing the deed of renunciation.

Application of Limitation Act

[42] The Court of Appeal also held that the allegation of fraud not being entitled to succeed the petitioner’s action was time-barred in terms of the Limitation Act. The petitioner’s position was that he did not know about the fraud. The deed of renunciation was executed in September 1985. Legal proceedings were initiated after 22 years on 10th August 2007. It is important to consider as to whether the provisions of section 10 of the Limitation Act was applicable in this case. The learned counsel for the petitioner submitted that the provisions of section 15 of the limitation Act are applicable as the fraud was discovered only in 2007 and time would start to run from 2007 after the fraud was discovered.

[43] To my mind section 15 of the Limitation Act shuts the petitioner off completely on account of the view we have taken affirming the decision taken by the Court of Appeal with regard to allegation of fraud. I am of the view that in this case the relevant section that is to be considered is section 10 of the Act and not section 15 as relied on by the petitioner.

Section 10 of the Act provides as follows:

“Subject to the provisions of subsection (1) of section 9, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.”

Section 15 of the Limitation Act provides that:

“Where in the case of any action for which a period of limitation is prescribed by this Act, either:-

- (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent ; or*
- (b) the right of action is concealed by the fraud of any such person ; or*
- (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake , as the case may be or could the reasonable diligence have discovered it:..”*

[44] In Lindsay Petroleum Co. v Hurd (1874) L.R. 5 P 221 at 239 Lord Selbourne LC observed :

“Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has ,by his conduct , done that which might fairly be regarded as equivalent to a waiver of it, or his conduct or neglect he has, though perhaps not waving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted , in either of these cases lapse of time and delay are most material.”

[45] I have held that there was no evidence of fraud or collusion in this case. Therefore the action of the petitioner is time-barred under section 10 of the Limitation Act. The laches in this case is considerably a substantial period of time. It is inequitable to enforce a claim under the law. It is relevant at this stage, to refer

to the well entrenched Latin Maxim “*vigilantibus non dormientibus jura subveniunt*” which means that the law does aid the vigilant not the ones who sleep over their rights. This is an equitable defence.

- [46] It is with reluctance we mention, that after such a long lapse, it would not have been reasonable to place the petitioner in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted for which reason the lapse of time and delay are most material. The principle of law is worth to be mentioned as follows: “*Lex delationes abhorret*” (The law abhors delays).
- [47] Thus viewing the matter in that perspective, being reminded of the inveterate proposition that “justice must be done according to law”, while I sympathise with the petitioner’s grievance I am unable to respond to his call for which I feel driven to affirm the path which the Court of Appeal took.
- [48] Accordingly I hold that, quite apart from the substantive legal contest on “fraud”, breach of fiduciary duties, and “*non est factum*”, the appeal before the Court of Appeal could have been allowed on the applicability of the provisions of section 10 of the Limitation Act alone.
- [49] In that regard, I cannot resist in noting a sympathetic approach the Court of Appeal might have adapted to the petitioner’s cause but eventually being forced to overturn the judgment of the High Court in accordance with the law.

Conclusion

- [50] We have sufficiently dealt with the central issues contained in the grounds of appeal and urged by the learned counsel for the petitioner on fraud, breach of fiduciary duty, “*non est factum*” plea and reached the conclusion that, having considered the oral submissions, written submissions of both parties and judicial authorities submitted there is no far-reaching question of law involved in any of the grounds of appeal and that special leave should be refused.

[51] We are satisfied that the Court of Appeal did not fall into error in overturning the trial Judge's decision.

[52] The application for leave to appeal is refused and the decision of the Court of Appeal dated 2nd October 2015 is affirmed. In the circumstances of this case we make no order for costs.

Chandra, J

[53] I agree with the reasoning and conclusions of the judgment of Hettige J.

The Orders of the Court are:

1. *Special leave to appeal is refused.*
2. *Decision of the Court of Appeal dated 2nd October 2015 is affirmed.*
3. *We make no order for costs.*



.....
 Hon. Justice Priyantha Fernando
Acting President of the Supreme Court

.....
 Hon. Justice Sathya Hettige
Justice of the Supreme Court

.....
 Hon. Justice Suresh Chandra
Justice of the Supreme Court

Solicitors:

Mishra Prakash & Associates for the Petitioner
 Mr. Samuel K. Ram for the Respondents.