

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC No. 58 of 2015

BETWEEN: **GANGA RAM** of Nasoso, Nadi, Farmer.

PLAINTIFF

A N D: **SANT RAM** of 7456 Winklyay, Sacramento, United States
of America, Driver.

DEFENDANT

Appearances: Ms. Vanua of Young & Associates for Plaintiff
 Mr. K Patel of Krishna & Company for Defendant
Date of Trial: 22 June 2017
Date of Judgement: 28 June 2019

J U D G E M E N T

INTRODUCTION

1. At the heart of this case, is some land in Nasoso in Nadi. The land is all comprised in Certificate of Title 36296. It is currently registered in Sant Ram's name (**DW1**). He is the defendant. The plaintiff, Ganga Ram (**PW1**), is the immediate predecessor in title to CT 36296.
2. Sant Ram is the eldest of Ganga Ram's nine (9) children. The other eight, from second eldest to youngest, are Ashok Kumar, Adesh Kumar, Sunila Devi, Sarita Devi, Veena Devi, Reena Devi, Anita Devi and Sunita Devi.
3. Sant Raj acquired legal title over CT 36296 when a transfer in his favour from Ganga Ram was registered on 06 October 2014. It is the circumstances which led to the transfer which is at issue in this case.
4. Ganga Ram filed his writ of summons and statement of claim on 27 March 2015. Sant Ram filed his statement of defence on 18 June 2015. What Ganga

Ram desires is an order of this Court to have the title to CT 36296 restored to him. He seeks the following Orders:

- (a) a declaration that Sant Ram's transfer of CT 36296 is void and of no effect.
- (b) a declaration of the proper ownership and proprietorship of CT 36296 to Ganga Ram
- (c) judgement against Sant Ram for damages and/or equitable compensation.
- (d) judgement for exemplary damages against Sant Ram.
- (e) interest against Sant Ram.
- (f) costs on a solicitor-client basis

THE TRIAL

5. At the trial of this case, the following witnesses gave evidence for the plaintiff:

Ganga Ram	PW1
Sunil Gupta Sen	PW2
Veena Devi Kumar	PW3

6. The defendant called the following witnesses:

Sant Ram	DW1
Pravindra Deo Sharma	DW2
Sarwal Kumar	DW3
Jyoti Naidu	DW4
Victor Vishal Sharma	DW5

7. In addition to the above witnesses, the affidavit of Wasu Sivanesh Pillay ("Pillay") sworn on 21 June 2017 was tendered by consent and marked DEX3. Pillay is the principal of the law firm of Gordon & Co. At the time this matter went to trial, Ganga Ram (PW1), although of advanced age, was very much alive.

AGREED FACTS & ISSUES

8. Both counsel executed a set of pre-trial conference minutes on 24 July 2016. These minutes records a total of fifty-four (54) agreed issues to be decided. They are all to do with how Sant Ram allegedly contrived the execution of

certain crucial documents by the unwitting Ganga Ram. These documents appear in the factual chronology below.

9. Counsel have agreed to two facts only. The first is that Ganga Ram was the registered proprietor of CT 36296 from 1983 until 2014. The second is that Sant Ram currently resides in Sacramento, US.
10. If counsel had been a little more proactive at pre-trial conference, they could have drawn up a factual chronology based on certain documents and instruments whose existence are seriously not disputed.
11. Most of these are official documents in the public domain.
12. The power of attorney for instance, and the instrument of transfer in question, are duly stamped and registered by the relevant public authorities. That Sant Ram did lodge a Police Report and made a statutory declaration are beyond question, and so is the fact that he did so as part of his application for a duplicate title.
13. The very existence of these documents is evidence of the fact that they were created by someone, which, when readily admitted, and placed in a timeline or sequence with other agreed facts, does tell quite a story.
14. I say all this:
 - (i) being aware that the parties respective case theories are built on, and based on their different explanation and rationalisation of the same basic factual chronology.
 - (ii) while keeping an open mind that the circumstances under which those documents or instruments were created, all go to the issues at stake in this case.

FACTUAL CHRONOLOGY

15. The following is the uncontroverted factual chronology in this case.

Factual Chronology (Uncontroverted)

1. 14/12/11 – Will purportedly executed by Ganga Ram. Bequeaths all of CT 36296 to Sant Ram.
 2. 19/01/12 - Sant Ram lodges a Power of Attorney for registration. This was registered as PoA No. 53481. This Power of Attorney is purportedly given by Ganga Ram to Sant Ram.
 3. 22/04/14 – Sant Ram lodges a Police Report together with a statutory declaration that he had lost a bag in Waililai in Ba. The bag allegedly contained some documents including the Duplicate Title over CT 36296.
 4. 05/06/14 – Sant Ram signs a request for Provisional Title. He allegedly lost a duplicate in Waililai in Ba.
 5. later in May 2014, Sant Ram visited the law firm of Gordon & Co and instructed Pillay to transfer CT 36296 from Ganga Ram to Sant Ram.
 6. June 2014 – Ganga Ram allegedly tells Anita Devi (daughter) that he wanted to transfer to her 50% interest in CT 36296 in acknowledgement of her having looked after Ganga Prasad and his wife for the last 14 years. Ganga then went to Samuel K. Ram to instruct the firm to carry out the transfer of 50% of the property to Anita Devi.
 7. 11 July 2014 – Ganga Ram executes a transfer of the 50% interest to Anita Devi. Transfer then lodged with Commissioner of Stamp Duties for assessment.
 8. 22/08/14 – Sunil Gupta (Anita Devi’s husband) makes a Bank Cheque to the sum of \$5,405-00 to pay FRCA the assessed stamp duty.
 9. 26/08/14 – Stamp Duty paid to FRCA.
 10. 06/10/14 – CT 36296 was transferred to Sant Ram. The transfer was made out of natural love and affection and in consideration of the sum of \$10-00 (ten dollars only). Hence, Sant Ram purportedly acquired the property as a mere volunteer. He was not a *bona fide* purchaser for value (the remaining issue being, whether or not Ganga Ram did gift the property at all to Sant Ram).
 11. 01/12/14 – Ganga Ram executes CGT Returns with CGT Declaration.
 12. 03/12/14 – FRCA issues CGT Clearance to Ganga Ram.
16. When Sant Ram visited Gordon & Co in May 2014, he provided the following supporting documents to Pillay:
1. Power of Attorney 53841 DEX 3A
 2. Copy of Police Report No. 2075/14 – Ba Police Station DEX 3B
 3. Copy of Certificate of Title 36296 DEX 3C

- | | |
|---|--------|
| 4. Copy of Crown Lease 9972 | DEX 3D |
| 5. Copy of TIN Letter for Sant Ram | DEX 3E |
| 6. Copy of TIN Letter for Ganga Ram | DEX 3F |
| 7. Copy of Fiji Passport Bio-Page of Sant Ram | DEX 3G |
| 8. Copy of Valuation Report for CT 36296 dated 26/08/14 | DEX 3J |

THE LAW

17. Once a transfer of title to land is registered with the Registrar of Titles under the Land Transfer Act, the transferee's title is protected under the indefeasibility provisions of the Act.
18. There are two things to note.
19. Firstly, in Fiji, the principles of indefeasibility under the Land Transfer Act protect not just a *bona fide* purchaser for value without notice, it also applies to a volunteer (see **Star Amusement Limited v Prasad & Ors**, Supreme Court of Fiji Civil Petition No CBV 0005 of 2012 (28 August 2013) FJSC 8; **Jacob John Steiner Jnr v Ernie Steiner**, Fiji Court of Appeal, Civil Appeal number ABU 0091 of 2015 (14 September 2017)).
20. Flowing from this, I would add that a predecessor in title who has transferred title to a piece of land, by gift, and which transfer has been duly registered, cannot simply recover his land from the transferee, merely because he has had a change of heart.
21. The fact that the latter was gifted the property and acquired title as a mere volunteer, does not make it any easier to revert title than in a case where the transferee was a *bona fide* purchaser for value.
22. Secondly, to impeach Sant Ram's indefeasibility of title, Ganga Ram must establish and trace actual fraud to Sant Ram (see **Frazer v Walker** [1967] A.C. 569, **Assets Co v Mere Roihi others** [1905] HL AC; **Fels and Another v Knowles & Another** [1906] CA Vol XXVI; **Breskvar v Wall** [1971] 126 C.L.R.
23. To succeed in tracing actual fraud to Sant Ram, Ganga Ram must show that Sant Ram acted with some sort of dishonesty (see **Steiner v Steiner** [2017] FJCA 102; ABU0091.2015 (14 September 2017); **Assets Company Limited v Mere Roihi** (supra); **Fels v Knowles** (supra)¹.

THE EVIDENCE

24. As I have said, the parties' respective case theories are founded upon the same basic factual chronology above.
25. Ganga Ram's case is that the Sant Ram orchestrated and stage-managed the execution of the Will, the power of attorney, the obtaining of the duplicate title, and a series of related processes which enabled him, eventually, to contrive the transfer of CT 36296 to himself. He, Ganga Ram, was an unwitting participant in Sant Ram's scheme.
26. In chief, Ganga Ram said Sant Ram took him to Vijay Naidu & Associates some years ago. There, he was given some documents to sign. He said he was only there to sign a Will. Unbeknownst to Ganga Ram, a power of attorney was interspersed with the documents that were placed before him. Thinking that the documents were all part of the Will, he signed whatever was placed before him and ended up signing that power of attorney as well to Sant Ram.
27. A month later, on 19 January 2012, Sant Ram lodged the power of attorney for registration.
28. Some two years and ten months later, on 06 October 2014, CT 36296 was transferred to Sant Ram. Sant Ram himself executed all the necessary documents and the instrument of transfer. It is clear from the evidence that Ganga Ram was oblivious to all this.
29. It is also clear to me that Sant Ram was of the view that the power of attorney gave him authority to deal with CT 36296. It is also clear to me that his solicitor, Pillay, was also of the same view.
30. However, to transfer CT 36296 to himself, Sant Ram relied, ultimately on the testamentary bequest in the Will which favours him absolutely.
31. Ganga Ram's, PW3's and PW2's evidence is that Ganga Ram would later learn of the bequests he had made in the Will and was not happy with it.
32. Apparently, Ganga Ram was given a copy of that Will, but not the power of attorney, following execution in 2011. The evidence of Ganga Ram, PW2 and PW3 is that at some point after executing the Will, Ganga Ram would take his

copy to Ba where, after being read the Will by **PW2**, he would express his "regret" to **PW2** and **PW3** about the bequest to Sant Ram. Ganga Ram said he had always intended to make specific testamentary bequests to his daughter, **PW3**, who has cared for and looked after him and his bed-ridden wife for many years.

33. I gather from Ganga Ram's evidence in chief that, at some point in time, he formed the desire to entitle his daughter and her husband (**PW3** and **PW2**) to 50% share in CT 36296. This is so, probably out of gratitude, or it could be just out of natural love and affection for them. They are his family after all.
34. Ganga Ram did tell **PW3** and **PW2** about his intention to transfer 50% share to them. The chronology would place this at around June 2014. Together with **PW2** and **PW3**, Ganga Ram then went to Samuel K. Ram lawyers to instruct the firm to attend to that.
35. Meanwhile, unbeknownst to Ganga Ram and **PW3** and **PW2**, Sant Ram was already working quietly and arranging for the transfer of CT 36296 to himself.
36. At the time Ganga Ram was instructing Samuel K. Ram, Sant Ram had already reported to the Police that the duplicate copy of CT 36296 which was in his possession, had been stolen from him in Wailailai in Ba. His police report was lodged in April 2014.
37. That report precipitated the process which led to the issuance of a new duplicate title.
38. Sant Ram uplifted the duplicate title by virtue of the power of attorney. Because the duplicate title is required to complete the transfer, he then presented it to Gordon & Company for that purpose.
39. The statement of claim pleads at paragraph 22 that Sant Ram gave a false declaration to the Fiji Police when he declared that the duplicate title to CT 36296 was stolen from him. The claim asserts that the duplicate lease title was always in the possession of Ganga Ram.
40. No clear evidence is placed before me as to who actually had the duplicate title, let alone, whether it was truly stolen. I make no finding on this.

41. Hence, as is clear from the chronology, at the time when Ganga Ram, PW2 and PW3 were giving instructions and making all related arrangements for the transfer of 50% share in CT 36296 to PW2 and PW3, Sant Ram was also arranging to have CT 36296 transferred to him absolutely.
42. Sant Ram's defence is as follows:
- (i) that the testamentary instrument and the power of attorney which he relied on to transfer CT 36296 to himself were executed by Ganga Ram.
 - (ii) Ganga Ram did so with full capacity and without any undue pressure or influence by him (Sant Ram).
 - (iii) Ganga Ram intended to transfer CT 36296 absolutely to him. This is evident from the Last Will & Testament which he executed.
 - (iv) Sant Ram exercised the power of attorney to transfer CT 36296 to himself.
 - (v) he refutes any allegation of fraud in the execution of these instruments, or in the manner in which he later transferred CT 36296 to himself.

ANALYSIS

Did Ganga Ram Have Testamentary Capacity to Make Will?

43. It is hard for me to say whether or not Ganga Ram had full capacity to give instructions on the Will in question. The principles for determining testamentary capacity were summarized in **Banks v. Goodfellow** (1870), L.R. 5 Q.B. 549 (Q.B.) by Cockburn CJ at 565 as follows:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not been made Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.

44. I am inclined to the view that Ganga Ram had full testamentary capacity to make the Will in question and I find so accordingly.

Did Ganga Ram Have Capacity to Grant Power of Attorney?

45. Sant Ram's defence hinges on the argument that Ganga Ram had the testamentary capacity to make the Will and also to grant the Power of Attorney in question. Both counsel raise submissions around whether or not the power of attorney was procured by duress, undue influence or fraud, and whether or not Ganga Ram lacked capacity to grant the power of attorney.
46. I agree! A power of attorney invalidly obtained for whatever reason is *void ab initio*, and any property transferred pursuant to such an instrument may be reversed provided it has not passed to an innocent third party *bona fide* purchaser for value.
47. However, I am also mindful that a lawfully appointed attorney may still deploy a validly signed power of attorney as an instrument of fraud to make decisions for his own personal benefit against the wishes of the grantor.
48. Justice Cullity in *Stern v. Stern* 2003 CanLII 6193 (Ont. Sup. Ct.) at paragraph 28 sets out a perspective which encapsulates this:

The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.

49. In *Egli v. Egli* 2005 BCCA 627 at paragraph 33, the British Columbia Court of Appeal had to consider where to draw the line between capacity and incapacity to grant a Power of Attorney. Justice Hall said the test is not necessarily the same as the standard for testamentary capacity, however:

"the donor must have a general appreciation of the enabling power he or she is bestowing upon the donee of the power. The donor must be cognizant of the circumstance that the donee is being granted a broad power to deal with the property of the donor"

50. As I have said, Ganga Ram's evidence is that he thought he was only to sign a Will. However, unbeknownst to him, he ended up signing a Power of Attorney as well. It is hard for me accept this. He appeared to be very sound whilst giving evidence in Court. I find that Ganga Ram had full capacity in granting the power of attorney.

Was Ganga Ram Pressured Into Signing The Will & Power of Attorney?

51. In cross-examination, Sant Narayan said that he sat right beside Ganga Ram at all material times at the offices of Vijay Naidu & Associates when Solicitor Mr. Victor Sharma read and explained to Ganga Ram the entire Will (see pages 102 and 103 of the Court transcripts). Interestingly, Sant Narayan first conceded that he heard everything being explained. Later however, obviously having become the wiser after extensive cross-examination, he said:

Q. So, I take it no, you were never told to step outside while your father was signing the document?

A. I was beside him and I didn't listen on what they were conversing (sic).

52. The Wills Act at section 11 provides generally that a witness or the married partner of a witness cannot benefit from a Will. If a witness is a beneficiary or a family member, the Will is still valid but the beneficiary will not be able to inherit under the Will.
53. Sant Ram was not a "witness" in the sense that he did not participate in the process of the formal validation of the Will by signing on the document. If he did, section 11 would work to disentitle him from any inheritance under the Will.
54. However, the following facts leaves open the probability that Ganga Ram was influenced into signing the Will and in giving the Power of Attorney in question to Sant Ram:
- (i) Sant Ram sat right beside Ganga Ram throughout the signing of the Will.
 - (ii) the Will bequeaths Sant Ram the property absolutely, and
 - (iii) the power of attorney gives general powers to Sant Ram to deal with the property.

55. However, whilst the evidence is strong as to the high likelihood that Ganga Ram was unduly influenced or pressured into signing the Will and the power of attorney in question, I would prefer not to make a finding in that regard.
56. I say that because, in my view, this case could be determined simply by applying the law on the established facts. These must now include the following:
- (i) that the Will was validly obtained.
 - (ii) that the Power of Attorney was validly obtained.
57. In that regard, the question I ask is whether Power of Attorney No. 53481 gives any power to Sant Ram to transfer CT 36296 to himself?

Whether Power of Attorney No. 53481 Gives Power To Sant Ram To Transfer CT 36296 To Himself

58. As I have said, for Sant Ram's defence to work, he must rely on the argument that:
- (i) Ganga Ram did execute the Will and also the power of attorney in question
 - (ii) Ganga Ram had capacity.
59. I have now accepted these to be the truth. However, in my view, Sant Ram's case is doomed in any event for the following reasons.
60. Firstly, an attorney, for a grantor who is still alive and who is **not incapable** to deal with property, is considered to be an agent of the grantor. Accordingly, the attorney must act only on the specific instructions of the grantor. In this case, there was no specific instruction from Ganga Ram to Sant Ram for Sant Ram to transfer the property to himself. As I discuss further below, in the particular circumstances of this case, the Will in question cannot stand as such an "instruction" or substitute for such an "instruction".
61. Secondly, a broadly worded provision of an instrument of attorney which gives power to deal with property, cannot be construed as authorizing the

attorney to deal with property for the attorney's own benefit. A more specific and clear term is needed.

62. The common law position was succinctly stated by Dixon J in Tobin v Broadbent [1947] HCA 46; (1947) 75 CLR 378:

Prima facie, a power [of attorney], however widely its general words may be expressed, should not be construed as authorizing the attorney to deal with the property of his principal for the attorney's own benefit. Something more specific and quite unambiguous is needed to justify such an interpretation.

63. Russell J's dissenting view in Reckitt v Barnett Pembroke and Slater Ltd (1928) 2 KB 244, 268 which Dixon J cited is:

The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or to others of his principal's property.

64. The above was later approved by the House of Lords in Reckitt v Barnett Pembroke and Slater Ltd (1929) AC 176².

65. In Banton v. Banton 1998 CarswellOnt 3423, Cullity J states at paragraph 51 that:

An attorney for a donor who has mental capacity to deal with property is merely an agent and, notwithstanding the fact that the power may be conferred in general terms, the attorney's primary responsibility in such a case is to carry out the instructions of the donor as principal. As an agent, such an attorney owes fiduciary duties to the donor but these are pale in comparison with those of an attorney holding a continuing power when the donor has lost capacity to manage property. In such a case, the attorney does not receive instructions from the donor except to the extent that they are written into the instrument conferring the power. The attorney must make decisions on behalf of the donor and, pursuant to sections 32 and 38 of the Substitute Decisions Act, he or she is a "... fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit". The status of such an attorney is much closer to that of a trustee than an agent of the donor. This has been the case since the Powers of Attorney Act was amended in 1979 to permit the creation of such powers. It is now made explicit in the provisions of the Substitute Decisions Act I have mentioned and others including those dealing with the standard of

care, the ability to seek the directions of the court, the court's power to remove the attorney, the right to compensation and the rules relating to the passing of accounts.

66. Thirdly, I have looked at the eighteen clauses in the instrument of attorney in question in this case. Of these, only clause 1 concerns land. However, it gives no specific power to authorise Sant Ram to transfer the land to himself. All it grants are general powers to sell, mortgage, lease, surrender any lease and to purchase any land lease mortgage, easement or encumbrance.

The Will Purports To Bequeath CT 32450 Absolutely To Sant Ram. Does That Fact Somehow Validate The Transfer To Sant Ram In Any Event?

67. As I have said above, a person who holds power of attorney for a grantor who is still alive and who is not incapable to deal with property, is an agent of the grantor must act only on the specific instructions of the grantor.

68. Can the Will in question stand as an "instruction" to Sant Ram to transfer CT 32450 to himself?

69. At clause 3(b), the Will provides for a bequest of CT 32450 to Sant Ram absolutely.

70. At paragraph 7.2 of the statement of defence, Sant Raj pleads that:

At all material times, the Plaintiff made his intention clear when he instructed his lawyers to attend to prepare the Plaintiff's Will which was executed on the 14th December 2011.

71. The above suggests that Sant Raj counted on Ganga Ram's purported testamentary intention to bequeath CT 32450 to Sant Raj as the basis to instruct Pillay to transfer the land to him.

72. This is absurd! A Will does not take effect until the one who made it has died. Following from that, in law, the beneficiaries under a Will obtain no interest in the testator's property until the testator dies. It follows therefore that the Will *per se* cannot be taken as Ganga Ram's "instructions" to Sant Ram to use the instrument of attorney to transfer CT 32450 to himself, nor does it confer any iota of right to Sant Ram to transfer the property to himself.

73. In Hebrews 9:17, the Bible says:

For a will takes effect only at death, since it is not in force as long as the one who made it is alive.

74. Lord Chancellor Hardwicke in the case of **Duke of Marlborough v. Lord Godolphin** [1750] 28 All E.R. 41 (H.L.).

"[T]he law says that a testamentary act is only inchoate during the life of the testator from whose death only it receives perfection, being until then ambulatory and mutable vesting nothing, like a piece of waste paper ..."

75. The phrase "ambulatory and mutable" is an acknowledgement of the fact that a Will is liable to change and a testator is perfectly free to change his mind regarding his legacies or bequests. In Fiji, he can do so by any of the means provided in section 15 of the Wills Act³.

76. In **Kidd v. Canada Life Assurance Co.**, 2010 CarswellOnt 911 (S.C.) at para. 48, the Canadian Court said that the named beneficiary in the will of a living person receives no rights whatsoever. Until the testator dies, the beneficiary holds only a *spes successionis*, a mere expectancy.

77. Ganga Ram, the purported testator, was very much alive and kicking when Sant Raj instructed Pillay to transfer CT 32450 from Ganga Ram to him (Sant Raj). In fact, he was very much alive and was the very first witness when this case went to trial.

78. The interest which Sant Ram appears to rely on in order to use the power of attorney to transfer the property to himself was a mere expectancy interest. It is not a valid basis to transfer CT 32450 to Sant Ram, whilst Ganga Ram was still alive with full capacity.

THE DUPLICATE TITLE

79. As I have said above, the statement of claim pleads at paragraph 22 that Sant Ram committed fraud when he gave a false declaration to the Fiji Police stating that he had lost the duplicate title to CT 36296 which was in a bag that was stolen from Wailailai in Ba.

80. Ganga Ram, PW2 and PW3 allege that at all material times, the duplicate lease title was always in the possession of Ganga Ram. The whole case appears to turn on this question of fact. As I have said, I make no finding of fact on this. From where I sit, even the duplicate title was with Sant Ram at all material times, that, in itself, gives him no "instruction" or power or right to transfer CT 36296 to himself whilst Ganga Ram is still alive.

GANGA RAM INTENTION TO TRANSFER 50% SHARE TO DAUGHTER

81. Whether Ganga Ram wanted to transfer ½ interest in CT 36296 to PW2 and PW3 out of his own free will, or whether he was pressured to do so by PW2 and PW3, is an issue of fact.
82. Sant Prasad asserts in his pleadings and in Court that Ganga Ram was pressured by PW3 and PW2 to arrange for the transfer of that property to PW3. There is no clear evidence of pressure adduced by the defendant. He called no evidence on that. In making that allegation, Sant Ram appears to rely on the fact that Ganga Ram had unequivocally indicated by his Will, and also verbally in the past, that he intended to make bequests only in favour of Sant Ram and the sons and not in favour of the daughters. This is something that Ganga Ram and PW3 refute in court.
83. The suggestion that Ganga Ram was under pressure was put to PW2 in cross examination. From where I sit, it appears that the allegation hinges on the fact that PW2 been very much "involved" in taking PW1 to Samuel K. Ram and, later, in lodging a complaint with the police, in going to Suva to Police Head Quarters, in following up on the complaint by going to the Police Head Quarters in Suva, and even, in the ensuring of court case.
84. In my view, there is nothing wrong with PW2's involvement and "passion" in pursuing his father in law's case against Sant Ram. The evidence is clear and I accept it as fact, that there had been bad blood between Sant Ram on one side, and the rest of his family on the other. The evidence is also clear that PW2 and PW3 have looked after Ganga Ram and his wife for many years. As I have said again and again, Ganga Ram's wife is bed ridden and requires a lot of personal attention and maintenance and that Ganga Ram and his wife are well taken care of by PW2 and PW3 and are happy to be staying with them in Ba.

85. In the circumstances, it is not unreasonable to expect Ganga Ram to want to gift a portion of his estate to **PW2** and **PW3**. The latter, after all, is his own biological daughter. What is clear to me from Ganga Ram's evidence in Court is his distaste of his son Sant Ram.
86. **PW1**, **PW2** and **PW3** all gave evidence that in June 2014, Ganga Ram expressed his intention to transfer 50% interest in CT 36296 to his daughter Anita (**PW3**) in acknowledgement of her having looked after him (Ganga Ram) and his bedridden wife. He in fact did execute a transfer of 50% interest in CT 36296 to **PW3** in July 2014, for which no issue is raised in the evidence about his capacity to do so. I believe it to be true. I believe he did so out of natural love and affection and was under no pressure whatsoever. This, of course, must supersede his testamentary bequests in the Will, and anything he might have said in the distant past (which I do not believe is true) that he intended only to gift his sons and not his daughters.

WAS THE TRANSFER OF CT 36296 TO SANT RAM VOID AND OF NO EFFECT? IF SO, SHOULD THIS COURT THEN DECLARE THAT GANGA RAM IS THE OWNER & PROPRIETOR OF CT 36296?

87. From all I have said above, I ask the following questions.
88. Why would Sant Ram want to transfer CT 36296 to himself *vide* the power of attorney given that Ganga Ram was still very much alive? Why would he want to do that when all he needed to do was to get his father, Ganga Ram, to execute an instrument of transfer to him (Sant Ram)?
89. If Sant Ram was confident that Ganga Ram would not waver in his resolve in the "purported" Last Will, one would expect Sant Ram to simply go to his father, Ganga Ram, and get him to execute an instrument of transfer to him.
90. The evidence of Ganga Ram, **PW2** and **PW3**, which I accept, is that at that time when Sant Ram was orchestrating the transfer of CT 32450 to himself, he (Sant Raj) had fallen out with Ganga Ram and the rest of the family.
91. Sant Ram said in chief that it was extremely hard for him to contact Ganga Ram because **PW2** and **PW3** would not let him into their house. Even if this is true, I believe it was due to the falling out between the members of the family. In any event, it does not in any way validate Sant Ram's actions.

92. It appears from the evidence of Sant Ram that Ganga Ram had earmarked the property in question for subdivision. In examination in chief, Sant Ram said that his father gave him the duplicate title to keep it as later on, he (Sant Ram) would need it for the subdivision work. A copy of the proposed sub-division plan on CT 36296 is included in the defendant's bundle of documents at tab 25. I note that the plan was to subdivide the property into 15 Lots.
93. Even if this is accepted as the truth, it still does not give Sant Ram *carte blanche* to deal with the property as he wishes, least of all, to transfer the property to himself. He must still act on the instructions of his father, Ganga Ram.

CONCLUSION

94. I find that the Power of Attorney 53841 does not confer any specific unambiguous clear power to Sant Ram to gift Ganga Ram's CT 32450 to himself or to others.
95. For the reasons stated above, I make the following findings:
- (i) Ganga Ram gave a Power of Attorney to his son, Sant Ram and also willed his Nasoso property to Sant Ram.
 - (ii) however, whilst Ganga Ram was still alive (and I believe that he still is) he changed his mind. He wanted his daughter **PW3** and her husband **PW2** to have a 50% share in his property.
 - (iii) Ganga Ram then went to a firm of solicitors, Samuel K. Ram, and instructed Samuel K. Ram to draft a transfer of 50% share of his property in Nasoso to **PW2** and **PW3**.
 - (iv) the preparation of the transfer was delayed.
 - (v) by the time the transfer was prepared, and was ready for lodgement, it was discovered that Sant Ram had already transferred the property to himself using the Power of Attorney and also, relying ultimately on the Will in question.
 - (vi) the Power of Attorney in question does not give power to Sant Ram to transfer the property to himself.

- (vii) because Ganga Ram is still alive, and because the Will only comes into full effect upon the death of the testator, the Will does not confer any right to Sant Ram to transfer the property to himself, nor can the Will be evidence of any authority from Ganga Ram to Sant Ram to transfer the property to himself using the power of attorney.
96. While it is hard to determine from the evidence whether the signatures on the Will and the power of attorney in question were forged, or, otherwise, whether Ganga Ram had the necessary capacity when he executed those instruments, in my view, even if I were to assume that these instruments were validly executed, Sant Ram, being a lawfully appointed attorney as I have assumed him to be, still deployed the validly signed power of attorney as an instrument of fraud to transfer CT 36296 to himself for his own personal benefit against the wishes of the grantor, Ganga Ram.
97. This is exactly the kind of case for which Justice Cullity issued that warning in Stern v. Stern 2003 CanLII 6193 (Ont. Sup. Ct.) (supra).

ORDERS

98. I make the following declarations and orders:
- (a) I declare that Sant Ram's transfer of CT 36296 is void and of no effect.
 - (b) I declare that Ganga Ram is still the true beneficial owner and proprietor of CT 36296 and direct that legal ownership be reverted to Ganga Ram by transfer. The Deputy Registrar is to facilitate this process in collaboration with both counsel.
 - (c) judgement against Sant Ram for damages and/or equitable compensation.
 - (d) judgement for exemplary damages against Sant Ram.
 - (e) interest against Sant Ram.
 - (f) costs on a solicitor-client basis



Anare Tuilevuka
JUDGE
Lautoka

¹ A review of the relevant law by the Fiji Court of Appeal in Steiner v Steiner [2017] FJCA 102; ABU0091.2015 (14 September 2017) is a good guide.

[49] The Privy Council in Assets Company Limited v Mere Roihi and Others [1905] A.C.176 cited with approval Fels v Knowles (*supra*) in regard to the degree of fraud required to impeach registered title obtained *bona fide*. In that case, the provisions of the Land Transfer Acts of 1870 and 1885, of New Zealand, which are similar to the Land Transfer Act of Fiji, were considered. In respect of the allegation of fraud for the purposes of impeaching registered title, Lord Lindley delivering judgement, held as follows: -

“...by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort; now what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further it appears to their Lordships that the fraud must be proved in order to invalidate title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out if he had been more vigilant and had had he made further inquiries which he omitted to make, does not of itself, prove fraud on his part. But if be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon”. (per Lord Lindsley. 210) (Emphasis added).

Thus, if the designed object of transfer is to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered, and thus fraudulently keeping the register clear. It is not however necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest and the dishonesty must not be assumed solely by reason of knowledge of an unregistered interest. (Emphasis added)

² In some jurisdictions, the common law position is enacted in legislation, for example the Powers of Attorney Act 2003 (NSW) ss 12 and 13, which precludes an enduring attorney from conferring a benefit on themselves or others unless the enduring power of attorney document itself expressly authorises the conferral of the benefit.

³ Section 15 provides:

15. Subject to the provisions of Part V, a will or codicil or any part thereof is not revoked otherwise than-
- (a) by marriage, as provided by this Act;
 - (b) by another will or codicil executed in manner provided by this Act;
 - (c) by some writing declaring an intention to revoke the will, codicil or part thereof and executed in the manner in which a will is required by this Act to be executed; or
 - (d) by the testator or some person in his presence and by his direction, with the intention of revoking the will, codicil or part, burning, tearing or otherwise destroying the will, codicil or part.