

IN THE HIGH COURT OF FIJI
AT SUVA

Civil Action No: HBC 3 of 2009

BETWEEN : JAMES PREM SINGH

Plaintiff

AND : MADAN KUMARI

First Defendant

AND : BHARAT SINGH

Second Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr. Suresh Chandra for the Plaintiff
Mr R. Prakash, Mr. S Nandan with him, for the First and
Second Defendants

Dates of Hearing : 10, 11, 12, 18 and 19 April, 2017

Date of Judgment : 9 May 2017

JUDGMENT

1. This is an action relating to the validity of a will.
2. The Plaintiff in his Second Amended Statement of Claim avers as follows:

- (1) The Plaintiff is the sole executor and trustee of the estate of Bhanmati aka BhanMati Singh (Bhanmati), who was married to Suruj Pal Singh (the deceased) on 7 June 1953. The deceased died on 6 February 2008.
- (2) The First Defendant is the Executrix and Trustee of the estate of the deceased pursuant to the Grant of Probate issued by the Court on 3 April 2008 of the will of the deceased dated 17 January 2008 (the will).
- (3) The deceased fraudulently before his death, obtained a fee simple title to the land, the subject of the lease in which Bhanmati had an interest.
- (4) The Plaintiff claims that the will was not executed in accordance with the Wills Act, as the deceased was not capable of signing or understanding the nature of the will, the particulars of which were the following allegations:
 - (a) The will included a property of which Bhanmati was a co-lessee.
 - (b) The 2 witnesses to the will and the deceased were not present at the same time when it was executed.
 - (c) The effect of the will was not fully explained to the deceased by the witnesses.
 - (d) The deceased in the will provided for both de facto wives but failed to provide for his legally married wife.
 - (e) The Defendant and her associates exerted their influence over the deceased to sign the will.

- (5) At the time of the execution of the will, the deceased neither knew nor approved the contents thereof as the will was obtained by undue influence from the Defendant and or relatives.
- (6) At the time of the execution of the will the deceased was not of sound mind, memory and understanding, the particulars of which were the following allegations.
 - (a) He suffered from hypertension and heart disease.
 - (b) His memory was defective.
 - (c) He was unaware of the nature and effect of the will.
 - (d) The will was not made by him nor by his directions.
 - (e) He was not able to read the will.
 - (f) The witnesses exerted their influence over him to sign the will.
- (7) The First Defendant (Kumari) is collecting all the rental income of \$1,900 per month from the lease property. She is also collecting the rental income of \$1,400 per month from the property under Certificate of Title No. 26810.
- (8) The First Defendant transferred two properties of the estate to the Second Defendant (Bharat) pursuant to the will. Bharat "having full knowledge that him being a beneficiary in the purported Will accepted the conveyance of the two properties..... pursuant to the said Will..."
- (9) The Second Defendant is holding the two properties in trust as (sic) beneficiaries of the estate.
- (10) The First Defendant fraudulently transferred CT 21368 to the Second Defendant.

- (11) Wherefore the Plaintiff claims for these Orders:
- (a) An injunction.
 - (b) That the Court pronounce against the validity of the will.
 - (c) That the grant of probate be cancelled.
 - (d) The transfer of the two properties to the Second Defendant by the First Defendant be declared null and void.
 - (e) A grant be issued to the Plaintiff as the sole executor and trustee of Bhanmati.
 - (f) The Defendant to pay to the Plaintiff as executor and trustee of Bhanmati an equitable and fair share of the deceased's estate.
 - (g) The First Defendant to pay 50% of all income from the two properties to the Plaintiff until the determination of this action.

3. The Defendants in their Statement of Defence say as follows:

- (1) The Plaintiff is the sole executor and trustee of the estate of Bhanmati, who was legally married to the deceased.
- (2) The First Defendant is the executrix and trustee in the true valid last will of the deceased executed on 17 January 2008.
- (3) The will dated 17 January 2008 was proved in the High Court and Probate No. 47377 granted to the First Defendant.
- (4) It is denied that the deceased fraudulently obtained the title No. 21368.
- (5) The will was made in compliance with the Wills Act.

(6) The income from the property belonged to the estate until its transfer to the Second Defendant.

(7) The two properties had been transferred to the Second Defendant pursuant to the last will of the deceased and he is the registered proprietor.

(8) Wherefore the Defendants ask for the Plaintiff's claims to be dismissed and the Court to pronounce the validity of the will.

4. The Plaintiff filed a Reply to the Statement of Defence.

5. The Pre-Trial Conference Minutes show the following:

A. Agreed Facts include:

(1) The Plaintiff is the sole executor and trustee of the estate of Bhanmati who was legally married to the deceased.

(2) The deceased died on 6 February 2008.

B. Admitted Documents include:

(1) Probate in the Estate of Bhanmati.

1. Probate in the estate of the deceased.

C. Issues to be Determined include:

(1) Whether the deceased made his will in compliance with the Wills Act.

- (2) Whether the deceased understood the nature of the will.
- (3) Whether the 2 witnesses to the will dated 17 January 2008 were present at the same time when the will was executed.
- (4) Whether the effect of the will was explained to the deceased by the witnesses.
- (5) Whether the witnesses exerted their influence over the deceased to sign the will.
- (6) Whether the will was obtained by the undue influence of the Defendants or their relatives.
- (7) Whether the deceased was not of sound mind, memory and understanding at the time of the execution of the will.
- (8) Whether the deceased's will dated 17 January 2008 was his true and valid last will.
- (9) Whether the First Defendant acted fraudulently in the transfer of the estate properties to the Second Defendant.
- (10) Whether the Second Defendant is holding the two properties of the estate in trust for all the beneficiaries of the estate.
- (11) Whether the Plaintiff is one of the common beneficiaries of the estate of Bhanmati and the estate of the deceased.

6. The Hearing commenced with the Plaintiff's first witness Ajay Narayan (PWI) giving evidence. He said the deceased was his mother's elder brother. He last saw him in 2008, when he was very ill. He had breathing difficulties.
7. The next witness was Ms Uma Wati Singh (PW2). She is 73 years old and the deceased was her eldest brother and was married to Bhanmati. She last saw him in 1993. She visited him because he was sick. In his bedroom were the First Defendant, the deceased and herself. He had a hernia problem and could not talk properly. He said he would not survive. The First Defendant asked him to transfer all the properties into her name. The deceased signed a white paper given to him by the First Defendant. He did not show it to her, PW2. The First Defendant asked him for money for the lawyer's fees. PW2 saw a tall Indian man standing in the sitting room. There was no one else in the room when the deceased signed the paper. Two or three days later the deceased died.
8. In cross-examination, PW2 said Bhanmati was the deceased's first wife. She, PW2, did not know the contents of the white paper. The deceased said to the First Defendant that she was taking everything and after that he is dying. She did not see a female i Taukie!
9. The next witness was James Prem Singh (PW3), the Plaintiff. He said he was bringing the action as the trustee of his mother (Bhanmati). He says the will of his father (Exhibit P1) is fraudulent. His mother was married to the deceased and Exhibit P2 is the marriage certificate of his parents. The marriage was existing at the time of the deceased's death. In the will there is no provision for his mother, or for him, or for any of his siblings. His mother left for Australia 15 years before his father's death.
10. At this juncture both Counsel informed the Court that they agree all the 24 documents in the Agreed Bundle (AB) and the Supplementary Agreed Bundle (SAB) are Agreed and Admitted.

11. PW3 continued it was out of the deceased's character to have done such a will, When the deceased died, PW3 was in Sydney and he was not aware of his health status. He was 74 years old at death.
12. In cross-examination, he said the proceeding was started in his mother's name, but he was the one who was giving instructions to the solicitors. His mother was sick but mentally sound and after the funeral she never came to Fiji. During his father's lifetime, his mother never made any claim. She never made a claim to the First Defendant. He agreed that Bhanmati (his mother) accepted the First Defendant as the executrix of the estate of the deceased.
13. PW 3 said the writ was filed on 5 January 2009 but he did not have any idea that it was not served in his mother's lifetime and that it was not served during the 12 months. He said it was not fraud for his father to purchase the freehold himself. His mother had become an Australian Citizen 8 years before his death. She was well provided for.
14. Under cross-examination PW3 said only one person was registered as the owner of Samabula Electrical Works (SEW) (Exhibit D1) and that was his father and not his mother. He had no information that his mother contributed to SEW. He agreed that both de facto wives do not have any shares in the estate. He agreed that Para 4 (d) of the Second Amended Statement of Claim is not correct (This alleges that the deceased provided for both de-facto wives but not for his legally married wife). He had no knowledge of any other will.
15. In re-examination PW3 said in para 5(c) of the will the de facto wives live in the Grantham Road property as long as they live.
16. The penultimate witness was Ms Torika Solicake Goneca (PW4), the Deputy Registrar of Titles. She tendered as Exhibits P5, P6 and P7 the certified true copies of the titles. Exhibit P6 shows the current lessees are Bhanmati and the deceased as tenants in

common. The Registrar of Titles (ROT) transferred the title (Exhibit P7) to the Second Defendant, subject to the lease.

17. The final witness was Arjun Singh (PW5) the younger brother of the deceased. In cross examination he said SEW belonged solely to the deceased. With regards to the lease property the deceased and Bhanmati were the lessees.
18. With that the Plaintiff closed his case and the Defendants opened their case.
19. The first witness was Ms Hirdeshni Kumari, a probate officer (DW1). She said the probate was granted to the First Defendant as the sole executrix on 3 April 2008 (AB 2). The will of the deceased which was attached was proved and probate granted on this will. The probate was advertised in the newspaper and the oath filed. The original will is with the Registrar of Titles. To challenge a will, you need to file an application. If someone is interested to restrain probate, he files a caveat and until it is removed, probate will not be granted. No caveat was filed here.
20. During cross-examination DW1 said the application for probate was filed on 1 April 2008 by the First Defendant herself. The applicant produced the original will. The ROT stamped the date of receipt of the original will on 8 July 2008.
21. The next witness was Shelvin Amit Singh (DW2) who said he was a solicitor. The document (AB2) was the will that was prepared by him. The signatures thereon were his, the deceased's and his colleague, Ms Drova. He prepared and typed this will on the instructions of the deceased. It was on 17 January 2008. The deceased had telephoned him on 17 January 2008 to say he wanted to do a will. The deceased came with 3 others viz the First Defendant, the Second Defendant and Daya Wati to his office. He took the deceased alone to his office. He walked unaided. DW2 took his instruction and prepared this will. There was no one else in the room. He gave the deceased a draft, he read it and said it is o.k. The deceased had a pain in his stomach. DW2 called Ms Drova into his office. He explained the will in Hindi to the deceased in the presence of Ms Drova and

explained the contents to her in English. The deceased signed in both their presence and they both signed as witnesses. No one left the room during the signing. The deceased did not look under pressure. He did it of his own will. No one put pressure on him. He knew what he was doing and wanted to give all to the Second Defendant. He said these two, the First Defendant and Daya Wati have a place to live. DW2 said “two thousand and seven” is an error. The correct date is 2008.

22. During cross-examination DW2 said the will was done in 2008. He was related to the deceased. He did whatever the deceased asked him to do. He did not create 3 life interests, merely that the deceased wanted these 3 persons to live there for their lifetimes. The deceased was fit and fine when he walked into the room and did not look sickly. DW2 had obtained his identification and witnessed his signature on an ANZ guarantee about a month earlier.
23. The next witness was Swaran Singh (DW3). He said the deceased was his father and the First Defendant his mother. He moved permanently to Australia in 2004. He said his mother and Daya Wati were the deceased’s de facto wives. The legally married wife, Bhanmati moved to Australia. He talked on the telephone to the deceased for the last time at the end of January 2008, and he told DW3 he was giving everything to David (Second Defendant). There was no benefit in the will to him because he went overseas. The deceased was quite clear and said he was fine. DW3 and the Second Defendant helped in developing the place. Bhanmati did not make any financial contribution. The deceased gave money to Bhanmati, a few times.
24. In cross-examination DW3 said when a property was sold the deceased gave \$5,000 to Bhanmati.
25. The next witness was Raj Pal Singh (DW4). He said the deceased and the First Defendant were his parents. Daya Wati was his father’s de facto wife. During the construction, Bhanmati was living elsewhere and he was not aware of any financial contribution from

her. The deceased worked in SEW till the last day. He drove a vehicle to buy spare parts. He had no health issues. On the day of his death, the deceased had lunch with him. He was called to the deceased's bedroom and from there the deceased was taken to the Colonial War Memorial Hospital where he passed away. He had no medical problems. He had a sharp mind. He did daily walks. He walked upstairs unaided.

26. In cross examination DW4 said the deceased was in good health and driving his car. He did not go to Parshotam Lawyers where the will was signed. He did not know if Mr Shelvin Singh visited his father's premises before his death.
27. The final witness was Bharat Singh (DW5), the Second Defendant. His parents were the deceased and the First Defendant. At No 403 Grantham Road were now living the First Defendant, Daya Wati, Raj Pal Singh and himself. Bhanmati went to live permanently in Australia where she died. Bhanmati did not contribute financially to the building. In January 2008, he accompanied the deceased and the First Defendant to the lawyer's office. The lawyer, Shelvin came out and took only the deceased inside. He did not know what happened inside. All along the First Defendant was sitting outside. After one hour, the deceased came outside and informed him that he made a will for him. The deceased did not show him any paper. By the deceased's will he gave all the properties to him. The will was probated and all the properties were transferred to him. He denied he was holding the properties as trustee.
28. In cross-examination DW5 said he is to get the property absolutely. He wants all the people to stay as per the will. He agrees to everything that is written in the will. The First Defendant was the trustee and she transferred the properties to him. In 2009, the properties were transferred to him, but he arranged for the First Defendant to collect the rents on his behalf.
29. In re-examination he said he asked Mr Shelvin if he could accompany the deceased inside but Mr Shelvin said no.

30. The next witness was Ms Madan Kumari (DW6) the First Defendant. She said the deceased was not legally married to her but they had the relationship of husband and wife. When the deceased was alive he collected the rents. After probate was granted she collected the rents. After the properties were transferred to the Second Defendant, he advised her to collect the rents on his behalf. In January 2008 she went with the deceased and her son to the lawyer's office in the car driven by the deceased. Mr Shelvin took the deceased into the office. The deceased came out and told the Second Defendant he had given something to both of them.
31. DW6 denied she had done any fraud. The deceased was in good condition. She never forced the deceased to sign a piece of white paper. She never forced the deceased to give the properties to her. The properties were given to the Second Defendant.
32. In cross-examination DW6 said the deceased told them he had given both of them something but never mentioned there was a will.
33. With this the Defendants closed their case and the oral submissions began.
34. The Plaintiff's Counsel submitted that the will was invalid and the First Defendant had fraudulently transferred the property to the Second Defendant. At the time of or before making the will, the witnesses saw the deceased had breathing difficulties and was not speaking in a normal manner. The will was not executed in accordance with the Wills Act and the First Defendant exerted pressure on the deceased to sign the will. There are 2 dates in the will: 2007 and 2008. The deceased gave the property he owned absolutely to the Second Defendant. Life interests were created and it is the responsibility of the trustees to manage the property. Another lawyer in Fiji would have drafted a better will.
35. Counsel said this is an indictment of the draftsman of the will, which should have been perfect and both witnesses should have explained the will in Hindustani to the deceased. The will is invalid because the legitimate children were left out. The children of the de facto wives are illegitimate. The deceased was elderly and did not understand

the ramifications of the will and he died 2 weeks later. Counsel submitted the will should be declared invalid. The transfer was fraudulent as there were 3 life interests. The Second Defendant accepted the transfer fraudulently knowing the provision of the will. The First Defendant should have remained as a trustee until all the conditions of the will were compiled with. Counsel said the basic error is the trustee, the First Defendant, is holding a life interest. This is not right for if she dies then who will take care of the other life interest. He said the Second Defendant is holding the property as trustee for the beneficiaries of the will who are the legitimate and illegitimate children of the deceased. The Plaintiff seeks a declaration that the property should revert to the First Defendant as trustee for all beneficiaries. There are 5 exceptions to the indefeasibility principle. The property should be given to the trustee of Bhanmati's estate.

36. Counsel for the Defendants then submitted. He said the Plaintiff went out of his pleadings. There was no pleading of equitable or continuing interest. It was not pleaded that the will is fraudulent, that there was undue influence by the First Defendant and her associates, or that there was undue influence by the attesting witnesses. PW2 never mentioned a will only that it was a white paper and she did not know its contents. It is for the Court to decide whether the will is valid. Mr Shelvin made the deceased's intention clear to the Court. Plaintiff's Counsel has no locus standi to represent beneficiaries under the will who have not come to court to say their interests need to be protected. All these have not been pleaded. Para 11 of the Second Amended Statement of Claim is not against the Second Defendant. Plaintiff's Counsel's submission is not of fraud but of breach of fiduciary duty of a trustee which has not been pleaded. Anyway any fiduciary duty is owed to Daya Wati and Raj Pal. Mr Shelvin was not challenged on the validity of the execution of the will. There was no evidence of any lack of capacity on the part of the deceased at the time of the execution of the will. On the contrary, the Defendants' witnesses all testified of the testamentary capacity of the deceased. No other will is known and no estate caveat was lodged against the probate application. No contrary claims were ever made. There is no evidence of any express or implied trust

nor have these been pleaded. The Second Defendant has an indefeasible title because no fraud was alleged against him.

37. Plaintiff's Counsel in his reply said there is an implied trust because the property was transferred according to the will and the Second Defendant should be aware of the life interests.
38. At the conclusion of the arguments, I said I would take time for consideration. Having done so, I now deliver my judgment.
39. I have found it necessary to reproduce the evidence led during this protracted hearing so that I do not need to repeat the salient parts on which my decision is based.
40. I also found it necessary at the commencement of my consideration to "cut a path through the jungle" of verbiage adroitly drafted by the Counsel for the Plaintiff to enable the Court to get to the truth of the matter which is this. The pivotal issue here is whether the will is a valid one or not. Upon my determination of this, lies the determination of all other issues, if there be any, which came within the bounds of this action.
41. The bounds of the Plaintiff's claim are set in the Plaintiff's prayers (see para 2(11) above). Counsel on both sides should have kept within them because there were no claims here by any of those who have life interests by the will.
42. The relevant legislation which I needed to consider is the Wills Act of Fiji, as amended by the Wills (Amendment) Act 2004 (Act). S.4 of the Act says every person not less than 18 years of age has capacity to make a will. S.5 says such a person may by a will executed as required by the Act, "dispose of all his property." S.6 says a will is not valid unless it is in writing and executed as follows:

- (a) It is signed by the testator.
- (b) Such signature is made in the presence of at least 2 witnesses present at the same time; and
- (c) The witnesses attest and subscribe the will in the presence of the testator but no form of attestation is necessary.

43. The Court refused to follow the trial of the red herrings drawn across its path by Counsel on both sides as it was crystal clear that only the will was an issue and no questions of any trust or land transactions and caveats were involved. There was also no need for S.6A of the Act to be called in aid here.

44. Since the only witness to the will at the time it was executed, who was called by the Defendant, was DW2 Shelvin, it was necessary for the Court to assess the value it was going to place on his evidence. I found DW2's evidence stood during examination-in-chief and stood up to the cross-examination of Plaintiff's Counsel. The Court, as the trial court, was in the best position to assess his veracity and the probative value of his testimony. "Probative" is defined in the Oxford Dictionary as "having the quality or function of proving or demonstrating something; affording proof or evidence." I therefore make a finding of fact that the evidence of DW2, is accepted as showing that the deceased knew what he was doing and intended freely and fully to give the Second Defendant all that he had. In other words the deceased was *compos mentis*.

45. In the light of the decision I am reaching it is inexpedient to refer to the cases cited by Counsel. This is because I am applying the opinion of the Judicial Committee of the Privy Council in an appeal from the High Court of Australia: *McDonnell and Ors AND Neil and Ors*: [1951] A.C.350 where Lord Simonds said "their Lordships do not think it necessary to look beyond the language of the will" and "the intention of the testator (is) to be gathered from the language and tenor of his will".

46. As I said at the beginning the pivotal issue is the validity of the will. Plaintiff's Counsel failed to produce one iota of evidence to prove his contention that there was duress and undue influence exerted on the deceased, the onus of which was on the person alleging them, in this case the Plaintiff. Since the piece of paper was never produced, the Court is obliged to treat it as nothing more than a will o' the wisp, especially when the person who said this, PW2, said the last time she saw the deceased was in 1993. Not a shred of medical evidence was called by the Plaintiff to bolster his allegation that the testator was not of "sound mind, memory and understanding". Certainly any alleged unproven hypertension, breathing difficulties and heart disease cannot be taken into account. The Court is of opinion that the evidence led by the Plaintiff and his witnesses were purely suppositious. It should have been apparent to the Plaintiff from his Counsel's cross-examination of Shelvin (DW2), if not earlier, that his claim was going to fail and yet the Plaintiff did not bring the proceedings to an end.

47. In the result, the Plaintiff's case has collapsed and all his claims have fallen to the ground. It is consequently inexpedient, irrelevant and unnecessary to discuss them. I therefore dismiss the Plaintiff's action against the First and Second Defendants, decline to grant the prayers (a) and (b) and (i), (ii) (a) and (b), (ii) (sic), (iii), (iv), (v), and (vi) contained in the Statement of Claim, and order the Plaintiff to pay the First and Second Defendants costs which I summarily assess at \$5,000.00.

48. Before I conclude, I am compelled to make some necessary comments. Counsel on both sides were unable to see the wood for the trees in their conduct of their respective clients' cases when it was as plain as a pikestaff that the Plaintiff's claims were bounded by the orders he sought. In the light of this, it should have been blindingly obvious to the Plaintiff or at least his Counsel that he did not have a leg to stand on. Mr Suresh Chandra was extremely critical of Mr Shelvin Singh in the latter's drafting of the will. But Mr Chandra should have been mindful that people who live in glass houses should not throw stones, for after all his thrice amended Statement of Claim, the witnesses called and the evidence led and the oral submission he made, muddied the waters for all

involved except the Court. I trust my comments will have a salutary effect on legal practitioners, to deter their protraction of litigation to achieve some end other than the ends of justice.

Delivered at Suva this 11th day of May 2017.

.....
David Alfred
JUDGE
High Court of Fiji.