

IN THE FIJI COURT OF APPEAL

517

CIVIL JURISDICTION

CIVIL APPEAL NO ABU0014 OF 1994S
(High Court Probate Action NO HPP0039 or 1991)

BETWEEN:

ROSY REDDY F/N ARJUN PRASAD Appellant

-and-

MANCHAMA WEBB & LAWRENCE WEBB Respondents

Mr. V. Kapadia for the Appellant.
Mr. H. M. Patel for the Respondents.

Date and place of hearing : 9 November 1994, Suva.
Date of delivery of judgment : 11 November 1994

JUDGMENT OF THE COURT

Where a person dies intestate in Fiji, the property of the deceased is distributed in accordance with the Succession, Probate and Administration Act (Cap 60) (hereinafter referred to as "the Act").

The deceased Narayan Reddy died intestate on 27 September 1991 leaving his widow Rosy Reddy (hereinafter referred to as "the appellant") and a son Shiu Narayan Reddy. As the wife of the deceased, and as the first person entitled to a grant of letters of administration of the deceased's estate under Part IV the Act, she appointed the Public Trustee to assume administration of the estate.

Before any application could be made for the grant of the administration of the estate under Part IV of the Act, a caveat

was lodged on 13 November 1991 pursuant to Part VII of the Act.

The Public Trustee then took action under the Non-Contentious Probate Rules 1954 (U. K.) to deal with the caveat.. These Rules apply in Fiji in accordance with s 52 (2) of the Act. Under r 44 (7) upon application by the Public Trustee a warning was issued which required the caveator to give particulars of any contrary interest in the estate of the deceased. The warning was filed on 30 October 1992.

On 10 December 1992 affidavit of service of warning in accordance with r 44 (11) was filed deposing that no appearance or summons for directions was filed by the caveator. No appearance by the caveator was filed in response until an affidavit in reply was filed on 17 January 1994.

On 30 November 1993 lawyers for the appellant filed an originating summons in the High Court for removal of the caveat. This application was made under s 47 of the Act. The originating summons was heard by Fatiaki J on 2 March and he dismissed the application on 25 March 1994 and maintained the caveat "until such time as the claim or interest of the child in the Estate has been finally determined by an appropriately constituted action".

The appellant has appealed to this Court on the following grounds of appeal:

"1. The Learned Judge erred in law and in fact in holding that the Caveators had a contrary interest in the estate in terms of

S 6 (1) (c) and S 6 (3) of the Succession, Probate and Administration Act Cap. 60.

2. The Learned Judge erred in law and in fact in holding the Caveators interest in the deceased's estate if accepted amounts to "an interest contrary to the person warning... in terms of Rule 44 (10) of the Non-Contentious Probate Rules 1954 (U.K.).

3. The Learned Judge erred in law and in fact in holding that the Caveators had a caveatable interest which prevented a grant of Letters of Administration to the Applicant/Caveatee.

4. The Learned Judge erred in law and in fact in assuming and indicating in his Judgment that the Caveators were acting for an illegitimate son of the deceased when in fact there is no evidence submitted by the Caveators to this effect.

5. The Learned Judge erred in law and in fact in failing to hold that the Caveators cannot prevent the grant of Letters of Administration to the wife of the deceased who is entitled first to make the application under S. 7 (a) of the Succession, Probate and Administration Act Cap. 60.

6. The Learned Judge erred in law and in fact in holding that he would exercise his discretion to maintain the caveat until such time as the claim or interest of the child in the Estate is determined in some other proceedings when that issue was not before him."

We think it is important at the outset to clarify the nature of the issue before the trial judge. Whilst it is true that the Public Trustee on behalf of the appellant purported to deal with the caveat in accordance with r 44 of the Rules, the application before the trial judge was brought pursuant to s 47 of the Act which is in the following terms:

"47. -(1) In every case in which a caveat is lodged, the court may, upon application by

the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be, remove the same.

(2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned in the caveat.

(3) Such application may be heard and order made upon affidavit or oral evidence, or as the court may direct."

We note that the procedure for dealing with a caveat under the Rules is different from removal of a caveat provided under s 47 of the Act. Under the Rules, a caveat shall remain in force for six months (O 44 (4)). A caveat may also cease to have any effect if the caveator does not file an appearance or take out a summons for directions (r 44 (11)). Under these Rules, a caveat may cease to have any effect in this way without there being any need for resort to court proceedings. However, under the Act, s 47 provides that in every case where a caveat is lodged, an application may be made to the court to remove the caveat.

As the application before the trial judge was brought pursuant to s 47 of the Act, the Rules relating to removal of a caveat have no direct application and therefore it is not necessary to consider their effect.

Section 46 of the Act gives a right to any person to lodge a caveat with the Registrar at any time before probate or administration is granted or sealed. Section 46 (2) requires that the caveat shall set out the name of the person lodging the caveat and an address in Suva. It does not require any other information or the nature of the interest or reason for lodging

the caveat.

The application before the trial judge was to remove the caveat under s 47 (1) of the Act. On what grounds should a caveat be removed? The section does not give any indication. It simply says "Such application may be heard and order made upon affidavit or oral evidence". This gives the court a discretion.

In formulating the discretion of the court in such an application, we are of the opinion that the Court may have regard to the practice set out in the Rules as a guide. This is not the same as applying the Rules. The relevant rule for consideration in this regard is r 44 (7). For the purposes of a warning, a caveator is required to give particulars of a contrary interest. We would adopt this and formulate that a caveator should establish a contrary interest to the person applying for the removal of a caveat.

It has been submitted by counsel for the appellant that the contrary interest must relate to probate or administration being granted or sealed. Counsel for the respondents submitted that contrary interest here relate to the estate of the deceased. Again in determining this issue, the Court may have regard to the nature of the contrary interest that is required to be particularised by the caveator under the Rules. Again the relevant rule in this regard is r 44 (7) which specifies that nature of the interest is to be "any contrary interest in the estate". We would adopt this and formulate that for the purposes

of removing a caveat under s 47 of the Act, the caveator is required to establish a contrary interest in the estate of the deceased.

We would make a distinction between an application which is made to remove a caveat which seeks to protect the interest of a child of the deceased and an application which is made for grant of administration by a spouse; in the latter the caveator must establish a contrary interest in the grant. A contrary interest in the estate of the deceased cannot prevent a grant because, under s 7 of the Act, a spouse has priority.

In this case there was no application for grant of administration at the time of the application to remove the caveat. The contrary interest alleged for the purposes of this case was the interest of an alleged illegitimate child of the deceased who lives in Australia. An illegitimate child has an interest in the estate of a deceased under s 6 (1) (c), 6(3) and 6 (4) of the Act.

The trial judge made two important findings of fact in determining whether or not there was a contrary interest. The first appears on page 26 of the record:

"Although no argument has been raised on the matter I would point out that the interest (if any) of the caveators themselves in the Estate is unclear from their affidavit nor has any relationship (if any) between the caveators and the child been deposed to therein."

The second finding of fact relates to consideration of s 6 (4) of the Act which is in the following terms:

"For the purposes of this section, an illegitimate relationship between a father and his child shall not be recognised unless there is proof that the paternity of the father has been admitted by or established against the father while both the father and child were living"

After setting out the law on the proper application of this provision, the trial judge concluded:

"From the above it is patently clear that the caveators have fallen well-short of discharging the evidential onus placed upon them by the provisions of Section 6 (4) of the Succession, Probate and Administration Act (cap. 60). Equally clearly the discharge of the statutory onus is unlikely to be determinable upon affidavit evidence only."

With respect we agree with these findings. As these findings have not been challenged on appeal, they must stand. However, in our opinion, the learned trial judge fell into error in making the consequential order to maintain the caveat. We are, therefore, of the view that he exercised his discretion on an incorrect premise. The proper order following on from his findings would have been to remove the caveat.

For these reasons we would allow the appeal, quash the order of the trial judge and remove the caveat. We further order that the respondents pay the appellant's costs of the appeal.

DECISION

Appeal allowed.

Order of the trial judge quashed and the caveat removed.

Respondents to pay the appellant's costs of these proceedings.

Moti Tikaram

 Sir Moti Tikaram
President Fiji Court of Appeal

Mari Kapi

 Sir Mari Kapi
Judge of Appeal

I.R. Thompson

 Mr Justice Ian R. Thompson
Judge of Appeal