

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0003 OF 1998S
(High Court Civil Probate Action No. 0015 of 1994S)

BETWEEN:

SHIU RAM

Appellant

AND:

PARMA NAND

Respondent

Coram:

The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt. Hon. John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gallen, Justice of Appeal

Hearing:

Thursday, 11 October 2001, Suva

Counsel:

Mr M. B. Patel for the Appellant
Mr G. P. Lala for the Respondent

Date of Judgment:

Thursday, 18 October 2001

JUDGMENT OF THE COURT

This is an appeal against judgment given in the High Court delivered on the 10th of December 1997 in an action in which the respondent sought certain orders relating to the administration of the estate of his father.

Mr. Shiu Shankar the father of both parties died on the 17th of March 1983 leaving a Will dated the 31st of January 1981 whereby he appointed the appellant sole executor and trustee of his estate and after making provision for his wife, Ram Pati provided that his residuary estate was to be distributed on the death of his wife to his two sons the appellant and the respondent in equal shares. His widow Ram Pati died on the 19th of January 1994.

At the time of his death the deceased had been engaged in the business of a seller of curios operating a small business in the market. He was also the owner of a substantial residential property in which he resided and which had at that time one other residential flat.

The respondent claimed to have worked in his father's business without pay. There was no indication that the appellant had played any part in the operation of the business. After the death of his father the respondent carried on business as a curio seller in the same premises which his father had occupied.

The appellant having taken out probate, which he did in 1988, appears to have administered the principal asset in the estate, the residential property, collecting the rent and extending it by the addition of further flats which were rented out.

In 1994 the respondent sought orders from the High Court in Fiji in the following terms:

1. The defendant who is the sole executor and trustee of the estate of Shiu Shankar do execute a transfer of half share in certificate of title number 6722 and as required under section 38 and 41 of the Succession Probate and the Administration Act cap 60.

2. The defendant do file within 28 days an inventory and accounts in the estate of Shiu Shankar F/N Ram Nandan as required under section 39 of the said Act.

It was the contention of the appellant that the procedure adopted by the respondent was incorrect and a notice of motion to strike out the proceedings was made on his behalf. This motion was dismissed by Mr. Justice Pathik on the 26th of January 1995. The record indicates that this decision was the subject of an appeal to this court which was dismissed.

The substantive proceedings then came before the court on the 19th of March 1996. After the completion of the hearing and the filing of written submissions the Judge gave his decision on the 10th of December 1997. It appears from that decision that the matters which remained in dispute were that no satisfactory accounts had been presented and that

1. The appellant was entitled to claim on behalf of the estate an interest in the profits which the curio business operated by the respondent had made since the death of the testator.
2. The respondent was obliged to account for sums alleged to have been incurred in respect of his board and lodging.
3. The respondent was obliged to accept a responsibility for monies secured by mortgage over the estate property.

4. The respondent was obliged to accept a responsibility for certain loans alleged to have been made to the estate by the sister of the parties and by the appellant.
5. The appellant was entitled to recompense for his administration of the estate.

The judge held that the respondent was not obliged to account for any sums in respect of the running of the curio business after his father's death. He also found that he was under no obligation to make any payment in respect of board and lodging.

The respondent had acknowledged a liability in respect of the bank mortgage and the judge concluded that half of the amount owing to the bank was an obligation of the respondent.

In respect of trustee remuneration, in his discretion, the judge made an order that the appellant was entitled to remuneration and noted that the respondent did not object to this. He fixed the sum at \$6000.

With respect to the alleged loans from the appellant and his sister this the judge noted that the onus was on the lender to prove the claim and that they had not discharged the onus. He also agreed that under the provisions of section 26 of the Trustee Act cap 65 any borrowing of \$10,000 or more by the trustee for development or improvement of the property required sanction from the High Court which had not been obtained.

He accepted that an accounting fee was payable.

At the conclusion of his decision he made the following orders:

“Orders:

1. *It is ordered that as provided under the Will of the said SHIU SHANKAR (the deceased) the defendant SHIU RAM as the executor and trustee of the Estate of SHIU SHANKAR do execute a document of transfer transferring to PARMA NAND the Plaintiff's half interest to him in the Certificate of Title No. 6277 after the accounts that are ordered to be filed herein are finalised.*
2. *It is further ordered that the Plaintiff be responsible to pay half the amount owing under the Mortgage over the said Certificate of Title. Consequently the Mortgage document to be varied accordingly.*
3. *It is further ordered and to which the Plaintiff has consented that the Plaintiff pay the defendant remuneration for acting as the trustee in the administration of the Estate in the sum of \$6,000.00 as at the date of instituting this action (15 March 1994) upon finalisation of accounts.*
4. *It is further ordered that the defendant as trustee file in Court within two months of this judgment a full and proper audited accounts in the Estate particularly in respect of the following matters:*
 - (a) *The details of all rent collected from tenants and all other income from estate property since the death of deceased to date.*
 - (b) *Details of all expenditure on estate property including details of expenditure on additional flats.*

(c) *Details showing the amount of the mortgage debt and how it has been paid from the date of death to date.*

5. *Liberty is reserved to parties to apply to Court generally.*
6. *Costs of this action is to be paid from the estate."*

The appellant contends that the judge was wrong in both fact and law in a number of respects.

All of the grounds upon which the appellant relies relate on analysis to questions of fact. There was evidence which justified the judge in coming to the conclusions which he did. He had the advantage of hearing and seeing the witnesses and there is nothing which would lead this court to interfere with the conclusions to which he came. It would therefore be sufficient for us simply to indicate that the appeal is dismissed. We are concerned however, that these proceedings have been extended for such a long period and gave consideration as to whether or not it was possible to make some kind of order which would assist in bringing them to a conclusion. We understand for example that the audited accounts which the judge required in the orders he made have not been completed, and cannot be completed, because it has not been possible for every aspect of the accounts to be certified by an auditor.

That does not excuse compliance. Audit reports are frequently "tagged", as no doubt these would be. Any resulting problem are best left to the High Court to resolve.

In the result the appeal is dismissed and the orders as made by the judge in the High Court will stand.

The respondent is entitled to costs which we fix at \$1000 together with disbursements to be fixed by the Registrar.

Thomas Eichelbaum

.....
Sir Thomas Eichelbaum
Presiding Judge

John S. Henry

.....
Rt. Hon. John S. Henry
Justice of Appeal



Rodney Gallen

.....
Sir Rodney Gallen
Justice of Appeal

Solicitors:

Messrs. M. B. Patel and Company, Suva for the Appellant
Messrs. G. P. Lala and Associates, Suva for the Respondent