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

Civil Appeal No. ABU 0080 of 2015
(High Court Civil Appeal No.HPP 04 of 2009)

BETWEEN	:	**VIJENDRA SHARMA**
		Appellant
AND	:	**1. ATENDRA SHARMA** **2. RAJ KAUR SHARMA aka RAJ KAUR**
		Respondents
Coram	:	**Chandra JA** **Lecamwasam JA** **Almeida Guneratne JA**
Counsel	:	**Mr. V.M. Mishra with Mr. R. Prakash for the Appellant** **Mr. R. Singh with Ms. U. Rakai for the 1st Respondent** **Mr.R. Harper for the 2nd Respondent**
Date of Hearing	:	**08 May 2018**
Date of Judgment	:	**01 June 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasoning, conclusion and the proposed orders made by Almeida Guneratne JA.

Lecamwasam JA

[2] I agree with the conclusion of Guneratne JA.

Almeida Guneratne JA

Introduction

[3] This is an appeal against the judgment of the High Court at Suva dated 30th September, 2015. By that judgment the Court rejected a last Will dated 9th February, 2006 as against an earlier Will dated 7th October 2005on the ground of forgery.

[4] The principal grounds upon which the said judgment has been appealed against may be extracted from the grounds of appeal urged as follows that;

(i) the fact of forgery "had not been pleaded or properly pleaded";

(ii) the learned Judge had not followed the principles laid down in Dharmawati v Sat Narayan & Ashok (FCA Civil Appeal No. 0010/2009);

(iii) the learned Judge had failed to take into account the mandatory rule in Order 76 Rule 15 (4) of the High Court Act and;

(iv) the learned Judge had failed to assess the evidence adduced including the need to have required the assistance of an expert witness before he reached the conclusion that the impugned last Will was a forgery. (The Notice and Grounds of Appeal are at pages 04-07 of the Copy Record)

Consideration of the said principal grounds of appeal

Ground (i)

The Statement of Defence and Counter-Claim (at pages 141-145 of the Copy Record)

[5] The Defendant (Respondent) had pleaded that:

(a) "...any signature on the purported Will dated 9th February 2006 is not that of Narendra Sharma (the alleged testator) (vide: paragraph 2 of the Statement of Defence)

(b) "...the Will was prepared by the 1st Plaintiff but never signed by the late Narendra Sharma". (Vide: paragraph 5 of the Statement of Defence).

Issues Raised at the pre-trial conference (pages 126-128 of the Copy Record)

[6] "Issue 8 – Whether the signature on the Will dated 9th February, 2006 is that of the deceased Narendra Sharma" (page 127, supra).
"Issue 9 – Whether the Will dated 9th February was created by the Plaintiffs after 15th March, 2006" (supra).

[7] While it is to be noted that the word 'forgery' is neither mentioned in the said pleadings nor the issues, the first question that arises for consideration is whether the said pleadings (taken together or otherwise with the issues) sufficed as constituting a plea of forgery.

The Authorities impacting on the said question

[8] They are that, pleadings will not suffice as constituting a plea of forgery

(i) where they do not adequately direct attention to the issue (Vide: Rajeshwar Dayal & Others v. Watisoni Vunivi & Others (FCA) Civil Appeal No. 46) referred to by the learned High Court Judge in his Judgment (at page 29 of the Copy Record);

(ii) where the defence could not have anticipated or have been expected to meet an allegation of forgery (vide: Shankar v Fiji Foods Ltd FCA No. 113 of 1985; referred to by the learned High Court Judge in his Judgment at page 30 of the Copy Record).

[9] Those were two precedents cited by the Appellant, a third being when an issue will not be entertained by Court when the evidence led is a "Complete departure from the particulars" (Vide: Robert v Dorman Long & Co. Ltd [1953] 2 ALLER 428 at 435.

[10] In as much as the ground of appeal under consideration being as regards the adequacy of pleadings in regard to a defence of forgery and not having to go into the aspect of evidence at that stage as to whether there was a forgery, I do not think that decision was

of relevance, although reference to that decision had been made by the Judge. In the result I agree with the learned Judge's conclusion that,

"... those scenarios did not apply in the present case since the statement of defence avers that "the Will was prepared by the first plaintiff and never signed by the late Narendra Sharma. This beyond doubt raises the issue of forgery." (page 30 – copy record) (Paragraph 5 of the Statement of Claim- Supra).

[11] And then, there is the antecedent averment in the Statement of Claim I have recapped at paragraph 5(a) above.

What then was required to constitute a plea of forgery?

[12] Forgery is an act of making a "false statement" in order that it may be accepted as genuine..." (vide: Oxford Dictionary of Law- 8th edition (2015); page 270).
"It is the (act) of making an illegal copy of a document as if it was a real one". (vide: Law Dictionary, 2nd Edition (1997), page 101).
"It is the fraudulent making or alteration of writing with the intent to prejudice the rights of another." (Salwan and Norong – Academics Legal Dictionary (11th Ed., 1996).

[13] On the application of those legal definitions and the proposition laid down in Shankar v Fiji Foods Ltd (supra; paragraph 8(ii) of this Judgment), I hold that, notwithstanding the fact that, the Respondent in his statement of defence or in the issues had not mentioned the word "forgery", the averments in paragraphs 2 and 5 sufficed to put the Appellant (Plaintiff) on guard as to a plea of forgery for which reason I reject the said Ground of Appeal.

[14] I felt fortified in taking that view when I gave my mind to the Appellant's own lament that, the fact of forgery "had not been properly pleaded".

Ground (ii)

[15] The decision in Dharma Wati v Sat Narayan & Ashok Naidu which the Learned Judge relied on was a decision which had held that;

> "Even if no strict compliance with the formal requirements of the Wills Act the Courts will still uphold the last Will of the deceased as the last wishes of the testator". (Vide: paragraphs 23 to 25 of the said Judgment)

[16] The present case is not one concerned with the formal requirements of the Wills Act" but one involving the very signature of the alleged testator as being a forgery. Accordingly, I reject the said ground of appeal as well as having no relevance or bearing on the instant case.

Ground (iii)

[17] Mr. Mishra contended under this ground that in the Counter-claim contained in the Statement of Defence there is non-compliance with Order 76 Rule 15(4) of the High Court Act which requires thus:

> "Order 15 r.4: Before it is served a probate counter claim must be endorsed with a memorandum signed by the Register showing that the Counter Claim has been produced to him for examination and that three copies of it have been lodged with him".

[18] The learned Counsel for the Respondent conceded that there had been such non-compliance.

Was such non-compliance a curable defect or a fatal irregularity?

[19] The words "must be indorsed" leaves no room for doubt in my mind that the said words are couched in mandatory terms.

[20] However, the learned High Court Judge regarded the said defect (of non-compliance) as a technicality that can be cured "in the interest of justice". For that approach the learned Judge derived support from a judgment of Byrne, J in Viveka Nand v Kavita Devi (vide: paragraph 0000 of the learned Judge's judgment at page 35 of the Copy Record).

[21] Consequently, the learned Judge made order that the said counter-claim be referred to the Chief Registrar for the required endorsement.

[22] While I do see that, there is no subsequent rule to Rule 15(4) that mandates the striking out of a counter-claim for such non-compliance, my initial concern was whether the Court could have taken it upon itself to have cured that defect without an application made by the defendant (Respondent) in that regard.

[23] On account of that concern, I looked at the Plaintiff (Appellant's) Reply to the Statement of Defence (at pages 129-131 of the Copy Record) where I could not find any objection having been taken in regard to the said non-compliance with Order 79 Rule 15(4) .

Procedural Rules in relation to the object of Justice – A handmaid and not a mistress

[24] While it must be said that, a Court cannot conduct its business without the aid of procedural rules, such rules must be regarded as having been intended to be that of hand maid and not mistress and therefore ought not to be regarded as a decisive factor resulting in an injustice in a particular case.

[25] In articulating that proposition I derived inspiration principally, from a statement of Collins, MR in Re Coles and Ravenshear [1907] 1 KB at 4 and the dicta I found in Nothman v Barnet London Borough Council [1978] 1 WLR 220, 228 per Lord Denning.

[26] Finally, having grappled with the matter under consideration I have reached the conclusion that, the initiative taken by the learned High Court Judge (having considered

the rival factors as I have sought to recount above) was in order being reminded of that celebrated statement made by Abrahams C.J. in a Sri Lankan (Commonwealth jurisdiction) decision that, a Court is there to mete out Justice and not there as an academy of law.[1936] 39 New Law Reports (Ceylon/Sri Lanka) 464 at 465.

[27] For the aforesaid reasons I reject the said ground of Appeal No. (iii) in as much as, if I were to accept the said procedural ground, then the result would be that the impugned last Will will past muster without the need to consider whether it amounted to a forgery.

Consideration of Ground of Appeal (iv)

[28] In that regard, to begin with, looking at the proceedings and the evidence given by (Dr) Sharma, the principal witness to the Will, if I may refer to him as such, and witness Jagendra Prasad (the other witness), I could not find how the learned Judge could have inferred that the Will was a forgery although the learned Judge said that he disbelieved their evidence. I say this for the reason that, in so far as the form requirements of propounding a last Will in terms of Section 6 of the Wills Act the same had been prima facie satisfied.

[29] No doubt, (Dr.) Sharma , (referred to above), a son of the testator stood to gain from the impugned second Will of 9th February, 2006 as against the defendant (Respondent) (the testator's adopted son) who was to be the beneficiary of the residuary estate of the testator after his widow's death on the earlier Will dated 7th October, 2005.

[30] The other witness, Jogendra Prasad known to the family had no material stake in the matter. The Attorney J.P. had been deceased at the time of the trial.

[31] Then I took note of the following facts as well in my endeavour to see whether the trial Judge's conclusion that the impugned Will was a forgery bears scrutiny.

[32] The learned Judge, in that regard, had taken the time line between the first Will of 7th October, 2005 and the second (impugned) Will of 9th February 2006 taking into consideration several circumstances that had passed in between, the circumstances (Dr.) Sharma spoke to about his father (testator) about the impugned Will and the 1st Plaintiff (another son of the testator) which appeared to constitute inconsistencies.

[33] I do see some merit in Mr. Sharma's argument that, his client had indicated to the Respondent that the Will was available for inspection. This was in counter to the Respondent's Counsel's arguments as to the suspicious circumstances the impugned Will is said to have been propounded.

[34] However even if the Respondent had inspected the Will, how could that circumstance have had a hearing, whatever impression the Respondent might have been left with, if in fact the Will was a forgery?

[35] Then there is all the important fact that, the Respondent had sought to lead expert evidence in regard to the alleged testator's signature on the impugned Will which was shut out by the learned Judge on the Appellant's Counsel's objection thereto, on the basis that, he had no notice until the date of trial.

[36] While I could not find any fault with that objection on the part of the Appellant's Counsel, yet, I say, based as it had been on a procedural basis, the Respondent's Counsel's effort to call evidence as to the signature of the alleged testator having been shut out, I think it was incumbent on the part of the Appellant to have made an application to call for expert evidence through a handwriting expert at that point which he did not do.

[37] In the result, in the absence of any statutory duty imposed on the Judge to have called for expert evidence in such circumstances, the learned Judge had taken upon himself to study the alleged signature (of the alleged testator) on the impugned Will of 9th February, 2006 as to its authenticity and/or genuineness.

Was that approach wrong on the part of the learned Judge?

The Law on that aspect

[38] In his treatise "The Law of Evidence". (2nd Ed.1989,Volc1) summing up the effect of authorities, Coomaraswamy, a Sri Lankan legal scholar at page 627 states thus:

"The correct position as to the value of the evidence of the handwriting expert seems to be that his evidence must be treated as a relevant fact and not as conclusive of the fact of genuineness or otherwise of the handwriting: His opinion is relevant but only in order to enable the Judge himself to form his opinion (being) "...not in the class of the opinion of (a) finger print expert."(vide: the Indian Supreme Court decision in **Bhagwan v Maharaj** AIR [1973] SC 246.

[39] If I may pause here, the learned Judge as revealed from the reasons he gave (supra, paragraph [36] above) appears to have had no doubt that on a consideration of the evidence of the witnesses that the last Will in question was not the act of the alleged testator which made it incumbent on the Appellant to have called a handwriting expert to assist him and I dare say, it would have been at such point that, the burden to lead evidence in re-buttal could be said to have shifted to the Respondent.

[40] That not being done by the Appellant (as plaintiff) he was destined to stand or fall on the assessment of the evidence that was led before Court and on the basis of which the learned Judge had come to his findings.

The nature of the findings by the learned Judge in consequence thereof

[41] Those findings in the background of the evidence produced by the parties are ultimately findings on questions of fact and as laid down by the Privy Council in Harnes & Another v Aitkinson, "whether or not the evidence is such as to satisfy the conscience of the Court must always in the end be a question of fact." (vide: [1946] 62TLR 445).

Conscience of the Court in relation to the assessment of evidence deposed to by witnesses

[42] I asked myself the question and that is, having gone through the Copy Record, could I found some element that might have troubled my conscience otherwise?

[43] "Conscience" being a psychological cum emotional and/or a personal factor, even assuming, and I say assuming, because I might have entertained different thinking at some point.

[44] I say that, because the learned Judge in my assessment could not have concluded that, the impugned Will was a forgery on the mere basis of him disbelieving the witnesses (Dr.) Sharma and Jogendra as being dishonest witnesses.

[45] After all the matter concerned an allegation of "a forgery of a last will".

[46] However, perusing the proceedings of the High Court I was struck by the 1st Appellant's (1st Plaintiff) evidence, when cross-examined he had said when he had been asked: "the second Will of your father was not signed by him, it was a forgery?"

[47] The answer had been "I don't know if it's forged or not."

[48] There was no re-examination on that by the learned Counsel for the Appellant (The said proceedings are found at page 323 of the Record of the High Court).

[49] This was the 1st Appellant's evidence as the 1st Plaintiff who had instituted the present action as against the evidence of the principal witness (Dr.) Sharma who maintained that the impugned Will was not a forgery.

[50] I also took into consideration the fact that, (the 2nd plaintiff) who had initially joined in the original action (the widow of the testator on the alleged Will) did not participate in the appeal before us.

[51] At the hearing before us when I asked Mr Sharma (Counsel for the 1st Appellant) as to what he had to say in regard to his clients (the 1st Appellant's) said answer recapped by me at paragraph [45] above, Counsel's response was that "it was an honest answer".

[52] So, how was an "honest answer" to be viewed by this Court? other than for the Judge to have looked at the Will by himself in the absence of any assistance by an expert witness, when the same had been shut out on account of the Appellant's own objection thereto when the Respondent's counsel had moved to call such evidence?

[53] It is in that light that I felt the matter had to be viewed when the learned Judge himself examined the Will.

[54] True, the learned Judged looked at the Will and said that "I find that there are major differences in the two signatures (that is as contained in the earlier Will) and the impugned Will) 'as pointed out by the defendant."

[55] In fairness to the learned Judge, in the absence of expert evidence, he had to take a decision on the evidence that was placed before him. Indeed, that evidence was the only evidence that was provided to him by the defendant as contained in paragraph [00] at page 31 of the High Court Record.

[56] In my view therefore, it is not as if the learned Judge merely accepted the *ipse dixit* of the defendant *per se*, but, where he had given his judicial mind to that evidence of the defendant which he recapped at paragraph [00] at page 31 of the copy record.

Final Assessment – the Applicable Principles

[57] Viewing the matter in perspective as recounted above, while, initially, I felt inclined to send this matter for a re-trial, but on further reflection, on the basis of the matters recounted above, particularly on account of the fact that, the learned Judge's final findings reduce themselves to findings of fact in which regard based as they were on his perception of the credibility of evidence given by witnesses, such findings are entitled to great weight and would have been liable to be reversed only if they appeared to this Court (sitting in Appeal) that on the plainest consideration, the trial Judge had failed to make full use of the advantage he would have had in seeing and listening to the witnesses giving *viva voce* evidence.

[56] I could not find any plain considerations to reverse the trial Judge's findings on the application of the aforesaid principles.

Conclusion

[57] For the aforesaid reasons, while I acknowledge the forensic efforts made by Mr. Mishra to have the Judgment of the High Court Judge set aside or at least sent it back to the High Court for a re-trial, I could not find a reason to respond favourably to his efforts.

[58] On account of the conclusion I have reached, I did not see the need to address at length the other consequential and/or incidental matters dealt with in the High Court Judgment beginning at paragraphs 000 to wwww contained at page 20 of the Copy Record with which I agree and in respect of which I saw no reason to interfere.

[59] Accordingly, I proceed to make the following orders of the Court:

1. *The appeal is dismissed.*
2. *In all the circumstances of this case, there shall be no order for costs and the parties shall bear their own costs of this Appeal without prejudice to the orders made by the High Court in that regard.*

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Hon. Justice S. Chandra
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL