

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

CIVIL APPEAL NO.ABU 40 OF 2018
(High Court of Fiji at Suva Civil Action No. HPP 09 of 2012)

BETWEEN : 1. **JAGAN NATH**
2. **JAGAN NATH & NOKAIYA**
Appellants (Plaintiffs)

AND : 1. **DENNIS NARAYAN & NATHAN RAMA NAIDU**
2. **SARGENT SAMI NAIDU**
Respondents (Defendants)

Coram : Almeida Guneratne AP
Basnayake JA
Lecamwasam JA

Counsel : Mr. E. Maopa for the Appellants via skype
Mr. G. O'Driscoll for the Respondents

Date of Hearing : 6 May 2021

Date of Judgment : 28 May 2021

JUDGMENT

Almeida Guneratne AP

- [1] I agree that this Appeal should be dismissed subject to the variation ordered by Basnayake, JA in his judgment.

Basnayake JA

- [2] This appeal was filed by the 1st and the 2nd appellants (1st and 2nd plaintiffs and hereinafter referred to as plaintiffs) to have the judgment of the learned High Court Judge dated 27 April 2018 set aside. By this judgment the court ordered to revoke the letters of administration granted to the plaintiff. Instead the Letters of Administration were granted to the 2nd respondent (2nd defendant and hereinafter referred to as the 2nd defendant). The court also refused the counter claim made by the 1st and the 2nd respondents (1st and the 2nd defendants and hereinafter called defendants).
- [3] The plaintiffs were granted Letters of Administration No. 48213 on 3rd March 2009 in respect of the Estate of one Ramaiaya, deceased. On 20 April 2012 the plaintiffs filed this action (as per the statement of claim (pgs. 23 to 26 and the amended statement of claim in vol. 1 at pages 146 to 148 of the Record of the High Court (RHC)) to have the Letters issued on 3rd March 2009 revoked. The plaintiffs also moved for probate on the basis of discovering a last will of the deceased Ramaiaya.
- [4] The defendants in an amended statement made a counter claim praying that the Letters granted to the plaintiffs be revoked and to grant Letters of Administration to 2nd defendant. The defendants also prayed for an order on the plaintiffs to transfer to 2nd defendant all assets of the Estate of the deceased and the money taken from the estate.
- [5] The learned Judge made order (pg. 12 of RHC) revoking the Letters of Administration granted to the plaintiff and granted Letters of Administration to the 2nd defendant. The learned Judge refused the prayer for money. Although not included in the 'Final Orders,'

the learned Judge made an order in the body of the judgment to the plaintiff to transfer the estate property obtained, to 2nd defendant. Apparently the plaintiff had got a property of the estate conveyed to himself.

[6] Grounds of Appeal

1. *That the learned trial judge erred in law and in fact in considering the misrepresentation of the children of the deceased by the appellant and, in the absence of any finding of fraud, he ordered that the plaintiff take all necessary actions ... and also transfer of the property obtained through the grant of Letters of Administration No. 48213 [p9 para 38 Line 8 of the judgment] to the second defendant.*
2. *That the learned trial Judge erred in law and in fact when he failed to consider or give effect to the statutory bar pursuant to section 38 of the Land Transfer Act Cap 131, i.e. in relation to the indefeasibility of title that protects the registered owner, without first arriving at a finding that the title (on the property) is void under section 41 of the said Act.*
3. *That the trial judge acted beyond Order 76 rule 1(2) of the Probate Proceedings when he ordered the plaintiff to transfer the property, obtained through the grant of Letters of Administration No. 48231 to the second defendant.*
4. *That the learned trial judge erred in law and in fact and contradicted himself when he said:*

So this action will only confine to the grant of probate of the will of the deceased person or for revocation of the grant already made in favour of the 1st defendant (at para 14 of the judgment) but proceed to order the plaintiff to transfer the property obtained through grant of letters of administration No. 48231 [at p9 line 3 from the top paragraph].
5. *That the learned trial judge erred in law and in fact when he admitted and considered as exhibits the affidavit evidenced by the defendants filed and used in HPP No.11 of 2011 without proper application for leave being granted, and despite objection by the plaintiff, hence considering irrelevant matters.*
6. *That the learned trial judge erred in law and in fact when he failed to fully consider the content of the affidavit of Manormani deposed on 7th May 2014 and filed on 18th August 2015 and there was no objection by the defence counsel for the original Will being tendered as exhibit being PEx2.*

- [7] At the hearing of this appeal, the learned counsel for the plaintiffs filed written submissions and made oral submissions via skype while the counsel for the defendants relied on the written submissions tendered to court on 7 November 2019 in a stay application. The stay application was refused by a single Judge of this court on 20 June 2020 with costs \$1500.00 to be paid within 28 days. The reason for the refusal was the conduct of the defendants who were a successful party not taking steps to have the judgment executed pending appeal from April 2018.
- [8] In the written submissions filed the learned counsel for the plaintiffs withdrew the 1st part of ground 1 and ground 6. In the oral submissions the learned counsel addressed court only on grounds 3 and 4.
- [9] The learned counsel complained that the learned Judge has acted against the ambit of Order 76 Rule 1 (2) of the High Court Rules.

Order 76 rule 1 (2)

'In these Rules "Probate action" means an action for the grant of probate of the will or letter of administration of the estate of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business'.

- [10] The learned counsel submitted that in paragraph 13 (pg. 6 of the RHC) the learned Judge reproduces Order 76 rule 1 (2) of the High Court Rules and states in paragraph 14 that, "**So this action will only confine to grant of the probate of the will of the deceased person or for revocation of the grant already made in favour of the plaintiffs.** So any claim or counter claim needs to be in conformity with the jurisdiction, and needs to be orders in terms of the High Court Rules"..*(emphasis added)*.
- [11] In paragraph 38 of the judgment the learned Judge while granting letters of administration to the 2nd defendant, states, "The plaintiff is ordered to take all necessary actions to transfer the administration of the estate of late Ramaiya to the 2nd defendant, including the proper accounts and also transfer of the property obtained through grant of Letters of Administration No. 48213..".

- [12] The learned counsel complained that the above order requiring the plaintiff to transfer the property obtained through the Grant of Letters of Administration is contrary to the Order 76 rule 1 (2) for the reason that in terms of this section a probate action is only to grant or revoke probate or letters of administration and nothing else. The learned counsel submitted that the learned Judge having correctly interpreted the rule, contradicted the same by ordering to transfer the property so obtained.
- [13] The learned counsel for the defendants concedes the limitation imposed by the rule. He submitted that although there is an order to transfer property obtained through the Grant of Letters of Administration No. 48213, no such order is included in the Final Orders at page 12 of the RHC. The Final Orders are as follows:
- a). *The grant of Letters of Administration No. 48213 is revoked.*
 - b). *If grant No. 48213 is not deposited in the court the plaintiff is ordered to deposit it forthwith.*
 - c). *The defendants' counter claim as to the grant of Letters of Administration to the 2nd defendant is granted.*
 - d). *The counter claim of the defendant for money is refused.*
 - e). *The costs of this action is summarily assessed at \$4000 to be paid by the plaintiff to the defendants within 21 days.*
- [14] The learned counsel for the defendants submitted that the court has not allowed all the reliefs claimed in the counter claim. Therefore the judgment need not be set aside. In order to recover whatever the property, including the Nasilivata Road property, of the estate the learned counsel concedes that a further action will be necessary. In **Parma Nand v Shin Ram** [1995] HPP 15 of 94 (26 January 1995) an action seeking execution of transfer inventory and accounts was held not to be a probate action (Pathik J).
- [15] Addressing with regard to the grounds of appeal contained in the latter part of ground 1 and ground 2 the learned counsel for the plaintiff submitted that a court will order a transfer of property only in the event of finding fraud. The learned counsel relied on Sections 38, 39, and 41 of the Land Transfer Act and the following authorities, namely; "**EngMee Young and Others** (1980) AC 331, **Prasad v Mohamed** (2005) FJHC 124 (3.6.2005),

Kumar v Wati [2017] FJCA 126 (14 September 2017), **Star Amusement Ltd. v Prasad** [2012] FJCA 57 (28 September 2012), **Steiner v Steiner** ABU 91 of 2015 (14 September 2017).

- [16] The dispute in this case encompasses Order 76 rule 1 (2) which interprets the jurisdiction of courts in Probate actions namely to either grant Probate or Letters of Administration or revoke Probate or Letters already issued. Appeal grounds 3 and 4 cover the entire gamut of this appeal. Therefore there is no necessity to consider the other grounds which I consider as redundant.
- [17] The limitations were imposed by the Order 76 rule 1 (2). The learned Judge concurs with it expressly as per paragraphs 13 and 14 (pgs. 6 and 7 of the RHC) of the judgment. The learned counsel for the defendants too concedes it. By complying with this rule the learned Judge has admittedly made his final orders within its boundaries.
- [18] However I am of the view that the learned Judge has erred in the body of the judgment in paragraph 38 (page 12 RHC) by directing the plaintiff to transfer the property obtained through the grant of Letters of Administration No. 48213. The trial court has no power to order the plaintiff to transfer a property in an action filed to obtain probate or letters of administration which is governed by Order 76 Rule 1 (2) of the High Court Rules. This has to be considered in another action after obtaining probate or letters of administration, and not before that. I am of the view that the said order has been made *per incuriam* and hence I order that this portion of the judgment be expunged. There is no dispute with regard to the final orders made.
- [19] Subject to this variation the appeal stands dismissed. In view of the variation I am of the view that the parties should be allowed to bear their own costs.

Lecamwasam JA

- [20] I agree with the concise and yet sound order made by Basnayake, JA.

Orders of Court are:

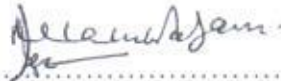
1. Appeal dismissed subject to the variation stated in paragraph 18 of the judgment.
2. No costs.



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Hon. Justice Almeida Guneratne
ACTING PRESIDENT, COURT OF APPEAL



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL